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REPORTS
OF
CASES AT LAW AND IN CHANCERY
DETERMINED IN THE
SUPREME COURT
OF
COLORADO TERRITORY
TO THE PRESENT TIME
By MOSES HALLETT
VOLUME II

EXTRA ANNOTATED EDITION

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JUSTICES OF THE SUPREME COURT.

During the Terms of 1873, 1874, and until March 1, 1875..

MOSES HALLETT, C. J.
JAMES B. BELFORD, J.
EBENEZER T. WELLS, J.

*After March 1, 1875.**

MOSES HALLETT, C. J.
ANDREW W. BRAZEE, J.
AMHERST W. STONE, J.

JOHN W. WEBSTER,
CLERK.

* Opinions filed after this date are reported at p. 564, et seq. This volume contains the cases decided at three terms, 1873 to 1875, inclusive.

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are published at these terms, 1875 to 1885 inclusive.

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CASES
AT LAW AND IN CHANCERY
DETERMINED IN THE
SUPREME COURT
OF
COLORADO TERRITORY.

PALMER v. COWDREY.

PRACTICE IN CHANCERY. The practice in chancery cases, and the manner of serving process and publishing notice of suit, is regulated by the law of the Territory, and not by the equity rules of United States courts.*

NOTICE BY PUBLICATION—*when sufficient.* Process should be personally served where the defendant is within the jurisdiction, and for that purpose the officer should hold the summons until the return day. A return *non inventus*, made before the return day, will not support a notice by publication.†

Error to District Court, Arapahoe County.

Messrs. BROWN & PUTNAM, for plaintiff in error.

Mr. H. R. HUNT, for defendant in error.

HALLETT, C. J. Defendant in error filed his bill in the Arapahoe district court, on the 25th day of February, A. D. 1868, and the summons was made returnable to the

* See *Hornbuckle v. Toombs*, 18 Wall. 648, a later case, in which this doctrine is fully established.

† The same rule was applied in *Wise v. Brocker*, decided at this term.

ensuing May term of the court. Notice of the pendency of the suit was published in a newspaper as provided in section 8 of the act relating to chancery practice (R. S. 93), and on the 30th day of March, and more than a month before the return day, the summons was returned *non inventus*. Plaintiff in error, failing to appear at the May term of the court, the bill was taken as confessed by her and a decree of foreclosure was passed. In this decree it was provided, that if the amount obtained upon the sale of the mortgage premises should be insufficient to pay the amount found to be due to defendant in error, the master should report the deficiency to the court, and, upon confirmation of the report, that execution should be issued for the sum so found to be due and unpaid. As the summons was not served upon plaintiff in error, and there was no appearance by her in the court below, we are first to consider whether the method pursued to bring her into court was effectual to that end. It is contended that the practice in chancery is regulated by the equity rules of the courts of the United States, according to which service by publication of notice cannot be made, and that the legislative assembly is without authority in the premises. This proposition rests upon the authority of *Orchard v. Hughes*, 1 Wall. 73, which originated in a district court of the late territory of Nebraska, and, like the case at bar, was a bill to foreclose a mortgage. In that case the district court awarded execution for the balance due after the sale of the mortgage premises; a proceeding not warranted by the general practice of courts of equity, and for which there was then no authority in the equity rules prescribed by the supreme court. In *Noonan v. Lee*, 2 Black, 499, it had been previously decided that without a rule of court to authorize it, a district court of the United States had no power to direct payment of the balance remaining unsatisfied after the sale of the mortgaged premises, and it was held, that the same practice should govern the district court of Nebraska territory. After *Orchard v. Hughes* was decided, and at the same term of court, a rule was adopted obviously for the purpose of conferring upon circuit and

territorial courts, the authority that had been denied to them in the cases mentioned. It has been suggested, that *Orchard v. Hughes* was a case in which the court had jurisdiction under the laws of the United States, and that the practice of United States courts was, for that reason, applied; *Stacy v. Abbott*, 1 Am. L. T. 84; but there is nothing in the opinion of the court, or in the reporter's notes, to indicate that such was the fact, or that the court intended to limit the application of the rule to any class of cases. In the recent case of *Clinton v. Englebrecht*, 13 Wall. 434, it was said, that *Orchard v. Hughes* was decided upon the ground, that the chancery jurisdiction conferred upon territorial courts was beyond the reach of territorial legislation, and this seems to identify the case with the principle established in *Dunphy v. Kleinsmith*, 11 Wall. 610. In the case last mentioned it was held, that the chancery jurisdiction, conferred by congress upon a district court of the territory of Montana, could not be divested by the legislative assembly of the territory, and that in a cause of equitable jurisdiction the statute of the territory conferred upon the court no power to proceed to trial by jury, and judgment according to the course of practice in courts of law. In this, nothing more is affirmed than that the chancery and common-law jurisdictions of territorial courts must be separately maintained; a proposition for which there is direct authority in the organic acts of the several territories. In these acts it is declared that the courts "shall possess chancery as well as common-law jurisdiction," and this provision undoubtedly requires that the general distinction between courts of law and of chancery shall be maintained, so far at least as to prevent the transfer of causes from one forum to the other. To remove a cause from the equity to the common-law side of the court, or to effect that result by providing that all issues of fact shall be tried by jury, would be to remove the cause to another forum and to abolish chancery jurisdiction, which is established by the organic act. Therefore, it cannot be doubted that the chancery jurisdiction of territorial courts is beyond the reach of territorial legislation, but I do not perceive that the

organic act extends beyond this point. In another clause it is provided that the jurisdiction of the several courts, both appellate and original, and of justices of the peace, shall be as limited by law, and this is followed by certain limitations upon the jurisdiction of justices of the peace, and probate courts, not material to our present inquiry. The law here referred to, which shall further define the jurisdiction of the courts, is unquestionably the law of the territory, so that, if we read this clause in connection with that first mentioned, we find that the legislative assembly is authorized to define and establish the jurisdiction of the courts, subject to the restriction that the distinction between common-law and chancery proceedings must be respected. In addition to the clause referred to, by which power to regulate the jurisdiction of district courts is expressly conferred upon the legislative assembly, subject to the limitation respecting chancery and common-law proceedings, the power of the legislative assembly is extended to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of the act. It will not be contended that the practice of the courts, at law and in chancery, is not a rightful subject of legislation, so that, as to jurisdiction and practice, we have full authority in the legislative assembly, with the single restriction that the chancery and common-law jurisdiction shall be separately maintained. There are, indeed, other provisions relating to writs of error and appeals, and the jurisdiction of justices of the peace and probate courts, which are to be regarded as limitations upon the powers of the legislative assembly, but they do not affect the present inquiry, and therefore need not be noticed in this connection. Nor is it necessary to the decision of this cause that the effect of the clause respecting chancery and common-law jurisdiction as a limitation of the power of the legislative assembly, should be considered; the powers which the court below was asked to exert were such as are usually conferred upon courts of equity. Accepting the organic act as the charter of our government, we find that the jurisdiction and practice of

the courts of the territory are to be regulated by the territorial assembly, maintaining the distinction between chancery and common-law proceedings. Accordingly, it was held in *Clinton v. Englebrecht*, *supra*, under the Utah act, which, in this respect, is like our own, that the method of procuring jurors for the trial of cases was a rightful subject of legislation, and that the whole matter of selecting, summoning and impaneling jurors was left to the territorial legislature. This case establishes the principle, clearly deducible from the organic act, that the jurisdiction and practice of the courts of the territory may be defined and regulated by the legislative assembly, subject to the limitations contained in the act. And this construction appears to have been accepted without question in some of the early territories. *Rogers v. Bradford*, Pinn. (Wis.) 418; *Lorrimer v. Bank of Illinois*, Mor. (Iowa) 223. With humility I confess that I am unable to harmonize the decision in *Orchard v. Hughes* with this principle. That was a chancery case, while *Clinton v. Englebrecht* was at law; but I submit that the power of the legislative assembly is the same in chancery as at law. As we have seen, the legislative assembly is equally bound to maintain the chancery and common-law jurisdiction, and within these limits the powers of that body are plenary. The language of the organic act applies with equal force to both jurisdictions. When it is said that the jurisdiction of the courts, both appellate and original, shall be as limited by law, this must mean the jurisdiction in chancery as well as at law; and if the practice at law is a rightful subject of legislation, where shall we find authority for saying that the practice in chancery is not equally such? When this subject shall be brought before the supreme court again, the logical force of the decision in *Clinton v. Englebrecht* will, I think, lead to the overthrow of the doctrine of *Orchard v. Hughes*, and therefore I am content to adhere to the practice long established in this territory by the act of assembly. To overturn this practice at the present time would greatly disturb vested rights, and this should not be done, un-

less it clearly appears that the act is not supported by the organic law. In this discussion I have purposely refrained from entering into the question of the jurisdiction of district courts when sitting for the trial of causes arising under the constitution and laws of the United States. This being a case under the laws of the territory, what is here said should not be extended beyond the class to which the case belongs. The attempt of defendant in error to obtain service by publication of notice was rightly directed, but he failed to secure full compliance with statute. In section 8 of the chancery act (Rev. Stat. 94), which provides for publishing notice of the pendency of the suit, it is declared that this proceeding (the publication of the notice) shall not dispense with the usual exertion on the part of the sheriff to serve the summons. The law intends that service of the summons shall be made on the defendant, if he can be found within the jurisdiction during the life of the writ. If the defendant is not in the county at the time the summons is placed in the hands of the officer, he may come into the county before the return day, and if notice by publication has been given, it is nevertheless the duty of the officer to serve the summons, if he can find the defendant in his bailiwick. To the performance of this duty it is necessary that the officer should retain the summons in his hands until the return day; for after return of *non inventus* of course the officer cannot obey the command of the writ. In the present case the sheriff returned the summons more than one month before the return day, and thereafter he could not comply with the statute by making the usual exertion to serve it. Whether the defendant came into the county after the return and during the life of the writ, we do not know, nor can we be informed except by the return of the proper officer. By the return, as it stands in the record, it does not appear that service could not have been made during the life of the writ, and the court had no authority to proceed upon notice by publication without such evidence. For this cause the decree

must be reversed, with costs, and the cause remanded for further proceedings.

BELFORD, J. While I fully concur in the opinion of the chief-justice, I deem it my duty to say that, in my judgment, the power of the territorial legislature over the legal and chancery practice of the district courts is full, ample and complete. It has been repeatedly held by the supreme court of the United States that a territorial legislature, acting under its general delegation of power given in its organic act, can legislate on all subjects which fall within the domain of rightful legislation. The mode of procedure in courts of justice is certainly a rightful subject of legislation. *Sparrow v. Strong*, 3 Wall. 104; *Rogers v. Burlington*, id. 662.

WELLS, J. I concur in all that has been said by the chief-justice, except so far as relates to the case of *Dunphy v. Kleinsmith*, and I agree that the doctrine of that case is here correctly interpreted; but it appears to me that it is sought to justify the doctrine of that case upon principle, which, with submission, I conceive to be unnecessary, and perhaps scarcely appropriate. It is sufficient, I conceive, to yield to the authority of the court of final resort without going further.

Reversed.

TERRITORIAL LEGISLATURE—REGULATION OF COURT PRACTICE.—By the organic act full power was given to the territorial legislature: *Berry v. United States*, 3 Colo. 206.

PROCESS, RETURN NON INVENTUS—NOTICE BY PUBLICATION.—A return non inventus before the return day will not support a notice by publication: *Cheely v. Clayton*, 110 U. S. 707; *Vance v. Maroney*, 4 Colo. 49; *Clayton v. Clayton*, 4 Colo. 413; *Israel v. Arthur*, 7 Colo. 7.

LISS v. WILCOXEN.

JURISDICTION OF SUPREME COURT—*in actions of unlawful detainer.* The judgment and proceedings of a probate court, in an action of unlawful detainer, may be removed into this court by writ of error.*

Error to Probate Court, Gilpin County.

Mr. WILCOXEN appearing in his own cause, now moved to dismiss the writ of error upon the ground that the court had no authority to proceed in this manner.

*The same decision was given at this term in *Hoyt v. Macon*, which was an action on the case.

The language of the statute giving the writ of error in actions of this kind, is as follows (R. S. 336): "Appeals and writs of error to the supreme court from the judgments of the district court, and writs of error to the judgment of any probate court in proceedings under this chapter, shall be allowed as in other cases."

Mr. ROCKWELL appeared for plaintiff in error.

HALLETT, C. J. The action was unlawful detainer, founded upon the statute (R. S. 332), by the 17th section of which it is provided that writs of error may be issued in cases of this kind, as in other cases. As there is no statute regulating the practice upon writ of error from this court to the probate court, in other cases, it is claimed that this provision of the act relating to forcible entry and detainer is ineffectual. By the act of congress of 1863 (12 Stat. 700), it is provided that writs of error, bills of exceptions and appeals shall be allowed from the final decisions of district and probate courts, to the supreme court, under such regulations as shall be prescribed by law. The organic act (12 Stat. 174) contained the same provision as to district courts, in pursuance of which the legislative assembly, in 1861, prescribed the manner of taking appeals, and of granting a supersedeas upon writ of error, and limited the time for prosecuting such writs. In this act the practice upon writ of error was not prescribed, except as to the manner of making it a supersedeas, and this is a limitation of the effect of the writ, rather than a grant of power to issue it. In the language used, the writ is recognized as existing process, and as the practice was well enough regulated by the common law, in which the writ originated, it was, doubtless, thought to be unnecessary to enter into that matter. Upon this hypothesis we have always proceeded in causes brought into this court from district courts by writ of error, and the practice has not been questioned hitherto. In 1864, the legislative assembly provided for appeals and writs of error, from judgments and decisions of probate courts to this court, in like manner and under the same restrictions, regula-

tions and provisions as in cases determined in district courts (3d Sess., p. 119); but this act was repealed in the following year (4th Sess., p. 100), and provision was made for removing causes from probate to district courts by appeal. It will be observed that in the act of 1864, which expressly authorized the removal of causes from probate courts to this court, by writ of error, no attempt was made to define the practice otherwise than according to the practice in the district court, and as we have seen, the practice in the latter court had not been defined by statute, except as to the supersedeas. From the organization of the territory to that time, the writ of error, as now known, had been used for removing causes from district courts to this court, and the act of 1864 must be regarded as affirming the regularity of the proceeding.

The power of the legislative assembly to confer upon district courts appellate jurisdiction in causes originating in probate courts, was denied in *Cass v. Davis*, 1 Col. 44, upon the ground that this court alone was invested with such jurisdiction, and since that decision, notwithstanding the repeal of the act of 1864, it has always been the practice to remove causes from probate courts into this court, by writ of error, excepting the short time during which this court was deprived of that power by act of congress, as hereinafter explained.

The jurisdiction of this court to proceed in that manner, although not questioned, was, probably, maintained upon the ground that the writ of error given by the statute of 1863 was common-law process, which needed not the aid of the legislative assembly to make it effectual. If, as we concede, the legislative assembly has power to regulate the time and manner of issuing the writ, and the terms upon which it shall become a supersedeas, it is not absolutely necessary that this should be done. The office of the writ of error is fully explained by the common law, and congress having authorized this court to issue it, the jurisdiction to hear and determine causes, brought into this court

by means of that writ, is complete without further action of the legislative assembly

A different view of the proceeding by appeal, with which we are not, at present, concerned, has been taken in this court, but it seems unnecessary to point out the distinction between the remedy by appeal and by writ of error. In our jurisprudence the appeal is founded upon statute, by which all essential qualities must be prescribed; but the writ of error was framed, and fully equipped for service, in the common law, in which condition it is believed that it has been transmitted to us.

By act of congress of May 4, 1870 (16 Stat. 96), provision was made for appeals from probate to district courts, under such proper regulations as should be prescribed by the law of the territory, and it was further enacted, that no appeal, or writ of error, should be allowed from a probate court to the supreme court; but this latter clause was soon afterward amended, and the writ of error from this court to probate courts, as it existed prior to May 4, 1870, was restored. 16 Stat. 279.

For some years prior to May, 4, 1870, causes were removed into this court from probate courts, by writ of error, as before stated; and if it should be conceded that the practice was unwarranted, it has been expressly recognized and adopted by congress in the act of July 14, 1870, above referred to. In that act it is declared, "that writs of error shall be allowed from any decision of a probate court to the supreme court of said territory, in the same manner they were allowed before the passage of the act" of May 4, and this warrants the presumption that congress was informed of the use which had been made of the writ, and intended to continue it. If it should be conceded that the practice prior to May 4, 1870, was unwarranted, it must also be conceded that it was revived and sanctioned by the later act, so that if we are wrong in supposing that a perfect writ was given, by the act of 1863, we cannot be wrong in saying that it now exists.

The jurisdiction of the court to hear and determine this cause rests upon the authority of the several acts referred to, and the motion to dismiss will be denied. *Motion denied.*

WRIT OF ERROR—UNLAWFUL DETAINER.—The office of a writ of error being fully explained by the common law, and Congress having authorized the territorial courts to issue it, the jurisdiction to hear and determine causes brought into the supreme court by means of this writ would be complete, without further action on the part of the legislature (*Stebbins v. Anthony*, 3 Colo. 274); and this rule was applied to unlawful detainer suits: *Vance v. Rockwell*, 3 Colo. 244.

CRAIG v. YOUNG.

PRACTICE IN SUPREME COURT—time of filing record. Where an appeal was taken in April, and appellant did not apply for a transcript of the record until January 20th following, he was guilty of laches, and further time to procure the record was denied him.

But, afterward, he was allowed until the next day in which to file the record.

Appeal from District Court, Arapahoe County.

In this case, Mr. Markham, for the appellant, applied, on the third day of the term, for further time in which to file the transcript of the record, which, he stated, he had applied to the clerk of the district court to prepare, as early as the 20th *ultimo*; that, owing to sickness in his family, the clerk had been unable to prepare the transcript, and that six days, or thereabout, would still be required to complete it.

It appearing that the appeal was prayed at the April term of the district court, the court were of opinion that to delay until so late a day as the 20th *ultimo*, before applying for the record, was laches. Therefore, the application was denied; but, afterward, Mr. Markham having in the meantime conferred with the clerk of the district court, again applied for leave to file his record on the next day, being the fourth day of the term, within which time he stated it could be prepared; whereupon, notwithstanding his negligence, the application was granted, but the court said this would not be suffered to be drawn into a precedent.

TAYLOR v. McLAUGHLIN.

PRACTICE—*proceeding to trial without issue.* If pleas are interposed which conclude with verification, and the parties proceed to trial without perfecting the issues, the irregularity will be waived, and judgment will not be arrested for that cause.

But if the record does not show that the party complaining was present at the trial, or that he, in some manner, consented to the irregularity, the rule is otherwise.

And where, to a declaration on a promissory note, the defendant filed several pleas, and, without further pleading, the cause was tried, the record showing that the defendant appeared at the trial, "by his pleas for a continuance," the judgment was reversed and the cause remanded.

Error to Probate Court, Park County.

THE plaintiff, below, declared upon a promissory note at the February term, 1871, of the probate court. The court convened on the 6th of February, and the defendant on the day preceding, being the 5th of February, filed the general issue and several special pleas, the latter concluding with verification. Upon what day the trial was had did not appear, but there was no further appearance by the defendant, unless the following, from the record of the trial and judgment, should be regarded as showing appearance :

"Now, this cause coming on to be heard, and the said plaintiff appearing in person, and the defendant by his pleas for a continuance of the case, the court ruling the pleas not sufficient cause for a continuance of the case, and a jury being waived, proceeded to try the cause," etc.

Mr. ALFRED SAYRE, for plaintiff in error.

Mr. M. BENEDIOT, *contra*.

WELLS, J. If after plea, pleaded with a verification, the parties proceed to trial without replication, judgment will not be arrested for the irregularity ; the proceeding is regarded as a mutual waiver of formal issues, and *consensus tollit errorem*, such waiver is to be inferred, however, only where it appears by the record that both parties, or at least

the party complaining has consented to the irregularity. In the present case the record fails to show that the plaintiff in error was present at the court below when the cause was set down for trial, or at any time during the trial, or afterward, so long as the cause remained pending in that court. Those recitals of the record which have been relied on in argument, as evidencing the presence of the defendant at the trial below, appears to us insufficient to warrant the conclusion sought to be drawn from them. The judgment of the probate court will, therefore, be reversed, and the cause remanded for further proceedings.

Reversed.

MACKEY v. THE PEOPLE.

GRAND JURY — *of the power to summon them.* The statute which provides that grand jurors shall be selected by the board of county commissioners (R. S. 387), does not exclude the common-law method; and if, after the regular panel has been discharged at a term of court, an exigency arises for another, a second panel may be selected and summoned by an open venire directed to the sheriff.

Of the number. Under the statute (R. S. 390) which provides that a grand jury shall consist of not less than 16 nor more than 23 persons, 21 is a sufficient number.

VENIRE — *whether it must appear of record.* Although the venire under which jurors were summoned may be inserted in the record if there is any reason for doing so, its absence therefrom is not ground for reversal.

MANSLAUGHTER — *upon conviction for, malice not in question.* If, upon an indictment for murder, the prisoner be convicted of manslaughter, objection cannot be made to the charge of the court in respect to malice, because the jury find that the killing was without malice.

INSTRUCTIONS TO THE JURY — *error cannot be corrected.* An erroneous instruction is not cured by another, covering the same point, which is correct.

Reasonable doubt. An instruction to the jury that a reasonable doubt must be grounded upon irreconcilable evidence, is incorrect, because the evidence may be insufficient to prove the charge.

ERROR — *which does not prejudice.* But if the case is entirely free from doubt, the error in the charge is not ground for reversal.

It must, however, appear that the prisoner was not and could not have been prejudiced by the error in the instruction.

VERDICT — *in case of manslaughter.* A verdict which finds the prisoner guilty of involuntary manslaughter, sufficiently determines the issue.

Error to District Court, Arapahoe County.

At the November term, A. D. 1870, Richard Mackey was indicted for the murder of Charles Laughrey, in the Gilpin county district court. The facts respecting the summoning of the grand jury are sufficiently stated in the opinion. The cause was removed to Arapahoe county by change of venue, where a trial was had and the jury found the prisoner guilty of involuntary manslaughter. At the trial it appeared that the homicide occurred in a saloon kept by one McLaughlin, in the town of Nevada, on the 13th November, 1870; that the prisoner was drunk and that he came into the saloon two or three times shortly before the shooting and threatened violence to some that were present, and brandished his pistol in a threatening manner. The deceased was sitting by the side of a table, and the prisoner having flourished his pistol above his head was in the act of bringing it down, when it was discharged either purposely or by coming in contact with the table, the ball taking effect upon deceased and causing his death. Several witnesses for the people including the physician who examined the wound testified that the ball entered the body of deceased six or eight inches above the line of contact with the table and ranged downward and toward the left; these witnesses were of the opinion that the pistol was discharged by the prisoner before it came in contact with the table; other witnesses for the defendant thought that the pistol struck the table before it was discharged; the prisoner proved that he was on good terms with deceased and had no quarrel with him.

The part of the charge respecting reasonable doubt upon which error was assigned, was as follows:

"The court instructs the jury that if they have a reasonable, well-founded doubt of the guilt of the defendant, that doubt should operate in favor of the defendant; such doubt, if any there be, must be a reasonable, well-founded doubt, grounded upon the irreconcilability of the evidence, not such a doubt as comes from the imagination."

The charge was quite voluminous, and the phrase "reasonable doubt," was often used. In another part the language of the charge was as follows :

"The court instructs the jury that reasonable doubt is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition, that they cannot say that they feel an abiding conviction to moral certainty of the truth of the charge. The proof is on the prosecution. All presumptions of the law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proven guilty, and if upon such proof there is reasonable doubt remaining, the accused is entitled to an acquittal, for it is not sufficient to establish a probability."

The charge respecting malice, to which objection was also made, was not discussed in the opinion, and therefore it is not inserted here.

Mr. Justice WELLS did not sit at the hearing.

Mr. H. P. H. BROMWELL and Mr. H. M. TELLER, for plaintiff in error.

Mr. M. A. ROGERS, District Attorney, for defendant in error.

HALLETT, C. J. The indictment was found at the November term, 1870, of the Gilpin district court, by a grand jury summoned by the sheriff under a special venire, issued after the regular panel of grand jurors for that term had been discharged. A challenge to the array was interposed by the prisoner before the jury was sworn, by which the power of the court to proceed in that manner was denied, and this presents the first question for consideration. It is claimed that the statute regulating the manner of selecting jurors (R. S. 387) points out the only method by which jurors can be lawfully selected, and that, after the regular panel of jurors had been discharged for the term, no jury could be selected until the next term of court. That statute provides

that the county commissioners shall select jurors, prior to each term of court, to serve at such term, and that the jurors, so selected, shall be summoned upon a *venire* issued for that purpose to the sheriff of the county.

By the 10th section of the act, if the county commissioners shall fail to select jurors to attend at any term of court, or if any officer charged with any duty respecting the selecting or summoning of jurors shall fail to perform the same, and thereby it shall happen that jurors shall not be summoned, or if jurors, when selected and summoned, shall fail to appear, the court may issue a special *venire* to the sheriff of the county to constitute a jury; and by the last clause of the section, if jurors summoned to attend at any term of court shall, for any cause, be discharged, talesmen may be summoned to supply their places. The argument of counsel, that the selection of jurors by the board of commissioners was designed to exclude the common-law mode of selection in all cases, is not borne out by the statute. We cannot presume that the legislature did not intend that a second panel should be summoned at any term of court, when a necessity for it should arise during the term, for there is nothing in the statute evincing such intention. Indeed, the anxiety of the legislative assembly not to impede or delay the course of justice is expressed in the 10th section, which affirms the common-law power of the court to convene a jury when none shall be selected in the manner prescribed by the statute.

The exigency which requires a second grand jury to be convened at a term of court is often quite as urgent as that upon which the first was obtained, and it was as fully recognized by the common law. The circumstance that provision has been made for selecting the first panel of jurors in a manner different from that adopted by the common law is not significant as to the second panel, which may or may not be required, and with which it is in no way connected. The authority to summon the second panel, which is given by the common law, may stand unimpaired by the regulation as to the first panel. *Stone v. The People*, 2 Scam. 326.

As to the number of grand jurors, the statute provides that it shall not be less than sixteen, nor more than twenty-three. While the order of the court required that twenty-three persons should be summoned, but twenty-one were returned and impaneled. This was a sufficient number under the statute, and more than was required at the common law.

It may be conceded that the *venire facias* enters into the record without bill of exceptions, or other method of authentication, but the fact that it is not embodied in the transcript filed in this court proves nothing.

It has not been the practice with us to send up the *venire* for either jury, and in cases where no question is raised as to the regularity of the process, there appears to be no good reason for requiring it to be done. In the South Carolina case cited by counsel, the *venire* was without a seal, and the original writ was sent up to enable the court of appeals to determine the fact. *State v. William*, 1 Richardson, 188. It is not said that the absence of the writ will constitute error in the record, and I know of no case which goes so far. It seems that the writ may be put into the transcript, if there is any reason for doing so, and this is all that is necessary to protect the rights of the accused.

If the writ is irregular, objection can be made in the court below, and the ruling of the court can be reviewed in this court. In the absence of the writ the proceedings must be supported according to the rule that error must be shown to exist, and will not be presumed.

The definition of malice, in the charge of the court, to which objection is made in the 9th and 11th assignments of error, has become immaterial by reason of the finding of the jury that there was no malice in the killing. The distinction between murder and manslaughter, and the fact that malice is a necessary ingredient in the first, was pointed out to the jury, upon which they found the prisoner guilty of manslaughter only; thus rejecting the idea of malice. The suggestion that the charge may have influenced the jury, in regard to the verdict returned, although it refers to

a higher crime, rests upon conjecture, merely, and cannot be entertained. We must assume that the jury performed their duty intelligently, and with a correct understanding of the charge of the court. In that view no question can be raised as to the charge in relation to the crime of murder, inasmuch as the prisoner has been acquitted of that crime. *State v. Dickson*, 6 Kansas, 220.

The charge in regard to reasonable doubt, given on behalf of the people, is open to the objection that it calls for a doubt, founded upon irreconcilable evidence, and this is not the only source of doubt which is recognized by the law. Although harmonious, the evidence may be insufficient to generate belief, and the doubt, arising upon such evidence, will avail the prisoner as well as that which arises from conflicting testimony.

The error was not cured by the instruction on the same point, given on behalf of the prisoner, for we cannot know by which the jury was guided. *People v. Campbell*, 30 Cal. 312.

But we think that the jury could not have been misled by the instruction, inasmuch as the facts are clearly established, and admit of no rational doubt as to the guilt of the accused. On the night of November 13, 1870, the prisoner was at a drinking-saloon in Nevada, armed with a pistol, and very drunk and quarrelsome. He drew the pistol once, at least, before it was discharged, and flourished it around in a threatening manner, accompanying the act with threats against the keeper of the saloon and others. Deceased was sitting at a table when the pistol was again drawn and discharged by the prisoner, either purposely or by casting it upon the table. According to the testimony of some of the witnesses the pistol was discharged in the hands of the prisoner, and these were supported by the testimony as to the direction taken by the bullet through the body of deceased. But if we accept the testimony most favorable to the prisoner, the pistol was discharged by bringing it down violently upon the table, and this, in any view that may be taken of it, was criminal carelessness, which the

law will not excuse. If the prisoner had no intention whatever to injure any one, the natural and probable consequence of handling a loaded pistol in the manner described was to discharge it, and this, in a room occupied by a number of persons, was, of course, dangerous to human life. Aside from the intention of the prisoner, his act was highly unlawful, and certainly it was not less criminal than the jury found it to be. (1 Bish. Crim. Law, 4th ed., § 390.) It is conceded that it rests upon the people to show that the prisoner was not and could not have been prejudiced by the error in the instruction. *Greene v. White*, 87 N. Y. 407.

When this is made to appear, the law is well settled in criminal as well as in civil cases, that an error in the charge is not ground for a new trial. *Brooster v. The State*, 15 Ind. 190; *The State v. Cooster*, 10 Iowa, 153; *The People v. Scott*, 6 Mich. 287; *Stewart v. The State*, 1 Ohio St. 66; *State v. Frank*, 5 Jones (N. C.), 384, *Shorter v. The People*, 2 N. Y. 193; *Josephine v. The State*, 39 Miss. 648; *The People v. Honshell*, 10 Cal. 83. So, also, in the analogous case of the admission of illegal evidence, if it clearly appears that the result would have been the same if the objectionable evidence had been excluded, the rule is the same. *The People v. Gonzalez*, 35 N. Y. 59; *Osburne v. The State*, 7 Ohio, 212; *The State v. Staley*, 14 Minn. 110; *The State v. Ford*, 3 Strobbh. 517; *The State v. Lawson*, 14 Ark. 114. Upon the undisputed facts established by the evidence, the prisoner is guilty of the crime of which he has been convicted, and, as there was no room for doubt, the jury must have arrived at the same result under a proper charge.

In defining manslaughter to the jury, the court used the language of the statute, which, following the common law, refers to voluntary and involuntary homicide. By the 24th section of the act, involuntary manslaughter is defined to be the killing of a human being without any intent to do so in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner; but where such involuntary killing shall happen

in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, then the offense shall be deemed and adjudged to be murder. Under this instruction, the jury returned a verdict of guilty of involuntary manslaughter, and it is urged that the verdict is insensible.

But we think that there can be no question as to the effect of the finding, and that there is no ambiguity whatever in the verdict. The general term "manslaughter" comprehends voluntary and involuntary homicide as defined in the statute; and although a general verdict of guilty of manslaughter would have been sufficient, it is no objection that the jury have specified one of the subdivisions which is recognized in the statute.

The discussion will not be extended to other points presented in the assignment of errors, but not noticed in argument. The judgment of the district court is affirmed, with costs, and the sheriff of Arapahoe county will take the body of the said Richard Mackey, and him, with all convenient speed, convey to the penitentiary of Colorado, there to be confined in conformity with the judgment of the said district court.

Affirmed.

JURY — OPEN VENIRE. — The principle which authorizes the action of a court in obtaining petit jurors by an open venire after the regular panel is exhausted is sanctioned by authority: *Clauston v. United States*, 114 U. S. 467, citing the principal case.

CRIMINAL LAW — EVIDENCE — REASONABLE DOUBT: *Clare v. People*, 9 Colo. 125.

MURDER — MALICE AN ESSENTIAL ELEMENT. — To convict of murder in any degree, malice must be found: *Babcock v. People*, 13 Colo. 525.

ELDRED v. MALLOY.

BILL OF EXCEPTIONS — *when to be signed and sealed.* The record should show that a bill of exceptions was allowed and perfected during the term, or, if afterward, within a time fixed by the court.

When to be filed. If signed and sealed at the term or within the time limited by the court, the bill of exceptions may be filed on a subsequent day, but if not filed, it forms no part of the record.

What is evidence of filing. Whether a bill of exceptions is of record cannot be determined upon affidavit but by inspection only.

If a bill of exceptions be deposited with the clerk with intent that he shall retain it, he being in any sufficient manner notified of this purpose, the omission to mark it as filed in the usual way will not be material.

Where there was nothing in the record to show that a bill of exceptions had been deposited with the clerk or filed by him, time was given the plaintiff in error to supply the omission and the manner of doing so was pointed out.

Error to Probate Court, Jefferson County.

THE transcript of the record filed in this cause set forth what purported to be a bill of exceptions reserved by the appellant, preceded by the following entry :

"Judgment for plaintiff. Defendant allowed forty days to prepare bill of exceptions herein. And the defendant prepared and exhibited to the said probate judge his bill of exceptions within the time limited by said court, and which were then and there signed by the judge of said probate court, and are in words and figures following, to wit : "

Mr. DE FRANCE, for defendant in error, now moved to strike out the bill of exceptions, assigning for ground that the original had never been filed in the court below ; accompanying his motion with his own affidavit that the original of what purported to be the bill of exceptions of plaintiff in error, although among the papers of the probate judge, and lodged in his office, had never been filed there.

WELLS, J. We are of opinion that, in order to the consideration of any errors assigned upon the rulings of the probate court during the trial, it must appear by the record, certified to us, that a bill of exceptions was allowed by the judge of that court, either during the term or afterward, and within a period allowed by the order of the court for that purpose. If signed and sealed within the time limited, it may, it would seem, be filed at any subsequent day. R. S. ch. LXX, § 21.

But it must appear by the record to have been actually filed at some day, for otherwise, though signed and sealed by the judge, it forms no part of the record, and we cannot consider it, unless indeed the defendant in error waive the irregularity by joining in error. *Murphy v. Cunningham*, 1 Colo. 471.

The question whether the bill of exceptions is or is not properly in the record must, however, be determined by the record itself. We cannot consider the affidavit of counsel. If, by the record, it appears that the bill of exceptions was filed and became of record in that court, we must, in this court, accept that as conclusive. If the verity of the clerk's return is to be questioned it must be in the probate court, for which purpose, in a proper case, a continuance will be allowed in this court. The affidavit filed by counsel will, therefore, be disregarded.

The question still remains whether, upon the face of the record, the bill of exceptions is properly returned to us. We are of opinion that it is not. The order of the court allowed to the plaintiff in error forty days within which to prepare a bill of exceptions, which we are inclined to interpret as fixing a period within which the bill of exceptions should be signed and sealed; for until signed and sealed it cannot be said to be a bill of exceptions at all. The transcript recites that, within the day limited, it was signed by the judge of said probate court; this, it was no part of the duty of the clerk, or the judge acting in that capacity, to certify; and the allowance, signing and sealing, moreover, appears by the bill of exceptions itself, as alone it properly can; and we must presume, in the absence of something appearing to the contrary, that all this was done within the time allowed for the purpose; but it nowhere appears that the paper, after it was perfected, and in condition to become a part of the record, was actually made so. In order to this it must have been deposited with the clerk of the probate court, or the judge acting in that capacity, to be by him retained as a part of the files of the cause. It is not necessary, as counsel for the defendant in error has argued, that the paper should be actually marked, "filed." The deposit of it with the clerk, with intent that he should retain it, he being in any sufficient manner notified of this purpose, is the essential thing; the marking it, is merely evidence of this, the absence of which may be otherwise supplied. But in the present case the file mark is wanting, and there is

nothing to supply it, except the affidavit of counsel, which we cannot consider. If counsel for the plaintiff in error desire, the cause may stand over, in order that the record may, in this respect, be perfected.

It will, we think, be sufficient, if the probate judge shall certify that the bill of exceptions, which has been included in the record certified, was filed in his office, at any day prior thereto; it need not be certified that it was marked filed, but the certificate must specifically refer to the bill of exceptions now in the record before us; or counsel may, if preferred, cause the bill of exceptions to be hereafter filed in the probate court, and procure a further transcript of the record, containing the bill of exceptions at large, prefaced by the clerk's recitation as to when it was filed. For this purpose five days will be allowed.* *Motion reserved.*

BILL OF EXCEPTIONS—TIME FOR FILING.—If a bill of exceptions is signed and sealed at the term, it may be filed afterward, but if not filed, it forms no part of the record: *Parkard v. Spellings*, 3 Colo. 111.

GILPIN v. EBERT.

AMENDMENT OF DECLARATION—*after plea in abatement.* After a plea in abatement has been filed, setting up variance between the writ and declaration, the latter may be amended so as to avoid the objection.

WAIVER—*of plea in abatement.* If issue is not joined upon a plea in abatement, and the defendant afterward pleads in bar, he thereby waives the right to such issue.

Appeal from District Court, Arapahoe County.

Messrs. MILLER & MARKHAM, for appellant.

Messrs. BELDEN & POWERS, for appellee.

HALLETT, C. J. By the summons, appellee, who was plaintiff below, claimed damages amounting to \$2,300, and in the declaration he alleged damages to the amount of \$5,000. Appellant pleaded the variance in abatement, but the court

* The cause was submitted upon the record, at the February term, 1874, *post*.

allowed appellee to amend the declaration so as to make it conform to the writ. Of this action of the court appellant complains, and we think without reason. The variance was indeed well pleaded, but the court was not thereby debarred from allowing appellee to amend his declaration so as to avoid the objection raised by the plea. This is often done in cases of misnomer, and upon the same reason it should be done in other cases, where the amendment cannot prejudice the rights of the defendant. In the cases cited by counsel, it does not appear that there was an application to amend, and the power of the court to allow an amendment after variance pleaded, is not considered. Beyond all doubt, amendments of the declaration before plea, are in the discretion of the court (1 Tidd's Pr. 697), and we do not perceive that the case is different after plea filed. As to the manner of disposing of the plea after the amendment, I think that issue should have been joined to be tried in the usual way. But counsel for appellant did not insist upon this.

They subsequently pleaded in bar of the action, and cannot now be heard to object that the plea in abatement was not disposed of.

The judgment of the district court is affirmed, with costs.

Affirmed.

THE STERLING CITY GOLD AND SILVER MINING AND TUNNELING COMPANY v. COOK et al.

DEBT ON BOND IN ATTACHMENT—*for wrongfully suing out the writ.* An action cannot be maintained upon a bond given pursuant to Revised Statutes, 55, conditioned to pay all such damages as shall be awarded against the plaintiff in attachment in any suit or suits which may thereafter be brought for wrongfully suing out the attachment, until judgment has been obtained against the plaintiff in the attachment suit, and then only for the amount of such judgment.

SAME—*for costs accruing in the attachment suit.* Upon a bond with condition as prescribed by the statute, an action may be maintained for the costs adjudged against the plaintiff in attachment in the attachment suit, but not if the condition respecting the payment of costs has been omitted from the bond.

AND, in such action, it is not sufficient to aver, generally, that the costs in the attachment suit have not been paid, but the amount of such costs should be stated.

Error to District Court, Arapahoe County.

DEBT upon an attachment bond, the condition of which was as follows:

The condition of this obligation is such, that whereas the above bounden George E. Cock has, on the day and date hereof, prayed an attachment out of the district court of the first judicial district of Colorado territory, in and for the county of Arapahoe, at the suit of George E. Cock, George Richardson, John Y. Scamman, John Finn and others, doing business as Butterfield Overland Dispatch Company, against the estate of the named Sterling City Gold and Silver Mining and Tunneling Company, for the sum of \$5,902.27, and the same being about to be sued out of said court, returnable on the 5th day of October next to a term of the court then to be holden; now, if the said Butterfield Overland Dispatch Company shall prosecute their suit with effect, or, in case of failure therein, shall well and truly pay and satisfy the said Sterling City Gold and Silver Mining and Tunneling Company all such damages as shall be awarded against the said Butterfield Overland Dispatch Company, their heirs, executors or administrators, in any suit or suits which may hereafter be brought, for the wrongfully suing out the said attachment, and all damages which may accrue to the said Sterling City Gold and Silver Mining and Tunneling Company, by reason of any excessive levy made under any writ of attachment issued in this cause, then the above obligation to be void, otherwise to remain in full force and effect.

Messrs. BROWNE & PUTNAM, for plaintiff in error.

Mr. B. M. HUGHES, for defendant in error.

BELFORD, J. This was an action of debt brought in the Arapahoe district court, on an attachment bond executed
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by George Cook as principal, and John Hughes as security. The defendants below demurred to the declaration, on the ground that it was not averred that any damages had been awarded against the plaintiffs in said attachment in any suit brought for the wrongful suing out of the attachment, according to the condition of the bond.

It will be seen, from this statement of the case, that the only question to be considered is, whether an action can be maintained on an attachment bond, against the principal and sureties, before a recovery of damages in a separate suit against the plaintiff in the attachment. The language of the statute on this subject is as follows :

“Now if the said — shall prosecute his suit with effect, or, in case of failure therein, shall well and truly pay and satisfy the said — all such costs in said suit, and such damages as shall be awarded against the said —, his heirs, executors or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, and all damages which may accrue to the said — by reason of any excessive levy made under any writ of attachment issued in this cause, then the above obligation to be void; otherwise to remain in full force.”

The language of the condition in the bond sued on corresponds with that above set forth, except in the matter of costs, which is omitted. What are the obligations imposed by the law on persons executing bonds conditioned as above? It seems clear that if the party suing out the attachment shall prosecute his suit with effect, then the persons executing the bond are liable for nothing, except it shall appear that the levy made under the attachment was excessive, and if, being excessive, damages accrued to the defendant in the attachment suit, then the obligors must satisfy these damages, notwithstanding the fact that the attachment plaintiff succeeded in his action.

Failing in the attachment suit, if the plaintiff shall pay the costs in said action, and the damages that shall be awarded against him in any suit to be afterward brought for wrongfully suing out the attachment, and also such damages as

may arise from an excessive levy, then the condition of said bond will remain unbroken, and no liability will exist against those executing it.

This condition contemplates that the damages for wrongfully suing out the attachment shall be recovered — not in the attachment suit, for there is no provision for estimating them in that proceeding. Not in a suit on the bond, for the right to sue on that instrument for these damages only accrues and ripens after they have been awarded, and the party against whom they have been awarded fails to pay.

It is hardly necessary to say that these damages cannot be paid until they are adjudged. Two things must then exist as precedents to the action on the bond for wrongfully suing out the attachment, namely: that the damages have been awarded the defendant for this abuse of the process of the court, and that the party against whom they have been awarded has failed to pay them. When these two things concur, then the right to sue on the bond for this class of damages exists, and not until then.

It may be said that this involves circuity of action, and multiplicity of suits. We admit it. With the policy of this provision of the law we can have nothing to do. Arguments on the grounds of inconvenience and hardship must be addressed to the legislative, and not to the judicial, branch of the government. Until this law is modified we must enforce it, and the hardships which its enforcement will engender may lead to some action on the part of those whose duty it is to alter and make laws. The first breach, assigned in the declaration, is for wrongfully suing out of the attachment. In the view above given, this assignment was clearly bad. In the second, it is alleged that the costs awarded against the plaintiffs in the attachment suit have not been paid. While we are of the opinion that an action may be maintained on attachment bond in the first instance, for the non-payment of costs, we are clearly of the opinion that they cannot be recovered in this case. There is no provision in the bond sued on for the payment of costs. In this respect the bond is not in accordance with the stat-

ute. There is nothing in the declaration to show what these costs amount to. It was not sufficient to aver generally that the costs had not been paid, but the amount of the costs for which the obligors were liable to the plaintiff should have been shown. This defect in this assignment is fatal. *Glide-well v. McGaughey*, 2 Blackf. 359. There being no error in the ruling of the court below, the judgment is *Affirmed*.

WRONGFUL ATTACHMENT—SUIT ON BOND.—An action cannot be maintained on the bond for wrongful attachment until judgment has been obtained against the plaintiff in the attachment suit, and then only for the amount of that judgment: *Atlantic Ins. Co. v. Manning*, 3 Colo. 230.

STATUTE—ADOPTION OF CONSTRUCTION.—The principal case is cited as an instance of the refusal by a court to presume the adoption by the legislature of an interpretation of a borrowed statute, which is palpably wrong: *Freas v. Englebrecht*, 3 Colo. 385.

HOBSON et al. v. PORTER.

EVIDENCE OF LOSS OF INSTRUMENT—*what shall be sufficient.* Evidence tending to prove that an instrument was deposited in a desk to which several persons had access, and which was, for a time, in the possession of one Ashley, and that papers in the desk were examined by a person not named, and that after the lapse of several months, search was made in the desk for the instrument without finding it, is not sufficient to let in secondary evidence of the contents of the instrument.

AUTHORITY OF PARTNER—*to bind his copartner by deed.* In an action of covenant broken, against two persons as partners, where the execution of the instrument sued on has been put in issue, proof that the instrument was signed by one partner, is not sufficient against the other without further evidence to show that the party signing had authority to bind his copartner in that manner.

PRACTICE—*instructing jury to find for defendant.* Where the evidence is not sufficient to support a verdict for the plaintiff, the jury may be instructed to find for defendant.

Error to Arapahoe District Court.

Messrs. BROWNE & MECHLING and Mr. J. B. FRANCE, for plaintiff in error.

Mr. ALFRED SAYRE, for defendant in error.

BELFORD, J. This was an action of covenant. The declaration contains two counts. In the first it is alleged that the plaintiffs Hobson, John, William and Charles, by their firm name of Hobson & Bros., and the defendants,

Andrew J. Gill and Henry M. Porter, by their firm name of A. J. Gill, entered into a certain written agreement, signed with their respective seals, and dated Dec. 26, 1866, and relating to the delivery of and payment of a certain amount of hay. Profert of the instrument is excused by the averment that the defendants have destroyed it. The second count is like the first, except profert is made of the alleged agreement. The pleas of Porter (the only defendant served), and on which issue was taken and trial had, are six in number. Among which are, 1st, *non est factum* verified; 2d, sworn plea denying partnership of Porter and Gill; 3d, Covenant not broken. On the trial the plaintiffs failed to produce the instrument mentioned in the declaration, and of which profert is made in the second count, and after the introduction of some testimony designed to show a loss of the instrument, and also that the defendant Porter had an interest in the subject-matter of the alleged contract, the plaintiff sought to introduce in evidence a paper which was a true copy of the original agreement, except the names and seals. The copyist had omitted these. To the introduction of this paper the defendant objected, assigning several grounds. Among which, were: *First*. The alleged copy is secondary evidence, and no sufficient foundation has been laid for its introduction. *Second*. That no proof that the original had ever been sealed by the defendant Porter, or by any party thereto.

The court sustained the objections and excluded the paper. In determining the correctness or incorrectness of the ruling below, we will consider these propositions. Did the plaintiffs excuse the production of the instrument upon which suit was brought? If they did, was there any evidence that the document offered was a copy of the original agreement? If it was such copy, was there any evidence that the original was the deed of the defendant Porter, or of the alleged firm of A. J. Gill, of which the defendant Porter was charged to be a member. The testimony on the loss of the original is substantially as follows: The witness Rogers testified to having had the original from January

1864, until April of the same year, when he returned it to H. G. Mills, the agent of the defendant Gill. The witness Mills testifies that he received the paper from Rogers, and left it, with other papers of Gill, in a desk kept by Gill. That in the ensuing fall he made search for it in the place where he had deposited it, but without avail; that Gill was present while the search was being made, and stated that if the document was not among the papers then undergoing examination, it was either lost or stolen, and that Ashley had charge of his papers during his absence; that Ashley had informed him that some of the papers had been carried away by Porter, and some brought back. This search was made after the desk had been removed from the National Bank to Gill's house. Ashley testified to the occupancy of Gill's house during the summer of 1867, and that papers were kept in a desk. Knows of no one having had an inspection of them but once, but does not say who made the inspection. The key was some time in the possession of Stephen Gill.

It is an elementary rule that evidence of the execution or contents of a written instrument cannot be admitted without the production of the instrument itself, unless it can be shown that it is in the possession of the opposite party, and he refuses to produce it, after regular notice, or that it is lost or destroyed. The evidence of the loss is addressed to the court alone, and it is not a subject on which the jury are to pass. That a particular instrument existed is the most material inquiry; the fact of its existence and the contents of it are matters to be tried by the jury; the loss of it must be made out to the satisfaction of the court. The law exacts nothing unreasonable in such a case. If parol proof of the loss establishes the fact with reasonable certainty, that is sufficient. No precise rule can be safely laid down upon this subject, further than this, that diligent search and inquiry should be made of those places or persons in whose custody the law presumes the instrument to be, supposing it once to have existed. The evidence elicited in the trial is quite unsatisfactory. From June, when the paper was

deposited, until autumn no search was made, and in the meantime the desk had been moved from one building to another, and no search was made, except as to the contents of the desk. The other papers of Gill were not examined. It appears that Porter and others had been handling the papers contained in that desk. No inquiry appears to have been made of him. *Harts v. Woods*, 10 Barr. 471. If the plaintiff had been seeking to introduce secondary evidence, against Gill, under the authority of *Cooper v. Maddan*, 6 Ala. 431, I would be inclined to hold that his declaration to Mills, "that if the paper is not in the desk it is lost or stolen" would be tantamount to an admission of loss, and sufficient to warrant the court in admitting secondary proof. If we regard the evidence as sufficient to establish the loss, there is another objection to the admissibility of the paper offered which seems insurmountable. There is nothing in the evidence to show that Gill had authority to bind Porter by such an agreement as that sued on. Conceding that they were partners, and that the agreement offered was sealed, in the absence of some special authority to Gill to execute a sealed instrument, Porter would not be liable on it in this form of action. After the plaintiffs had rested their case the court gave the jury the following instruction, of which the plaintiffs in error complain: "The court instructs the jury that the plaintiffs not having produced to them any evidence to support their action of covenant their verdict must be for the defendant." While, under our peculiar system of practice, a judge is restrained and enjoined from expressing any opinion on the character or weight of evidence, one thing still remains true, that when it is manifest, as it was in this case, that a verdict for the plaintiff could not have been permitted to stand, it cannot be accounted error for the court to direct the jury to find for the defendant. To establish a liability against Porter in this form of action it was necessary to show that the original instrument was a sealed one, and, also, that Gill had authority to bind Porter. The copy attached to the declaration shows that the original was not only signed,

but sealed, and the averments of the declaration go to this extent. The copy sought to be introduced had neither signatures nor seals. Rogers, who made the copy, states that he cannot tell whether the original was a sealed instrument or not. Nor can he tell how it was signed. Mills is equally uncertain. It was incumbent on the plaintiffs to show these facts. The pleas put the sealing in issue. If the loss of the original had been sufficiently established, and no copy existed, it would have been proper for the plaintiffs to have proven the contents of the original by parol evidence. If they had undertaken so to do, it would have been incumbent on them to show, in addition to the contents, that the original was sealed, as alleged in their declaration, and failing in this their case would not have been made out. Nothing of this kind was, however, attempted. They confined themselves to the offer of the paper excluded. The evidence nowhere shows that such an instrument as that described in the declaration ever existed. And the foundation being wanting, every thing else is abortive and vain. We cannot disturb the action of the court below. The judgment must be affirmed. *Affirmed.*

LOST PAPERS — SECONDARY EVIDENCE. — To admit secondary evidence of lost papers, it is held sufficient to prove their loss, that the custodian of them has searched for them in the place of their custody, and cannot find them, and does not know their whereabouts: *Burns v. Chase*, 9 Colo. 227.

THE WESTERN UNION TELEGRAPH COMPANY v. CLAYMORE.

JURISDICTION — *under sections two and four of practice act.* In an action against a corporation, process may be served in a foreign county under sections two and four of the practice act (R. S. 500).

And in such case it is not necessary to take out process in the county where suit is brought.

JURISDICTION — *defect of must be pleaded.* If the court has not jurisdiction of the person, the fact should be pleaded in abatement. *Cody v. Raynaud*, 1 Col. 272.

Error to the District Court, Larimer County.

CLAYMORE brought his action in Larimer district court, and directed process to Arapahoe. Service was then had

upon an agent, and the return shows that the president of the corporation was not found in that county. No process issued to Larimer county.

At the return term, the defendant interposed a motion to quash the summons, assigning for ground thereof, that service was not had in Larimer; which motion being overruled, the defendant reserved an exception, and submitted to a default. The plaintiff in this court assigned for error, the overruling of the motion to quash, and that the court below had no jurisdiction.

Messrs. CHARLES & ELBERT, for plaintiff in error.

Mr. E. L. SMITH, for defendant in error.

WELLS, J. Section 1 of the practice act (R. S. ch. LXX), prescribes the form of process, and directs when it shall be returnable. The second section of the same statute declares that "It shall not be lawful for any plaintiff to sue a defendant out of the county where the latter resides or may be found, except in cases where the debt, contract or cause of action accrued in the county of the plaintiff, or where the contract may have been specifically made payable, when it shall be lawful to sue in such county, and process may issue against the defendant to the sheriff of the county where such defendant resides." The third section directs within what time service shall be made. The fourth section is as follows: "In all suits against any incorporated company, summons shall be served on the president thereof, if he resides in the county, but if he do not reside in the county, * * * * then the summons shall be served by leaving a copy thereof with any clerk, secretary or agent of said company, within such time and under such regulations as are herein provided, for the service of such process in suits against natural persons. *Provided*, etc." Under the second section above quoted, it has for a long time been held, that where the plaintiff takes process to another county than that in which suit is brought, all things necessary to the jurisdiction will be presumed, without special

avermment thereof; and if the defendant would question the proceeding, he must plead the facts wherein the defect of jurisdiction consists. A motion, it has been thought, will suffice only in those cases where the absence of jurisdiction appears affirmatively by the record. *Cody v. Raynaud*, 1 Col. 272. This authority would be conclusive if the defendant were a natural person; but, in the present case, other questions are suggested:

1. The words of the second section, though sufficiently broad to include corporations, do not necessarily include them; and it has been questioned at the bar whether, inasmuch as the legislature have, by the fourth section, made special provision for the case in which a corporation is defendant, such cases are not to be regarded as excepted out of the previous general provisions.

This conclusion ought not to be adopted, unless necessary to avoid violence to the words of the statute. As between natural persons, the plaintiff is permitted to sue in his own county, when the transaction which gives rise to the controversy occurred there. This, it would seem, is upon the idea that the witnesses probably reside there, and that, therefore, both parties may there litigate their rights more conveniently than in a foreign county. And there is, manifestly, good reason and propriety in the idea upon which the statute is here supposed to proceed. The plaintiff ought not to be required to pursue his adversary, and transport his witnesses through the territory, when the litigation can, more conveniently to him, and without prejudice to his adversary, be conducted at the plaintiff's own door; and this is equally so whether the defendant be a natural person or a corporation.

No reason arising out of any inherent difference in the two cases can be assigned, therefore, for the distinction sought to be made.

Now, looking to the letter of the statute only, does it appear that the legislature intended to make such distinction? For the words of the fourth section, in virtue of which this case is supposed to have been excepted out of the second

section, address themselves only to the question upon whom process, in the case there specified, shall be served, and do not, as we conceive, assume to prescribe a rule as to where such process shall be addressed, for, in the provision, thus: "summons shall be served on the president thereof, if he resides in the county," these latter words must be construed with reference to those which immediately precede them; and so construed they import that process against a corporation shall be served on the president thereof, if he reside in the county where such process is *to be served*; that is to say, the county to which, in conformity with the former provisions, process is to be addressed; for it cannot be served elsewhere. The cases of *Stephenson Ins. Co. v. Dunn*, 45 Ill. 211, and *Winneshiek Ins. Co. v. Holzgrafe*, 46 id. 422, to which we have been referred, are not in point. The words of the statute of Illinois are, "process shall be served on the president of such company, if he reside in the county in which suit is brought."

And the circumstance that in adopting this statute, as they have done, substantially, our legislature omitted the words lastly here given, fortifies the conclusion to which we have arrived.

2. But it is suggested that the purpose of the statute is, that service of process in actions against corporations shall be made on the chief officer, if practicable; and that only in exceptional cases shall service upon an inferior officer be permitted; and here, it is said, there is nothing to show but that the president and other principal officers of the corporation reside in Larimer; that in such case, to permit the plaintiff to pass by these, and serve his process upon some inferior agent, in a distant county, would be to violate the spirit of the statute, and open the door to gross abuses. It is sufficient to say in reply, that whether the existence of the state of things supposed would, or would not, modify the duty or rights of the plaintiff, is not presented by this record. If the facts suggested exist, they should have been shown by plea. Nothing can be presumed against the juris-

diction of the court below, or the regularity of the proceedings in this respect.

If it be said that, in the case supposed, the corporation may, by negligence or fraud of the agent upon whom service is made, or by accident merely, fail to receive notice of the pendency of the suit in time to interpose the plea, or any other defense, the answer is, that corporations must not employ negligent persons to perform its function; and if, without laches, fraud or accident intervene to prevent a defense, the court in which judgment is given, or, as a last resort, equity, may afford relief.

The judgment of the district court is, therefore,

Affirmed.

MACHEBEUF et al. v. CLEMENTS.

POWER OF ATTORNEY — performance of conditions in. A power of attorney in which conditions to the exercise of the power are prescribed, as that the lands shall be conveyed, upon application therefor, within a time specified, and upon payment of a certain price, and the like, confers no authority to bind the principal except upon performance of the conditions.

Presumption as to performance. Whether, upon proof, that a deed was executed by the attorney in the name of the principal, in virtue of such authority, a presumption should be indulged that the conditions were duly performed, is, upon principle and authority, doubtful.

Admissions by attorney as to performance. Where, as in this case, however, the attorney has authority to determine whether the conditions have been performed, the execution of a deed, by him, in the name of the principal, should be regarded as an admission of that fact during the pendency and continuance of the agency, which is binding upon the principal.

Burden of proof as to performance of conditions. And in a suit by the principal to set aside a deed by the attorney, in virtue of such authority, the burden of showing that the conditions were not performed, is upon that ground with the complainant.

So, also, where, as in this case, the complainant grounds his action upon negative allegations, the burden of showing that negative is upon him.

Unless the subject-matter of the negative is such as not to admit of convenient proof, and it may reasonably be inferred, that if untrue, the defendant has peculiarly within his control the means of showing the affirmative.

And this case is not within the exception.

Error to District Court, Arapahoe County.

ALFRED H. CLEMENTS filed his bill in the district court of Arapahoe county against Joseph P. Machebeuf and twenty-two others, alleging that he owned a certain tract of land, embracing many blocks and lots, in the city of Denver. That in the years 1864 and 1865, one James Hall, pretending to act as the attorney in fact of the complainant, conveyed by deed of general warranty, some of the said lots and blocks to the said Machebeuf and others to the other defendants respectively. That all of the said deeds were made without any authority whatever, and that the said defendants combined and confederated with the said Hall to cheat and defraud the complainant, etc.

The prayer of the bill was that the said deeds might be set aside, canceled, etc.

The defendants admitted that the complainant owned the land and that Hall made the deeds as alleged, and relied upon certain powers of attorney, the first being as follows :

Know all men by these presents, that I, Alfred H. Clements of Central city, in the county of Gilpin and territory of Colorado, have made, constituted and appointed, and by these presents do make, constitute and appoint, James Hall of Denver City my true and lawful attorney for me and in my name, place and stead, to act upon the application and demand of any person or persons actually owning and showing the same by abstracts of title properly certified to by the county clerk of Arapahoe county, C. T., to town lots in Denver City, situate on the south ($\frac{1}{2}$) half of north-east, ($\frac{1}{4}$) and east ($\frac{1}{4}$) half of south-east ($\frac{1}{4}$) quarter of section (34) thirty-four, town (3) three south, range (68) sixty-eight west, in aforesaid county and territory, and upon the payment of forty cents (40 cts.) for each and every lot, and the further expenses of making, acknowledging and delivering and all other expenses of every name and nature in accordance with the tenor and meaning of a certain bond executed by me to H. J. Brendlinger, mayor of Denver City, in trust for

the citizens thereof, dated June, 1864, and upon the fulfillments of the above requirements and all others as intended and mentioned in said bond aforesaid, to make, execute and deliver good and sufficient deed or deeds with covenants of warranty to any person or persons that may apply for the same within three months from date of said bond aforesaid, and in compliance of the same, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present with full power of revocation, hereby ratifying and confirming all that my attorney or his substitute shall lawfully do or cause to be done by virtue thereof.

In witness whereof I have hereunto set my hand and seal this fourteenth day of June, 1864.

ALFRED H. CLEMENTS.

Sealed and delivered in presence of

CHAS. R. FISH,

The second power of attorney was dated June 17, 1864, and authorized Hall to enter into all lands in the county of Arapahoe to which Clements was in any way entitled, and to sell the same and convey by quitclaim deeds, being a general power without conditions. This instrument is not noticed in the opinion of the court. There was evidence which tended to prove that the bond mentioned in the first power of attorney had been lost, and it was not produced at the hearing. The court set aside the several conveyances made to the defendants respectively, according to the prayer of the bill.

Mr. E. L. SMITH and Mr. ALFRED SAYRE, for plaintiffs in error.

Mr. S. E. BROWNE, for defendants in error.

The chief-justice did not sit at the hearing.

WELLS, J. The plaintiffs in error have assigned for error

only the final decree given in the district court, and we have therefore omitted all consideration of the sufficiency of complainant's bill, and the regularity of the proceedings anterior to the decree.

In view of the conclusion to which we have arrived upon another point in the case, it will be unnecessary to consider whether the conveyances sought to be impeached by the bill can be referred to the letter of attorney of June 17, 1864. I therefore proceed to the question whether they can be sustained, as executed under the letter of attorney of June 14th. It is manifest that the authority given by the instrument was a conditional or limited one, in order to the exercise of which certain prerequisites must have occurred; thus the attorney could convey only upon application; the application must have been within three months next after the date of the bond to Brendlinger, which is referred to in the power; the applicant must have produced to the attorney an abstract of his title, certified from the recorder's office; he must have paid the sum of 40 cents for each lot conveyed, and the expenses of the conveyance; and all other requisites and conditions set down in the bond to Brendlinger must have been complied with and performed; and if the conveyances here complained of, or any of them, were executed without performance of these conditions, it may, I think, be well enough said that it was, in the language of the bill, "without any authority whatsoever." But the defendants severally deny this allegation of the bill, and there is no evidence, outside of the conveyances themselves, to show whether the conditions, set down in the letter of attorney of June 14th, were or were not performed; I think the case must therefore turn upon the question whether it was incumbent upon the complainant to prove the negative allegation of his bill in this respect, or upon the defendants to sustain the affirmative contained in the answer in response thereto; that is to say, upon whom is the burden of proof?

It is argued, on the part of the plaintiffs in error, that, inasmuch as nothing appears to the contrary, the attorney

must be supposed to have observed the limitations imposed upon him, according to the maxim "*omnia rite esse acta*;" and since, if there be such presumption, the defendants in the court below were at liberty to rest thereon until it was overthrown, even though the burden of proof should be held to be upon them, it will be necessary to inquire how far the maxim sought to be applied extends. In respect to the acts of public officers, this maxim is of almost universal application, and its force and scope in that class of cases is, I think, pretty well established and defined. How far it may be applied in support of the acts of private agents is, upon authority, not very clear.

In Mr. Broom's work (Leg. Max. 730*), it is said that the presumption applies to the acts of private individuals, especially when they are of a formal character, as writings under seal; and the same doctrine is asserted in substantially the same words in Mr. Phillip's work on Evidence (5th Am. ed. 643*), where many examples are cited from reported cases.

I do not perceive, however, that any of the cases there referred to are quite analogous to this, and, so far as I have been able to examine them, they appear to be examples of the application of the same maxim in another form, in which it is sometimes seen in the books, and in which lapse of time is essential to raise the presumption. 1 Greenl. Ev., § 20. There are, indeed, many instances wherein the courts, although not expressly referring to this maxim, appear to apply the rule which it announces; *e. g.*, the seal of a corporation appearing affixed to a deed purporting to be theirs, is presumed to have been affixed by proper authority. *Kohler v. Black River Falls Iron Co.*, 2 Black, 717. So, where a corporation is authorized by its charter to acquire and hold real or personal estate in a particular manner, or for particular purposes, and it is found in possession of such estate, it is presumed, nothing appearing to the contrary, to have acquired it in the manner and for the purposes authorized in the charter. *Downing v. Mt. Washington Road Co.*, 40 N.H. 234; *DeGroff v. Am. Linen Thread Co.*, 21 N.Y. 126;

Chautauqua Bank v. Risley, 19 id. 381; *Farmers' Loan and Trust Co. v. Curtiss*, 7 id. ; *Farmers' Bank v. Detroit R. R. Co.*, 17 Wis. 372.

So, where an insurance company was authorized to receive promissory notes in certain cases only, it was held, in an action brought by the corporation upon certain notes, wherein it was named as payee, that, in the absence of proof to the contrary, it must be presumed that they were executed in a transaction within the corporate powers, and in which the company were authorized to receive them. *Mutual Benefit Life Ins. Co. v. Davis*, 12 N. Y. 573.

The case of *Howard v. Boorman*, 17 Wis. 459, asserts the same doctrine. The same presumption has been applied to negotiable paper executed by a corporation. *Safford v. Wyckoff*, 4 Hill. So in the case of negotiable paper purporting to be executed in the name of a partnership, the signature being shown to be in the handwriting of one of the firm, it is held that a presumption arises that the paper was executed in a partnership transaction, and not for the individual debt of him who subscribed it. *McMullan v. McKenzie*, 2 G. Greene, 368; *Ensminger v. Marion*, 5 Blackf. 210.

These cases appear to me to be quite analogous to the one now under consideration. In every one of them the question was one of authority; authority to do the particular act, certain conditions concurring, was shown; and the courts presumed the concurrence of those things requisite to the rightful exercise of that authority, from the single fact that it had been exercised. And if we admit the doctrine of these decisions, it is difficult to deny its application to the present case; for it is not apparent that, upon principle, a distinction can be drawn between the case in which the authority is denied by letter of attorney, and those in which it springs from a charter of incorporation, or articles of copartnership; in each case the one exercising the authority is a private person, not acting under the sanction of an oath, nor liable to indictment for malfeasance. Nevertheless, the decisions here referred to have not, so far as I know, been questioned, and many others asserting quite as broad a doctrine might

be cited; and in a case decided in the supreme court of Tennessee, where A, having an equity in lands, upon which certain installments of purchase-money remained unpaid, had conveyed it to B, in trust, to secure an indebtedness to C, with power in the trustee, upon default in payment, after maturity of the indebtedness, to sell in satisfaction thereof, and the holder of the legal estate had conveyed to C, by deed reciting a prior sale by B, at which C became the purchaser, on bill brought by the heirs of A to compel a conveyance, nothing appearing to show whether B had ever sold to C, or if so, whether, before or after the maturity of the indebtedness, the court say that "the presumption of law is not only in favor of the exercise of the power, but in favor of meritorious claimants, or innocent purchasers, that it was exercised in the legal mode." *Wilburn v. Spofford et al.*, 4 Sneed, 704. A former decision of the same court (*Marshall v. Stephens*, 8 Humph. 159) is there cited, announcing the same doctrine.

Against these decisions, however, are others equally in point, and entitled to equal respect. In *Bruce v. Duke*, 2 Litt. 245, Bruce brought his bill to compel a conveyance of certain lands, to one moiety whereof he derived title from Maury, by conveyance executed in his name, by Barry, his attorney; the letter of attorney after conferring power to settle and adjust land titles in Kentucky, and to bring, and defend suits necessary thereto, and to convey lands which the principal had before contracted to convey, contained a power in these words: "and if necessary, to make sale of any of my said lands;" and it was objected that no necessity for the conveyance, by the attorney, under which the plaintiff claimed, was shown to have existed. To this the court, upon consideration of the evidence, were agreed; and as to whether the exigency authorizing the sale was to be presumed from the fact of the conveyance, the court say, that "to admit the fact of a deed having been made, to be evidence of a necessity to sell, would, in effect, prostrate all distinctions between limited and general authorities. A purchaser would then, after procuring a deed of convey-

ance, be secure in the title, though in making the sale the agent may have been guilty of the most palpable violation of his authority. The unauthorized act of the agent would then be evidence of his having acted correctly, and under the influence of that evidence the title would be adjudged to pass from the rightful owner, by the act of another, *deriving* no power or authority from him."

So, in the same court a distinction has been observed between public officers, acting under general laws, and agents or commissioners appointed *pro hac vice*, by special statute; and as to the acts and proceedings of the latter class, the presumption, *omnia rite esse acta*, is said not to apply. Thus, where commissioners had been appointed by act of the legislature, with authority to sell and convey such part of the lands of a decedent, as might be sufficient to satisfy his debts, on ejectment, by one deriving title through conveyance of the commissioners, it was held that the plaintiff could not prevail, the existence of debts of the decedent not being affirmatively shown; and that upon no principle could the presumption usually indulged in favor of the acts of public officers acting under general laws, be extended to the case of those deriving authority under special enactments, to perform services of a private character. *Pittman v. Brownlee*, 2 A. K. Marsh. 210. So in *Gebron's Heirs v. Jones*, the supreme court of Virginia, in a case precisely like that of *Wilburn v. Spofford*, arrived at a conclusion directly opposed to that of the supreme court of Tennessee. In that case, lands had been conveyed, in trust, to secure certain indebtedness of the grantor, with power, in the trustee, to sell upon default in payment, after giving notice; bill was brought to set aside a conveyance by the trustee upon the ground that the sale was made without notice; and the court held that no presumption could be indulged, either in favor of or against the regularity of the trustee's proceedings. Upon authority, therefore, it cannot be said that out of the mere fact that complainant's attorney has executed the conveyances mentioned in the bill, a legal presumption arises that he complied with those limi-

tations which, in the letter of attorney, are prescribed to him. And I am not prepared to concede that, upon principle, such presumption ought to be indulged.

Nevertheless, it appears to me, that, what amounts to the same thing in this case, the conveyances ought, as against the complainant here, to be received as *prima facie* evidence of their own regularity. It is conceded that, without prior performance of the conditions limited in the letter of attorney, the conveyances are as absolutely without authority as though the letter of attorney had never been executed. But the grant of any thing implies the grant of every thing necessary to the enjoyment of the thing granted; and so every express power bears with it, by implication, every other power necessary to its exercise. Broom's Leg. Max. 362*; *De Witt v. San Francisco*, 12 Cal. 289; *Rex v. Jackson*, 1 T. R. 653. And here, the principal having deputed, to the attorney, authority to act upon performance of the particular conditions nominated, has, by necessary implication, conferred the power to judge whether these conditions have been performed. The attorney was authorized to convey, but he could not convey until the conditions named by his principal were first complied with; of necessity, therefore, he was bound to judge and determine, in the first instance, whether such compliance had been made; and power to so judge and determine is as clearly given as though it had been set down in express words; and the attorney having power to determine for his principal, as to the performance of those conditions, his admission that the conditions had been performed, which is by implication contained in each of these conveyances, is within the scope of the power delegated to him, and, being made during the execution of the agency, it is evidence against the principal. And herein this present case is distinguishable from *Bruce v. Duke*, for there the controversy was between those claiming under the conveyance executed by the attorney and a third person not claiming under the principal; and, as against such third person, the admissions of the agent were no evidence whatsoever.

I conclude, therefore, that while it may well be doubted whether the legal presumption relied upon can be indulged, the conveyances executed by the attorney contain an implied admission, made within the scope of the attorney's authority, that all the conditions of the letter of attorney had been complied with; and that, therefore, the conveyances in question are, as against the complainant, *prima facie* evidence of their own regularity. But, if this reasoning is inconclusive, if the conveyances made by the attorney are not to be received as evidence of a compliance with the requisites of the power under which he assumed to act, then, inasmuch as no evidence *alibi*, the conveyance was given, the question returns, upon whom was the burden of proof?

And, as this question is not without difficulty, I have examined the authorities with some diligence, to ascertain what rule is applied by the courts in cases like the present. In the text-books, it is stated with tolerable clearness, as follows: That where the plaintiff grounds his action upon negative allegation, the burden of showing that negation is upon him. 1 Greenl. Ev., § 78. But to this rule is this exception: That where the subject-matter of the negative is such as not to admit of convenient proof, and it may reasonably be inferred, that, if untrue, the defendant has, peculiarly within his control, the means of showing the affirmative, the burden of proof shall be upon him. 1 Greenl. Ev., § 79; 1 Phill. Ev. (5th Am. ed.) 813*. This exception is grounded upon convenience merely; the law requiring that the plaintiff should produce evidence which, in the nature of things, must probably be inconclusive and unsatisfactory, and the production of which may involve delay and inconvenience, when, if the allegation be untrue, the defendant has, in his own hands, the means of at once and conclusively disproving it.

But upon this exception it seems, is to be noted another. That, though the case be as supposed in the last exception, yet if the negative involve a charge of fraud, or criminal omission of duty, the burden of establishing it shall, in

general, be upon him who asserts it. 1 Greenl. Ev., §§ 79, 80; 1 Phill. Ev. 812, * 815.* In truth this latter exception seems to be no exception; for it amounts to this only, that the presumption of innocence, which the law makes, shall stand in lieu of those proofs which would otherwise be required of the party accused, and so casts the burden upon his adversary. These propositions seem to me clearly deducible from the text writers, and to accord with sound principles, and the current of adjudged cases. To apply them to the present case it is to be resolved, 1st. Whether the allegation of complainant's bill, that all of the several conveyances executed by Hall were executed without authority, is necessary to the relief prayed; and if so, 2d. Whether it may fairly be said that the truth of the matter, and the means of proof, are so peculiarly within the knowledge and control of the defendants, as to bring the case within the exception to the general rule; and if this be so, 3d. Whether the bill contains the charge of fraud or criminal omission of duty, in such sense as to raise the presumption of innocence in favor of the defendants. Upon the first question, while it may well be doubted whether, even in its present form, admitting every thing stated therein, the bill shows a title to equitable relief, I take it to be too clear for argument, that without the allegation of want of authority in the attorney, it would be entirely insufficient to warrant any decree in favor of the complainant. It is, therefore, incumbent upon the plaintiff not only to allege, but to prove the want of authority. The burden of proof rests upon him, unless the case comes within the exception.

As to the second question: The negative alleged in the bill, like almost every negative allegation, admits not of convenient proof, and the defendant may well be presumed to have a knowledge of the several transactions which preceded each of these conveyances; and possibly, of whether the conditions in complainant's letter of attorney were or were not performed; but, with some hesitation, we have concluded that it cannot justly be said that the evidence of these transactions is more peculiarly within their control

than that of the complainant. To each of the several transactions which were consummated in these conveyances, there were, so far as appears to us, but two privies, to wit: the attorney, Hall, and the grantee in the conveyance. This is as far as our knowledge, from the record, extends. Nor are we warranted in assuming that there were others cognizant of the details; for, as matter of law, it cannot be said that the defendants were bound to secure the attendance of witnesses to their dealings with the complainant's agent; nor, having regard to the manner in which such affairs are ordinarily transacted, is it to be supposed that in point of fact they did so. The attorney, Hall, died before the filing of the bill; and the only living witness who can speak with directness as to either of the conveyances sought to be impeached, is the grantee therein, now impleaded before us. Now, by the law as it stood when this cause was brought to issue, the defendants were not permitted to give testimony on their own behalf; and, though the complainant might, if he had seen fit, have compelled them to speak, yet by requiring the defendants' answer to be given without oath, he has effectually prevented this, and so, it may be said, closed the only known avenue to the truth. The complainant, it is true, was under no obligation to put himself at the mercy of his adversary; unquestionably he was at liberty to take the answer under oath, or without oath, according as he saw fit; but reference being had to the nature of the transaction to be investigated, and the habits and usages of men, we do not think the defendants can reasonably be said to have means of showing the truth of the matter, superior to those within reach of the complainant, unless allowed their own oath; of which, as before suggested, the complainant has precluded them.

What is here said in the application of the general rule above stated, must not be regarded as a precedent which shall bind us in all cases.

Generally, whoever alleges negative matter material to the relief prayed, must prove the negative; whether any particular case is within the exception above noticed, in which

the burden of proof shifts to the opposite party, will depend sometimes upon the form of the action, sometimes upon who are the parties, sometimes, perhaps, upon the form in which the relief is sought, as is evidenced by the case of *Kitchell v. Burgum*, 21 Ill. 40, compared with *Stephenson v. Marony*, 29 id. 535, and in every instance the nature of the subject-matter or transaction involved in the controversy will enter into the question, so that no general rule can be prescribed; each case must rest upon its own circumstances. *Great Western R. R. Co. v. Bacon*, 30 Ill. 353. The present case seems to us not to come within the exception. The burden of proof was upon the complainant, and, not having sustained his allegations, he must fail. It appears to be unnecessary, therefore, to go further, and inquire whether the bill can be said to charge fraud, in such sense as to raise the presumption of innocence, for the protection of the defendants, if the resolution of the second question had been otherwise.

The final decree of the district court, given on the 18th day of November, A. D. 1870, will therefore be reversed, and the cause will be remanded to the district court, with directions to that court, that, as to the plaintiffs in error, the bill be dismissed, with costs. The decree given against the defendant Hutchinson, in the court below, not being complained of, will not be disturbed.

Reversed.

AGENT'S AUTHORITY—LIMITATION AS TO TIME: *Clements v. Macheboeuf*, 92 U. S. 418 affirming the judgment in the principal case.

DEED, BURDEN OF PROVING INVALIDITY. — Burden of proof is on the party asserting the invalidity: *Clements v. Macheboeuf*, 92 U. S. 418, affirming the judgment in the principal case.

WRIT OF ERROR, PRACTICE ON. — Writ of error being explained by common law, and authorized by Congress, the jurisdiction of the supreme court is complete, without further legislation: *Vance v. Rockwell*, 3 Colo. 243. WAIVER OF FORMAL ISSUANCE by stipulation: See *Stout v. Gully*, 13 Colo. 805.

SOLANDER v. THE PEOPLE.

CHANGE OF VENUE — *grounds for.* Statutes relating to change of venue examined with reference to a petition which is regarded as defective, in that the grounds of petitioner's belief in the causes for change of venue are not sufficiently set out.

CONTINUANCE in the discretion of the court. The continuance of a cause to the next term of court, there being no reason alleged for an immediate trial, rests in the discretion of the court.

JUROR — *preconceived opinion as ground of challenge.* Under the act of 1873 (9 Sess. 94), a preconceived opinion in the mind of a juror, with reference

to the guilt or innocence of the prisoner, is not a ground of principal challenge but of challenge to the favor.

Exception to ruling on challenge to the favor. Upon challenge to the favor, the court determines as matter of fact whether the juror stands indifferent between the parties, and the finding of the court in that particular is conclusive and not subject to review in this court.

WITNESSES — competency of accomplices. The fact that a witness participated in the crime charged goes to his credibility, but does not render him incompetent to testify.

EVIDENCE — declarations of one when received against another. A woman may conspire with others to procure miscarriage of her own person, and the conspiracy being shown, her acts and declarations in furtherance of the common design are evidence against others engaged with her in the criminal act.

Where deceased (a woman pregnant with child) shortly before her death visited the prisoner and upon her return told the witness the object of her visit and what took place on that occasion, such declarations were of the *res gesta* and were properly received to explain and give character to the visit.

And such declarations were proper for the consideration of the jury in connection with other evidence in the cause to determine the fact of conspiracy as well as other facts.

PRACTICE — whether the fact of conspiracy is for court or jury. Although evidence tending to prove an illegal combination, preliminary to receiving the declarations of any party to such combination, is for the court in the first instance, it may be submitted to the jury to find the fact.

WITNESSES — credit to be given to an accomplice — omission to charge. Where the principal witness is an accomplice of the prisoner in the perpetration of the crime, and he is supported by other witnesses and by corroborating circumstances as to some portions of his testimony, the failure of the court to charge the jury as to the weight to be given to his testimony and to the corroborating evidence is not a ground for reversal.

PRACTICE — omission to charge the jury on one point. Nor can it be objected that the court declined to charge as to the weight of circumstantial evidence, there being a proper charge as to the doctrine of reasonable doubt.

WITNESS — prisoner as such. The testimony of the prisoner who has taken the stand in her own behalf is a fair subject of criticism, and counsel for the people is at liberty to comment upon the failure of the prisoner to contradict a witness for the people.

PRACTICE — when objection should be made. Whether a petit jury has been regularly selected and summoned will not be considered in this court, if there was no challenge to the array or other objection on that ground before trial in the court below.

Error to District Court, Boulder County.

THE indictment was for manslaughter, and contained

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three counts. In the first count, it was charged that the defendant caused the death of Fredericka Baum by the use of a bougie in and upon the body of the said Baum, she being then pregnant with child. In the second count, it was charged that the death was caused by the use of an instrument unknown. In the third count, it was charged that the defendant administered to the said Baum a certain noxious and destructive substance called Gossypium, and other noxious and destructive substances, to the jurors unknown, with intent thereby to procure miscarriage of the said Baum, she being then pregnant with child, and thereby caused her death. At the June term, 1872, the defendant petitioned for change of venue, alleging, in her petition, "that she entertained serious and well-grounded fears that she will not receive a fair and impartial trial in this court, on account of the prejudice which she believes exists in the mind of the judge thereof against her, and that said fears rest upon the fact that petitioner has, within the last two days, heard, and she believes what she has heard to be true, that said judge expressed an opinion previous to the finding of said indictment against her by the grand jury, and, subsequent thereto, that she was guilty of the procuring the abortion therein charged, and was cause of the death of said Fredericka Baum; and that she has heard, and believes it to be true, that the said judge tried to prevent her from procuring bail, in said cause, at the last January term of said court. Petitioner further represents, to your honor, that she entertains serious and well-grounded fears that she will not receive a fair and impartial trial in this county, because the inhabitants of said Boulder county are prejudiced against the petitioner, so that she cannot receive a fair trial in said court; and that said fears are founded upon the facts that the physicians of said county, or many of them, tried to prejudice the minds of the jurors and people against her, and to make them believe she is guilty as charged in said indictment, and that they have, to a great extent, succeeded in doing so. And, also, that she has heard, and believes it to be true, that several of the

inhabitants of said county have been trying to prejudice the minds of several of the inhabitants of the petit jury summoned in this court to serve the present term against petitioner, and have succeeded in making them believe that she is guilty of the crime as charged in said indictment." Several affidavits in support of the petition were of the same tenor. The court denied the motion, and continued the cause to the next term. At that term, Mr. Justice WELLS was called to preside, and the first trial resulted in disagreement of the jury, December 13, 1872. The cause was then set down for trial on the 6th of January, 1873, and a special venire ordered for that day. No objection was made to this panel, and the second trial was begun on 7th of January, 1873. Objection was made to several jurors, which is sufficiently stated in the opinion of the court. Clemens Knauss, a witness for the people, testified substantially as follows: That he knew the deceased since the year 1867, and that she died on Tuesday, December 5, 1871; that shortly before her death he went to Boulder for the prisoner, and told her that deceased desired to see her; a conversation then ensued between the witness and the prisoner, in which the prisoner disclosed some knowledge of deceased's condition, and of the nature of her illness. Prisoner stated to witness that deceased had been taking medicine from Denver, and that if she should die that medicine would be the cause of her death; "she said that would clear her." The prisoner also inquired for the foetus which had come from deceased, and requested the witness to take it away, as inquiry might be made for it. The witness stated that he concealed the foetus at prisoner's request. On the following day the witness returned with prisoner to Boulder, and upon that occasion prisoner told him "that she wanted to get Berkley for her lawyer; that she wanted to get Dr. Beard and Groseback over; that they were good friends of hers, and if she got them over for examination, she would be all right; she said if any one should ask me what is the matter, I should say I do not know, the doctor will find it; that I should keep still and not say any thing

about it." The witness also stated that on the Saturday preceding, he visited the prisoner at Boulder, in company with deceased, and upon that occasion the prisoner asked him if he had come to get her for deceased, and if deceased was there herself; that deceased and prisoner remained together for about one hour, during which time the witness was not present; that deceased, the prisoner and the witness then returned to deceased's home, and the prisoner remained there until Monday morning; the witness further stated, that about three weeks before that time, he had procured medicine in Denver, at deceased's request, for the purpose of producing miscarriage, and that deceased had taken such medicine; that he had applied to Dr. Peters of Valmont, for medicine for the same purpose, but without success; the witness also stated that deceased went to Boulder on the Thursday preceding her death, and that upon the road home she told him what was the object of her visit; the declarations of deceased upon this occasion, being called for, were objected to by the prisoner, the court received them however, and the prisoner excepted. The declarations of deceased were that she had visited the prisoner for the purpose of employing her to procure miscarriage, that the prisoner had stated that it would be necessary to use an instrument, and to procure medicine from St. Louis; that she would charge \$30 for her services; the witness further stated, that the prisoner left some powders with deceased on Monday previous to the death of the latter, and that he gave deceased some of them; that deceased fainted after the taking of each powder; that deceased gave prisoner some chairs in part payment of the services of the latter. Other witnesses testified to the circumstances attending deceased's death. It was also in evidence that death was caused by an attempt to produce abortion, and that an instrument was used for that purpose. Dr. Allen, coroner, stated that the prisoner told him, at the inquest, that she supposed deceased was laboring under *prolapsus uteri*, and that she was treating deceased for that; he also stated that he saw no indications in the body of deceased, of *pro-*

lapsus uteri; it was also in evidence that a bougie, broken in three pieces, was found upon the premises, and that the injuries observed in the womb of deceased might have been produced by that instrument. It was also in evidence that the powder left with deceased, bore striking resemblance to gossypium, and that the effect of that drug is parturient and abortiary. The testimony as to the probable effect of the use of the instrument and of the powders, and the quality of the powders, was very voluminous. A witness also testified that when the bougie was found upon the premises of deceased, prisoner disclaimed any knowledge of it, and said she did not know what instrument was used for procuring abortions; that she had never seen one. The prisoner was put upon the stand as the only witness in the defense; she denied having used any instrument, and also that she had advised it; she admitted having given powders, but denied that they were gossypium, and averred that they were not intended to produce abortion.

Upon the argument, counsel for the people claimed before the jury, that the testimony of the witness, Knauss, was entitled to credit, from the circumstance that prisoner, although examined in her own behalf, had not contradicted said Knauss, as to conversations said to have been had by Knauss with the prisoner, and that prisoner's counsel had not interrogated her thereunto.

Upon this, the prisoner's counsel prayed the court to instruct the jury:

"That, in the examination of the prisoner provided for by the statute, which examination extends only to the facts and circumstances of the cause on trial, and does not confer on the prisoner the right to testify to facts or circumstances tending to impeach any of the witnesses in the cause. Therefore, the fact that defendant did not testify to facts or circumstances calculated to impeach any of the witnesses sworn in the case is not to be taken as properly commented upon, or as a circumstance against her."

But the court refused to so charge, and the prisoner excepted.

Prisoner also asked the following instructions :

“That, if the proof of her guilt rests on circumstantial evidence, unless the circumstances be such as to produce, in the minds of the jury, a moral certainty of her guilt, and of such a nature as not to be reasonably accounted for on the supposition of her innocence, but perfectly reconcilable with the supposition of her guilt, they ought not to convict the prisoner.”

“The jury are instructed that they cannot find the fact of confederacy between the deceased and the defendant, to procure the abortion which is charged to have resulted in the death of deceased, from the declarations of the said deceased not made in the presence of the defendant. The declarations of the deceased can only be received to prove some fact which is material to be proved, after the confederacy has been established by other competent evidence, and if the jury fail to find a confederacy between the accused and defendant, to procure the abortion complained of, by evidence other than the declarations of the deceased, made, in the absence of defendant, to some third person, they should acquit.”

Other instructions were asked, which it is not material to recite, and the court declined to charge as requested, and gave the following :

“The law, in the first instance, presumes the prisoner innocent of the crime wherewith she stands charged, and this presumption continues, and may avail to the acquittal of the prisoner, unless overthrown by evidence sufficient to exclude all reasonable doubt of her guilt. This is not, however, to be understood as requiring such a measure of proof as to exclude all doubt whatsoever. A reasonable doubt is such a doubt as grows out of the evidence by fair and reasonable deduction from the facts proven. You are not at liberty to go outside of the facts proven, nor to indulge in unreasonable deductions from the facts which are proven, in order to raise doubts. All reasonable doubts in the evidence are to be resolved in favor of the accused. In order to the

conviction of the prisoner, it must appear, by such a measure of proof as above prescribed :

"First. That the deceased, next before her death, was pregnant with child.

"Second. That the deceased, being so pregnant with child, the prisoner, with intent to procure a miscarriage of the deceased, used, or caused to be used, upon the person of the deceased, some instrument, or administered, or caused to be administered, to the deceased some noxious drug or substance, or both used such instrument and administered such drug or substance.

"Third. That, by reason of the use of such instruments, or the administration of such noxious drug or substance, or by reason of both, the deceased came to her death. It is not necessary that the prosecution should show the particular kind of drug or substance administered, nor that it was calculated to produce the miscarriage, nor what particular kind of instrument was used.

"Neither is it necessary that it should appear by the evidence that the prisoner, with her own hands, used any instrument upon the person of deceased, or that, with her own hands, prisoner administered to the deceased any drug or substance. If prisoner furnished any instrument to deceased or any other person with intent that deceased or any other person should use such instrument for the purpose of procuring the miscarriage of deceased, she being then pregnant, or if prisoner provided any noxious drug or substance with intent that deceased, being then pregnant, should administer the drug or substance to herself, or that any other person should administer it to her in order to produce the miscarriage of the deceased, prisoner thereby constituted the deceased, or the person to whom such instrument or drug was delivered or provided her agent and is accountable for all the acts of such person done in pursuance of the agency. And if such person, whether the deceased herself or any other, used such instrument upon the person of deceased, or administered such drug to deceased with the intent to produce the miscarriage of deceased, and

by reason of such treatment the deceased came to her death, the prisoner is guilty as charged in the indictment, even though she was not present at the time of the use of the instrument or administration of the drug.

"You are the exclusive judges of the credit which is due to each and every of the witnesses who have testified in the case and of the effect which shall be given to their testimony. If it appears to you by the evidence that the witness, Knauss, and the deceased were parties to the alleged combination to procure miscarriage of deceased, you ought to consider the circumstances in determining what credit is due to the testimony of Knauss and to the statement said to have been made by the deceased to Knauss. But if upon consideration of all the testimony you are of the opinion that Knauss has spoken truthfully in whole or in part, you will be warranted in acting upon so much of his testimony as you believe to be true, or in considering and acting upon the whole of his testimony if you believe it to be wholly true.

"You are not bound to consider the testimony of the prisoner as absolutely true nor any part of it as absolutely true, nor as equal to the testimony of one disinterested witness.

"You are to bear in mind that prisoner speaks in her own behalf to discharge herself of a criminal accusation, that the law does not permit the people's attorney to call witnesses to contradict or impeach her subsequent to the giving of her testimony, and you are to consider the great temptation which one so situated is under, to so speak, as to procure an acquittal. Upon consideration of these circumstances taken in connection with all the evidence you are to accord to the testimony of the person such credit and effect as you think it entitled to."

The prisoner was convicted and judgment was given that she be confined in the penitentiary for the term of three years.

Mr. G. BERKLEY and Messrs. BROWNE & PUTNAM, for plaintiff in error.

Mr. B. L. CARR, District-Attorney, and Mr. ALPHEUS WRIGHT, contra.

HALLETT, C. J. The questions presented in this record may be conveniently discussed in the order in which they arose in the court below.

Under the amendatory act of 1872 (9 Sess. 120), relating to venue, the petitioner must set forth in his petition the fact or facts which justify and support his belief that he will not receive a fair trial in the court where the cause is pending, in order that the court may judge of the sufficiency of such facts. In the prior statute on the same subject (R. S. 634), certain causes are specified which shall be sufficient to warrant a change of venue, as that the judge is interested in the suit, or prejudiced against the applicant, or that the inhabitants of the county are so prejudiced, etc. Construing these acts together, it is plain that the petitioner must now set forth in his petition the ground upon which the venue may be changed, as, that the judge or the inhabitants of the county are prejudiced against him, and also the facts which lead to the belief that such ground exists. Affidavits may be filed to show the truth of these facts, and if the ground upon which the change is asked sufficiently appears, the prayer of the petitioner will be granted; otherwise it should be denied.

In support of the allegation that the judge was prejudiced against her, petitioner averred that she had heard that the judge had expressed the opinion that she was guilty of the crime charged, and that, at a former term of court, he had tried to prevent her from procuring bail in the cause. The mere statement that she had heard such rumors, there being no averment as to the truth of them, may be dismissed without comment. As to the allegation that the inhabitants of the county were prejudiced against petitioner, it was averred that the physicians of the county, or many of them, and several of the inhabitants of the county, had been trying to

prejudice the minds of the people against her, and that they had succeeded, to a great extent. Neither the number of persons engaged, nor the means resorted to by them to create a prejudice in the minds of the people against the petitioner is stated. There is nothing in this to show that the petitioner could not obtain a fair trial in Boulder county, and, therefore, the petition was very properly denied.

In the argument of one of the counsel for plaintiff in error, it is assumed that the court granted the application, but refused to set the cause down for trial before another judge, or to make the order for change of venue at that term. The record does not disclose any such circumstances, and, of course, we cannot assume the existence of facts not stated in the record. The continuance of the cause at the June term was clearly within the discretion of the court, and cannot be questioned here. Whether the cause should proceed at that term, or stand over to another, was a matter of which the court below could best judge, and we will presume that there was good reason for the order made.

At the trial several jurors were challenged by the prisoner, upon the ground that they had formed or expressed an opinion upon the merits of the case, and the challenges were denied by the court. At the common law challenges to the poll were for principal cause, and to the favor, and the facts being ascertained or admitted, the former were determined by the court, as matter of law, and the latter was determined by triers, as matter of fact. In either case, the facts upon which the challenge was based were to be ascertained by triers, if any dispute arose concerning them, and in the case of a principal challenge, the triers proceeded no further. The fact being found, the law raised a manifest presumption of partiality, and the juror was set aside. Not so, however, upon the challenge to the favor, in which the question of indifferency was left to the judgment of the triers, to be determined upon the facts found by them. Bacon's *Ab. Juries*, E. 1, 12; *State v. Benton*, 2 Dev. & Bat. 196. In modern practice triers have not been called, and the fact, as well as the law, has been determined by the court; but it is

considered that this circumstance does not furnish ground for disregarding the distinction between the principal causes of challenge and challenges to the favor. *State v. Howard*, 17 N. H. 191. The fact upon which the challenge for principal cause was based was required to be entered of record, in order that the judgment of the law might be pronounced upon it. The fact being ascertained by triers, or by the court, acting in the place of triers, the law furnished the conclusion.

In the case of a challenge to the favor, the fact being ascertained, the matter of indifferency was still to be determined by the triers, or by the court acting in the place of triers. In one case the law declared the juror to be incompetent, when the fact was found to exist; in the other the fact was evidence of bias or favor, upon which the triers or the court must determine whether the juror was indifferent. *People v. Bodine*, 1 Denio, 281; *State v. Benton*, *supra*; *State v. Howard*, *supra*. A preconceived opinion, if fixed and determinate, although not characterized by malice or ill-will, has been generally regarded as a ground of principal challenge, while an opinion based upon rumor, and which does not appear to have taken firm hold of the mind of the juror, has been regarded, as cause for challenge to the favor only. *State v. Benton*, *supra*; *State v. Howard*, *supra*; *State v. Dove*, 10 Iredell, 469; *Ex parte Vermilyea*, 6 Cow. 355; *Schoeffler v. State*, 3 Wis. 823. Under the recent statute (9 Sess. 94) it is believed that this distinction cannot be longer maintained, for it is there provided that no person shall be disqualified to serve as a juror, by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused. We may pause here before taking up the proviso, to observe that the language of the act is not restricted to opinions based upon rumor or what are called hypothetical opinions, and that it appears to be entirely free from ambiguity. It may be fairly claimed that an opinion affected by malice or ill-will toward the accused is not within the terms of the act, for malice and ill-will may be made a distinct ground of challenge. If, however, a preconceived opinion is no longer a ground of principal

challenge, it is, by the terms of the proviso in the act, a ground of challenge to the favor, for it is there declared that the court shall be satisfied from the examination of the juror or from other evidence that he will render an impartial verdict in the cause, according to the law and evidence.

The pre-existing opinion which before the statute was a ground of principal challenge is now submitted to the court as matter for challenge to the favor, and the court must determine its sufficiency. Of course, a fixed opinion must always be regarded as good ground of challenge to the favor, since it is impossible to affirm that one who entertains such an opinion stands indifferent between the parties. So also an opinion less determined and positive, and, perhaps, originating in common rumor may be good ground of challenge to the favor, if the circumstances render it probable or possible that the juror may be influenced thereby upon the trial of the cause. In determining whether a juror will be biased by what he has heard of a cause, so much depends upon the intelligence and habits of thought of the juror, his disposition to judge impartially or otherwise, his business and social relations, and other circumstances which cannot be enumerated, that it would be difficult to follow any general rule. For this reason, probably, the legislative assembly did not attempt to prescribe such rule, and referred the matter to the courts, where the force of controlling circumstances may be respected.

Upon the language of the statute, however, it is plain that whatever the character of the opinion entertained by the juror, if it is merely an opinion as to the guilt or innocence of the accused, not affected by malice or ill-will, or any other disqualifying circumstance, the court is to determine as matter of fact whether the juror stands indifferent between the parties, and in this the court performs the office of triers at the common law. The opinion formed or expressed is not of itself a disqualifying circumstance, but if it produce a condition of mind, amounting to unindifference, the juror is disqualified, and the court is to determine upon the examination of the juror or other evidence, whether the

opinion has produced that result. In the exceptions before us, the evidence elicited upon the examination of the jurors is given. The record then states that the juror was challenged, or that he was challenged for cause, without more.

The examination disclosed that the jurors had heard much of the case, and one of them had talked with the witnesses a little, not a great deal. Two of them doubted whether they could act impartially, and one thought that he had a prejudice if nothing more. We are not informed whether all that was drawn out upon the examination of the jurors is embraced in the record, but it appears from what is given, in each instance, that the challenge was based upon an opinion entertained by the juror, upon the merits of the case, which, under the statute, was not a challenge for principal cause, but to the favor. Upon this, as we have seen, the court was required to decide whether the juror stood indifferent between the people and the accused, as matter of fact. Although the record does not state that this issue was submitted to, and determined by, the court, it does appear in every instance that the challenge was overruled by the court, and that the juror was allowed to sit in the cause. Upon this we are to presume that the duty assigned to the court by the law was performed, for the ruling of the court upon the challenge cannot take effect in any other way. If, however, it should be conceded that each of the jurors challenged held an opinion as to the guilt or innocence of the prisoner, and that the challenges interposed were for principal cause, and were so regarded by court and counsel, the statute having removed the disability arising from such opinion, the exception must be overruled.

Assuming that the court decided the question of indifference in each case, as matter of fact, we are now to consider whether that decision is subject to exception and review in this court. It will be observed that the statute gives no exception, nor is the case within the provisions of section 245 of the criminal code. R. S. 254. That section relates to motions in arrest of judgment, for new trial, for continuance, and for change of venue, and cannot be extended to

questions of this kind. Another section of the criminal code (225, R. S. 246) requires the judge presiding to sign and seal any bill of exceptions presented to him in which the truth of the case shall be fairly stated, but this must be limited to questions of law, which, according to well-known rules, are subject to exception and review. At the common law, upon trial of the question of indifference, decisions and opinions of the court as to the admissibility of evidence, and other questions of law arising upon the trial, may be reviewed in a court of errors, but the finding of the triers as to the fact of indifference is conclusive. *State v. Ellington*, 7 Ired. 61; *State v. Dove*, 10 id. 469; *Ex parte Vermilyea*, 6 Cow. 559; *Freeman v. The People*, 4 Denio, 33; *Schoeffler v. State*, 3 Wis. 828; Bacon's Ab. "Juries" E. 1, 12.

In the case at bar no question was raised upon the trial of the challenges, as to the admissibility of testimony, or the regularity of the proceedings, but we are asked to review the finding of the court upon the evidence. For this there is no warrant in the statute or common law, and therefore we must decline to enter upon the question.

As to the witness Knauss, the fact that he was an accomplice in the commission of the crime, undoubtedly goes to his credibility, but he was not thereby rendered incompetent as a witness. Mr. Greenleaf says that it is a settled rule of evidence that a *particeps criminis*, notwithstanding the turpitude of his conduct, is not on that account an incompetent witness, so long as he remains not convicted and sentenced for an infamous crime; and there are numerous authorities to the same effect. 1 Greenl. Ev., § 379; 4 Stark. Ev. 17.

In New York it has been held that a woman on whom an abortion has been produced is not an accomplice in the commission of the crime, but rather the victim of the act, and the same view appears to have been taken in Massachusetts. *Dunn v. The People*, 29 N.Y. 523; *Com. v. Wood*, 11 Gray, 85. But it is not necessary that she should appear to be an accomplice in order to make her declarations accompanying

acts done in furtherance of the criminal purpose evidence against another, who has joined in the unlawful act. She may be, and usually is, a party to the illegal combination to effect the abortion, and as this is the ground upon which the declarations are admitted, it can make no difference that she is not criminally liable for the act done. In some cases, probably, the woman is an unwilling subject, submitting to, but not actively joining in, the unlawful attempt, and in such cases the community of purpose which alone can make the acts and declarations of one admissible as evidence against his associate in crime, may be wanting. But where it appears that the woman not only submits to the unlawful attempt, but actively promotes it, by seeking the aid of others, and eagerly adopting the means suggested to accomplish the crime, it cannot be claimed that she is not a party to the criminal design. If the woman is not technically an accomplice, she may, nevertheless, conspire with others to produce the abortion, and the conspiracy being shown, her acts and declarations in furtherance of the common design are evidence against others engaged with her in the criminal act. 4 Stark. Ev. 403; 3 Greenl. Ev. 94.

The declarations of deceased, to which objection was made, were explanatory of the object of her visit to prisoner on Thursday before her death, and as to what took place at that interview. It appears that deceased resided about eight miles from where the prisoner lived, and these declarations were made by deceased when she was returning home, after the interview. It was important to show that a conference took place between the prisoner and deceased at that time, and the declarations of deceased, made immediately after the interview, give character to it, and may be said to be a part of it. *State v. Howard*, 32 Vt. 380; *Browning v. State*, 30 Miss. 657; *Bell v. Morrison*, 27 id. 84; *Johnson v. Sherwin*, 3 Gray, 374.

It is conceded that a mere narrative of past events, not made in furtherance of the criminal design, is not evidence against one who was not present at the time it was uttered.

State v. Thibreau, 3 Vt. 100; *Clawson v. State*, 14 O. S. 234, *State v. Dean*, 13 Ired. 63.

Although the statement of deceased was made after the interview with prisoner, and was, in one sense, a history of a past event, it was during the pendency of the criminal enterprise, and closely attendant upon an act done to promote the illegal purpose. If the evidence was admissible upon the principle of *res gestæ*, as I think it was, it would not have been proper to exclude it upon the ground that it was merely a narrative of a past event.

That a foundation had not been laid for the introduction of this evidence, by proof of conspiracy between the prisoner and deceased, does not appear to have been urged in the court below as an objection to allowing it to go to the jury, but counsel asked the court to charge the jury that the declarations of deceased were not evidence to establish the fact of confederacy between prisoner and deceased, and that such declarations could not be received until after proof of confederacy by other competent evidence.

Unquestionably, the evidence of illegal combination being offered as a foundation for the acts and declarations of deceased, was for the court, in the first instance; but whether it should have been submitted to the jury to find the fact, is a question upon which the authorities are not uniform. 1 Greenl. Ev., § 111.

It is undoubtedly a general rule, that questions of fact, upon which depend the admissibility of evidence, are to be decided by the court: As, for instance, whether dying declarations were made under a sense of impending death. 1 Greenl. Ev., § 160. Whether confessions of guilt were voluntarily made. 1 Greenl. Ev., § 219. Whether a witness is rendered incompetent by reason of interest in the suit. *Dole v. Thurlow*, 12 Metc. 157. Whether search has been made for lost instrument, so as to allow secondary evidence of its contents to be given. *Foster v. Mackey*, 7 Metc. 531. In *State v. Dula*, Phillips (N. C.), 211, it was held that the same rule is applicable where proof is offered of a conspiracy, and this view appears to have been adopted

in Virginia, and at one time in Massachusetts. *Clayton v. Anthony*, 6 Ran. 291; *Odiorne v. Bacon*, 6 Cush. 190. The case in 6 Cushing was, however, silently overruled in *Com. v. Brown*, 14 Gray, 419, and the current of authority is to the effect that the evidence should be sufficient in the opinion of the court to make out a *prima facie* case, and should be submitted to the jury to find the fact. *U. S. v. Hinman*, 1 Bald. C. C. 292; *State v. Thibeau*, 30 Vt. 104; *Fouts v. State*, 7 O. S. 476; *Browning v. State*, 30 Miss. 687; *Wiggins v. Leonard*, 9 Iowa, 194; 1 Greenl. Ev., § 111.

A question of this kind is often closely contested, and as there does not appear to be any inflexible rule of law which requires that it shall be determined by the court, I can see no impropriety in submitting it to the jury as the more appropriate tribunal to decide questions of fact. *Bartlett v. Hoyt*, 33 N. H. 165.

The propositions contained in the instructions asked by counsel are, however, when applied to the evidence in this cause, incorrect. It is undoubtedly true that the mere admission of the existence of a conspiracy by one of the parties thereto, is not evidence to establish the conspiracy against his fellows, but this principle is not applicable to declarations which are in themselves acts, or are accompanied by acts in furtherance of the common design. This distinction is dwelt upon in 4 Stark. Ev. 406; and in *Clawson v. State*, 14 O. S. 234, cited by counsel, the rule that declarations of a stranger shall not be received to establish the conspiracy, is expressly limited to such as are not made in furtherance of any design common to himself and the prisoner. From the nature of the case, the evidence of a combination to do an unlawful thing must usually be circumstantial, and the fact must be collected from collateral circumstances, and acts done in apparent concert, which tend to the accomplishment of the illegal purpose. The evidence of such acts is of no higher nature than the declarations which accompany them, and show the intent with which they are done, and the means by which the illegal design is to be accomplished.

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The declarations of deceased, to the witness Knauss, were attendant upon an act done in furtherance of the criminal design, and explanatory of it, and were therefore proper for the consideration of the jury, in connection with the other evidence in the cause, to determine the fact of conspiracy as well as other facts. The principle upon which evidence of an act done is admitted, is broad enough to support the accompanying declaration, which explains and gives character to the act. 4 Stark. Ev. 403.

The court was also asked to charge the jury that if they believed from the evidence that the witness Knauss and the deceased were parties to the confederacy, their declarations should be regarded as coming from a corrupt source, and should be weighed cautiously, which was refused, and the court charged that if Knauss and deceased were parties to the alleged combination to procure miscarriage of deceased, that circumstance should be considered in determining what credit was due to the testimony of Knauss, and the statement said to have been made by deceased to Knauss. The court was not asked to charge the jury that the testimony of Knauss should be supported by other witnesses, or corroborating circumstances, and nothing was said by the court upon that point. It is said that courts will, in their discretion, advise a jury not to convict of felony upon the testimony of an accomplice alone, and without corroboration; and it is now so generally the practice to give them such advice, that its omission would be regarded as an omission of duty on the part of the judge. 1 Greenl. Ev., § 380. Upon this it would seem that where the testimony of an accomplice is not corroborated, the omission to give such advice would constitute error in the record, although no prayer should be presented to the court therefor. *State v. Haney*, 2 Dev. & Bat. 396. Where the jury are properly cautioned as to the credit due to an accomplice, a conviction may be had upon his testimony alone, and the verdict will not be disturbed. *State v. Haney, supra*; *Allen v. State*, 10 O. S. 304; *Commonwealth v. Bosworth*, 22 Pick. 399;

State v. Stebbins, 20 Conn. 473; *People v. Costello*, 1 Denio, 86; *People v. Dyle*, 21 N. Y. 578.

Upon the same reason which requires that the jury should be cautioned against accepting the testimony of an accomplice, where it is not corroborated by other testimony, they should be charged in regard to the effect of corroborative evidence in a case where there is such evidence; and I have doubted whether the omission to charge on that point would not constitute error in the record. Conceding that such charge is useful and even necessary to guide the deliberations of the jury to a correct conclusion, and that it should be given in all cases in which a conviction is sought upon the testimony of an accomplice, it is nevertheless possible for the jury to pronounce correctly without such aid. The mere omission to charge upon a point of law is not the same as misdirection by which it appears more or less certainly or probably that the jury have been misled. It often happens in the trial of causes that the charge to the jury is not full upon all points; and if this alone should be regarded as ground of reversal, the rights of litigants would be very insecure. I have found no case in which, the verdict being correct, the mere omission of the court to charge the jury as to the weight to be given to the testimony of an accomplice has been held to be error, for which a new trial should be granted. But if such is the rule where there is no testimony to corroborate the accomplice, and the text of *Mr. Greenleaf* certainly supports that view, I think that it cannot be extended to a case in which the accomplice is supported by other testimony. *Johnson v. State*, 2 Ind. 652. In this connection it may be necessary to remark that the testimony of *Knauss* was corroborated in material parts by the testimony of other witnesses against whom nothing is alleged. As to the interview on Thursday between prisoner and deceased, he is confirmed by the prisoner herself, and as to the visit to deceased on Saturday, and the fact that prisoner remained at deceased's house until Monday morning, he is supported by the witness *Myers*. The physicians testify that miscarriage was produced by the use of

an instrument, and this corresponds with the declaration of deceased, that an instrument would be required. The powders mentioned by Knauss were found in the house, and the prisoner confessed that she had prescribed them. The account which prisoner gave of her connection with the case, which appears to have been false, affords some confirmation of the testimony of Knauss. According to the testimony of the physicians, there was nothing to indicate that deceased had been suffering from *prolapsus uteri*, for which prisoner said that she had been treating her, while the real character of the injury which resulted fatally was plainly apparent. It is considered that the omission to contradict an accomplice as to a material statement in respect to which, if false, contradictory evidence is within the prisoner's power, may be regarded as a circumstance to corroborate the evidence of the accomplice. *People v. Dyle*, 21 N. Y. 578. If the bare omission to contradict the accomplice is a circumstance to corroborate his testimony, *a fortiori* the assertion of a falsehood in contradicting him, should be regarded as a circumstance to confirm his statement. Without entering into a general discussion of the evidence, it is sufficient to say that the testimony of Knauss is entirely consistent with the other evidence in the cause, and is so far supported by that evidence, that it would be difficult to reject it as unworthy of belief.

The evidence appearing to be sufficient to warrant the conviction, and there being no misdirection by the court, the mere omission to charge the jury upon points which the law would sanction, but does not require a charge to be given, is not, in our opinion, an error for which a new trial should be awarded. I concede that this rule should be carefully limited to cases in which it is apparent that the omission has not affected the result. I think that it can be safely applied to cases of this kind where counsel usually draw the attention of the jury to the character of the witnesses, and comment freely upon all circumstances tending to discredit them. If, as in this case, the jury are told by

the court to regard the discrediting circumstances, the testimony will not be overvalued.

The instruction asked as to the weight to be given to circumstantial evidence was correct in form and principle, and might have been given with propriety. But as it relates simply to the weight of evidence, and the jury were correctly advised as to the doctrine of reasonable doubt, the refusal of this instruction cannot be ground for new trial.

The prisoner having elected to testify under the act of 1872 (9 Sess. 95), her testimony became a fair subject of criticism before the jury, and the counsel for the people was at liberty to analyze her testimony, to compare it with the other testimony in the cause, and comment upon the omissions and contradictions, if any, therein. The prisoner was at liberty to contradict Knauss, and to give her own account of the matters related by him, and the fact that she did not do so might well be considered by the jury in determining the credibility of Knauss. *People v. Dyle, supra*. The prisoner was not required to testify, and by the terms of the statute if she had chosen to remain silent, no inference of guilt could be drawn from her conduct. By taking the witness stand she opened the door to criticism, and cannot now complain that an effort was made to measure her testimony by the ordinary rules which govern human conduct.

It is also alleged that the jury impaneled to try the cause was irregularly summoned, but there being no challenge to the array or other objection to the jury before trial, it is believed that this objection cannot be relied upon here.

We see no error in the record, and therefore the judgment will be affirmed.

Affirmed.

CONTINUANCE—DISCRETION OF COURT.—A continuance to another term of court, no reason appearing for immediate trial, is in the discretion of the court: *Minich v. People*, 8 Colo. 48.

JUROR—CHALLENGE—PRECONCEIVED OPINION.—A preconceived opinion in the mind of a juror as to the guilt or innocence of a prisoner is not a ground of principal challenge, but of challenge to the favor. The court determines as a matter of fact whether the juror stands indifferent between the parties, and its ruling is not subject to review: *Union G. M. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 578; *Jones v. People*, 2 Colo. 355; *Jones v. People*, 6 Colo. 451; *Babcock v. People*, 13 Colo. 518. Any opinion by which the juror may be influenced in the trial of the case should be regarded as good ground for challenge to the favor: *Jones v. People*, 2 Colo. 355.

CRIMINAL LAW—TESTIMONY OF ACCOMPLICE.—There is no rule of law to the effect that a conviction cannot be had solely upon the unsupported testimony of an accomplice: *Winton v. People*, 11 Colo. 174.

BROWNE et al. v. STECK.

STAMPS—*affixed by collector of internal revenue.* In the month of February, 1871, the collector of internal revenue of the proper district had authority, under several acts of congress, to affix revenue stamps to instruments not properly stamped at the time they were made, and to remit the penalty incurred by the omission to stamp them.

EVIDENCE—*objection that it is not full.* That a witness has not fully disclosed the nature and extent of his authority to indorse a promissory note is not a valid objection to his deposition. If a full explanation is desired, the party may call for it upon cross-examination.

PRACTICE—*order of introducing testimony.* The order in which testimony shall be introduced rests in the discretion of the court in which the cause is tried.

NEW TRIAL—*not allowed where testimony is conflicting.* Where the testimony of two witnesses conflicts, a new trial will not be granted, and one of the witnesses being a party to the suit, the court was not bound to accept his testimony.

DAMAGES—*for failure to pay money on contract.* An allowance for the failure to pay at maturity money due by contract, is regarded as damages for the breach of contract, not as interest on the money due.

The measure of such damages is the value of the use of the money during the time for which it has been withheld.

May be regulated by contract. The stipulation of the parties as to the rate of interest after maturity may be accepted as the measure of damages, provided they adhere to what may be reasonably sufficient to compensate the loss arising from the breach of contract.

If, however, the rate of interest specified in the contract greatly exceeds the real value of the money, it is to be regarded as a penalty for the non-payment of the principal sum, rather than a just recompense for detaining it.

In the absence of evidence as to the current rate of interest at the time the contract was made, the rate specified in the contract may be accepted as the true measure of damages.

Error to Probate Court, Arapahoe County.

THE plaintiff declared upon a note of hand as follows :
\$280. DENVER, C. T., May 7, 1864.

Thirty days after date, we promise to pay to Rogers & Wilcox, or order, the sum of two hundred and eighty dollars for value received, negotiable and payable without defalcation or discount, at Rogers & Wilcox's office, in Den-

ver, Colorado Territory, with interest at the rate of ten per cent per month from maturity until paid.

(Signed)

ROBERT S. WILSON,
SAMUEL E. BROWNE.

Several matters were pleaded by the defendants, and the fourth plea of defendant Browne, to which reference is made in the opinion of the court, is as follows:

"And for a further plea in this behalf the defendant, S. E. Browne, says, that the said promissory note, in the first count of the declaration mentioned, is the only cause of action sued on, and that all the other counts are all for the same promissory note and for no other cause whatever, that the said promissory note was executed and delivered to the said firm of Rogers & Wilcox, copartners as aforesaid, before the dissolution of said firm, and that after the dissolution of said firm and after the plaintiff had notice of said dissolution, to wit: on the first day of May, A. D. 1870, in the county aforesaid, the said Henry J. Rogers, one of the said firm of Rogers & Wilcox and in the firm name of Rogers & Wilcox, indorsed the said note to the plaintiff, and this the said defendant is ready to verify."

To which the plaintiff, by leave of court, replied:

1st. That the firm of Wilcox & Rogers was not dissolved at the time of the indorsement of the promissory note to the plaintiff.

2d. That the plaintiff had no notice of the dissolution of the firm of Rogers & Wilcox at the time of the indorsement of the said promissory note to him.

3d. That at the time of the dissolution of the said firm of Rogers & Wilcox, the said Rogers was authorized and empowered by the said Wilcox to indorse the said note to the said plaintiff in the firm name.

4th. That before the dissolution of the firm of Rogers & Wilcox, the said Rogers was authorized and empowered by the said Wilcox to indorse the firm name on the said promissory note after the dissolution of said firm, and issue was joined upon all of said replications.

When the note was offered at the trial it was not properly stamped, and objection being made upon that ground it was carried to the collector of the district who affixed revenue stamps and remitted the penalty as provided for in the statutes referred to in the opinion of the court. The note was then received in evidence notwithstanding the defendants' objection, and the plaintiff rested. Thereupon Robert S. Wilson, one of the defendants, was called and testified as follows:

"I made payments on the note, credited on the back, July 14, 1864, \$45; August 29, 1864, \$87.15; about the last of June, 1864, can't tell the exact date, Charles Dahler, agent for Ben. Holliday O. Ex. Co., or the agent of Ben. Holliday's Overland Express, either him or N. Stein, paid Rogers \$63.80; that was the first payment that was made; I remember telling him I would let him have some county scrip soon; Rogers said I could let it run further; he did not give credit on the note for this payment; Browne knew nothing about it; Browne was my security on the note and they, Rogers & Wilcox, knew it; do not remember the amount of county scrip; I let them have \$200 at 45 cents on the dollar, making \$90; the scrip was paid in a very short time; about four or five days after; they did business in the same house with Butterfield; I directed Butterfield to pay them some commissions due me, about \$70 or \$80; that is not the credit for \$87.15 on the note; it may be it; Rogers agreed with me if I paid him the fees—\$63.80 due from Holliday O. Ex. Co. to me as sheriff, for sale made by me as sheriff, he would let it run until the meeting of the county commissions who met quarterly; do not remember any other payment; I knew at the time the note was paid; I had a conversation with Rogers in 1864 in relation to remainder of the note; cannot remember what he said; Rogers admitted to me that the note had been paid; that is my impression."

Upon cross-examination, witness repeated the same testimony substantially—the defendants then rested, and the plaintiff offered the deposition of Henry J. Rogers, one of

the payees of the note, to which defendants objected, but the objection was overruled and the deposition received. A portion of the deposition referred to in the opinion of the court was as follows :

3d Interrogatory. Were you acquainted with a firm or copartnership doing business under the firm name and style of Rogers & Wilcox ; if yea, state if you know who composed that firm, where they did business, and in what business that firm was engaged ?

Answer. I was acquainted with a firm doing business under the firm name and style of Rogers & Wilcox ; Henry J. Rogers and G. H. Wilcox composed the firm of Rogers & Wilcox ; they did business in Denver, Colorado, and were engaged in contracting and banking.

4th Interrogatory. If you say, in answer to the last preceding interrogatory, that you were acquainted with that firm, and that you and one G. H. Wilcox composed the copartnership of Rogers & Wilcox, and did business in Denver, Colorado Territory, state if you had any business transactions with the defendants, Samuel E. Browne and Robert S. Wilson ?

Answer. I did have business transactions with them.

5th Interrogatory. If you say, in response to the last preceding interrogatory, that you had such business transactions, and that the said defendants, Samuel E. Browne and Robert S. Wilson, executed and delivered to the firm of Rogers & Wilcox a promissory note, state the amount of said promissory note, its date, when due and payable, and if indorsed, when indorsed, if you can recollect, and to whom indorsed ; and the payments upon said promissory note, if any, and by whom said payments were made, and when the same were made ?

Answer. Samuel E. Browne and Robert S. Wilson did execute and deliver to the firm of Rogers & Wilcox a promissory note for the sum of \$280, dated Denver, May 7, 1864, and payable thirty days from date ; it was indorsed to Amos Steck, I think, some time during the year 1869 ; there were two payments made on the note in the year 1864,

as follows: July 14th, \$45; August 29th, \$87.15; these payments were made by Robert S. Wilson.

6th Interrogatory. If you state, in answer to the last preceding interrogatory, that there were payments made upon said promissory note by said Robert Wilson, state if any contract or agreement was made by you or the firm of Rogers & Wilcox, if you know, with the said Wilson, to extend the time of the payment of said promissory note; or whether any other contract or agreement was made by you or the firm of Rogers & Wilcox, other than appeared on the said promissory note, when you last saw the same; state, also, when and where you last saw said promissory note?

Answer. Rogers & Wilcox, nor myself, made any agreement with Wilson other than appeared on the note; I last saw the note in Denver at the time it was indorsed.

7th Interrogatory. State when the firm of Rogers & Wilcox was dissolved, if the same was dissolved; also state who had the possession of the said promissory note at the time of said dissolution; if you say it was dissolved?

Objected to by defendant Browne because the question is incompetent.

Answer. The firm of Rogers & Wilcox was dissolved in July or August, 1864; I had possession of the note at the time of the dissolution.

8th Interrogatory. If you state, in answer to interrogatory number five, that the said promissory note was indorsed to the plaintiff by Rogers & Wilcox, state which one of the firm indorsed the same, and by what authority the same was indorsed, if by any authority?

Objected to by defendant Browne, because the testimony sought would be incompetent.

Answer. I indorsed the note to Amos Steck; it was indorsed by authority of an agreement between Wilcox and myself at the time of dissolution.

9th Interrogatory. If you state, in answer to the last preceding interrogatory, that you indorsed the same in the name of the firm of Rogers & Wilcox, and that you was authorized to indorse the firm name thereon by G. H. Wil-

cox, state when and where that authority was given, whether before, at the time of, or after the dissolution of the said firm of Rogers & Wilcox, if there was a dissolution of said firm or copartnership.

Objected to because it presupposing the proof of a fact is incompetent.

Answer. The authority was given in Denver, Colorado, at the time of dissolution in July or August, 1864.

The cause was tried to the court without a jury, and judgment entered for the plaintiff.

Messrs. BROWNE & PUTNAM, for plaintiffs in error.

Mr. E. L. SMITH, for defendant in error.

HALLETT, C. J. By the revenue act of 1864 (13 Stat. at Large, 295), an instrument not stamped according to law might be stamped in the presence of the court, and by the act of 1866 (14 Stat. at Large, 143), authority was conferred on the collector of the district to affix the proper stamps in all cases in which they had been omitted. Under the act of 1866, the collector was authorized to remit the penalty prescribed by the act, within twelve calendar months from the 1st day of August in that year, upon satisfactory proof that the omission to stamp the instrument was not intentional. This act was subsequently amended (16 Stat. at Large, 257) as to the time within which the collector should have power to remit the penalty, by striking out the date 1866 and inserting 1871, and thereby it was required that the instrument should be presented to the collector within twelve calendar months from the 1st day of August, 1871. In this instance, the promissory note was presented to the collector in February, 1871, prior to the time fixed by the act of 1870, but we think that the collector had full power to remit the penalty at that time. The limitation expressed in the act of 1866, as well as the amendment of 1870, was designed to insure diligence on the part of the holders of unstamped instruments, and the act should be regarded as extending the time within which the collector might remit

the penalty to the 1st day of August, 1872. The seventh, eighth and ninth interrogatories propounded to the witness Rogers were designed to elicit the facts respecting the indorsement of the note, which, under the issue joined on the fourth plea of defendant Browne, were a proper subject of inquiry. The objection that Rogers did not disclose the nature of the authority given him by Wilcox is not sufficient to sustain an exception to the deposition. Whether the authority to Rogers was by parol, or in writing, and the exact language by which it was conferred, might have been ascertained upon cross-examination, and defendants below having neglected to interrogate the witness upon those points, it was no objection that the testimony was not as full as it might have been made. It is also claimed that this deposition should have been put in evidence before the plaintiff closed his case, the affirmative of the issue being upon him. But if this should be conceded, the order in which testimony is to be introduced rests in the discretion of the court, and it is no ground of error that the deposition was received after the defendants had closed their case. As to the weight of the testimony, there is no such preponderance in favor of the defendants below as requires that a new trial shall be awarded. The witnesses Wilson and Rogers are opposed throughout, and we know of no rule which requires that the court should accept the testimony of one of them in preference to that of the other. It is true that Rogers does not state that the payments of \$63.80 and \$90, mentioned by Wilson, were not made, but he was asked to state what payments had been made, by which, under the obligation of his oath, he was required to state all payments of which he had knowledge. Nothing less than this would be the whole truth, and when he answered that the payments indorsed on the note had been made, he should be understood as affirming that there were no others. Independent of this, it is by no means clear that a jury or a court trying an issue of fact is bound to give full credit to the testimony of a party to the suit. Ordinarily, the presumption in favor of a verdict will not yield to the uncorroborated testimony

of a party to the suit, or, at all events, this must be the case when the cause comes up on error. A question of greater difficulty arises out of the stipulation in the note to pay interest, after maturity, at the rate of ten per cent per month. The damages awarded for the detention of money after the day of payment are measured by the value of the money during the time which it has been withheld. This is the reasonable rule of compensation, which restores the plaintiff to that which he has lost by reason of the breach of the contract, and compels the defendant to surrender that which he has gained by the failure to keep his obligation. *Beckwith v. Hartford, P. & T. R. R.*, 29 Conn. 269. In law, the sum thus awarded is regarded as damages for the breach of contract, which, it has been held, may not be regulated by the parties. *Talcott v. Marston*, 3 Minn. 339; *Daniels v. Ward*, 4 id. 168.

There is unquestionably a technical difficulty in enforcing a contract for the payment of interest after the same contract has been broken by the non-payment of the principal sum, but this difficulty may be overcome by regarding the interest agreed upon, as damages which the law will award, as a compensation to the injured party. I concede that in this view the parties will be allowed to liquidate the damages to be awarded for the non-payment of money, but to this there can be no objection, where, as with us, there is no law against usury, and the agreement of the parties, as to interest, is expressly sanctioned. Although the authorities are not uniform upon the point, I conceive that the rule, that the parties to a contract for the payment of money may not liquidate the damages to be recovered upon breach thereof, was invented to support the statute against usury. *Orr v. Churchill*, 1 H. Black. 232.

By our statute the rate of interest is not arbitrarily fixed at ten per cent, but it is declared that such shall be the rate when no other is established by the parties. The theory of the law is, that money may be worth more or less than ten per cent per annum, and that the parties to the contract may determine its value; but if no agreement is made re-

specting it, the value shall be ten per cent per annum. Under this statute the parties may determine the value of the use of the money before it falls due, and it would seem that their estimate of its value, after it falls due, should be accepted, as the true measure of damages, until it is shown to be incorrect. The law seeks to indemnify the plaintiff for the loss he has suffered by the breach of the contract, and it is fair to presume that the rate fixed by the parties affords a just rule of indemnity. If, however, the rate of interest specified in the contract greatly exceeds the real value of the money, it is to be regarded as a penalty for the non-payment of the principal sum, rather than a just recompense for detaining it. Where it is clearly apparent that the rate is fixed for the purpose of enforcing payment, and not for the purpose of compensating the lender, there can be no better reason for exacting the penalty, than in the case of a penal bond. Whether the penalty grows with the lapse of time, or is given in a gross sum, the principle is the same. If it is alleged that the interest specified should be regarded as a penalty, evidence of the going rate of interest at the date of the contract should be heard in order that the court may determine the fact. In this the court will not nicely consider whether the rate agreed upon slightly exceeds the going rate, but if the parties have gone far beyond the just valuation of the use of the money, the fair inference is that it was intended as a penalty. These views have not been adopted without consulting numerous authorities bearing upon the subject, which do not proceed upon any uniform rule. These authorities are collected in 1 Am. Lead. Cas. 503, and in the briefs of counsel in the case of *Young v. Thompson*, 2 Kan. 83. From what has been said it will appear that the stipulation in the note to pay interest after maturity was *prima facie* sufficient to establish the measure of damages to be recovered for the breach of the contract. If it was, in fact, intended as a penalty to enforce payment of the principal sum, this might have been shown by proof that the going rate of interest at the date of the note was much

less than that expressed in the instrument. No such proof was offered, and therefore the court was at liberty to accept the stipulation of the parties, as establishing the measure of damages. Estimating the damages according to the stipulation in the note, and rejecting the payments which were mentioned by Wilson, as not having been indorsed upon the note, the judgment appears to have been rendered for a less sum than was due upon the note, but of this plaintiffs in error cannot complain.

The judgment of the probate court is affirmed, with costs.

Affirmed.

BREACH OF CONTRACT — DAMAGES — INTEREST.—The stipulation of parties as to the rate of interest after maturity may be accepted as the measure of damages, provided they adhere to what may be reasonably sufficient to compensate the loss arising from the breach of contract: *Buckingham v. Orr*, 6 Colo. 361.

BAKER v. HUGHES et al.

MASTER AND SERVANT — liability of master for injury to servant. A master is not liable to his servant in damages for an injury received by the latter in the course of his employment, where the injury results from the wrongful act of the latter.

Apparently, the driver of a stage-coach has equal authority with one who is employed to solicit passengers, in respect to the number of passengers to be carried, and if the coach be overloaded, and thereby overturned, the driver and the other are equally in fault, and neither one nor the other can have an action against the employers for an injury occasioned by the upsetting of the coach.

PRACTICE — power of court to nonsuit. By statute (9 Sess. 90), the court has power to direct a nonsuit whenever the plaintiff fails to make a case.

Error to District Court, Arapahoe County.

ACTION on the case to recover damages for injuries received by plaintiff, while engaged in driving a stage-coach for the defendants, caused by the upsetting of the coach. It appeared in evidence that Baker, the plaintiff, was employed to drive the coach, which was used for transporting passengers, and that, upon the occasion when the injury was received, the coach was brought out upon the order of one Dykins, who superintended the loading and collected the fares.

That there were nine passengers inside of the coach, and

nineteen upon the outside, which probably caused it to overturn upon quite level ground. There was nothing to show that the plaintiff, in any manner, objected to the way in which the coach was loaded, but one witness testified that, when the passengers were getting upon the coach, the plaintiff cried out "Plenty of room on the top."

The plaintiff was nonsuited at the trial, and prosecuted this writ of error.

Mr. H. R. HUNT, for plaintiff in error.

Mr. B. M. HUGHES, for defendants in error.

HALLETT, C. J. It appears that Dykins was employed to solicit passengers and collect fares, and to direct the movements of the coach, while the plaintiff was employed to drive the same coach. Having authority to fill all the seats designed for the use of passengers, and to direct where the coach should be driven, Dykins was, to that extent, in charge of the coach, and yet the plaintiff, as driver, was also in charge, for he was required, with the aid of the horses, to move the coach to such point as Dykins should direct. In respect to the manner of performing his duty, plaintiff was not under the control of Dykins, nor was he bound to accept a dangerous load at Dykins' command. In the absence of proof upon the point, it cannot be presumed that defendants authorized either Dykins or plaintiff to overload the coach, and both Dykins and plaintiff being present, acquiescing in, if not actively promoting the wrongful act, must be regarded as equally responsible for it. The circumstance that the plaintiff was the driver of the coach, devolved upon him the duty of seeing that it was not overloaded, for the coach could not be safely moved with a greater number of passengers than it was designed to carry. If Dykins was equally chargeable with this duty, the plaintiff was not thereby relieved of responsibility in the premises, nor could he lawfully accept the command of Dykins as to taking passengers on the coach after all the seats were full. If the plaintiff alone had been present at the time

the passengers were taken upon the coach, there could be no doubt that he alone should be held accountable for the wrongful act, and the circumstance that Dykins was present, aiding or even directing the plaintiff in that behalf, does not diminish the responsibility of the latter.

Therefore, the right of the plaintiff to recover damages for an injury resulting from his own wrongful act, upon well-established principles, must be denied.

The right of the court to nonsuit the plaintiff, where the evidence produced is insufficient to sustain a verdict in his favor, is expressly declared by an act of the last assembly. 9 Sess. 99. This evidence was not sufficient to support the plaintiff's demand, and nothing could have been gained by submitting it to the jury.

The evidence that two of the defendants were standing at some distance from the coach at the time the passengers were taking their seats, and that they were looking in the direction of the coach, is not regarded as sufficient to charge them with knowledge of what was taking place. And if they had knowledge of the fact that their servants were overloading the coach, it may well be doubted whether this would amount to an express command. But it seems to be unnecessary to enter upon this question.

The judgment of the district court is affirmed, with costs.

Affirmed.

NON SUIT MAY BE DIRECTED BY COURT whenever the plaintiff fails to make out a case: *Brusher v. Deaver & R. G. Ry. Co.* 12 Colo. 389.

MELVIN v. LATSHAW.

PLEADING — *want of jurisdiction in J. P.* A defect of jurisdiction in an inferior court, may be pleaded in bar of the action.

JURISDICTION OF J. P. — *where defendant resides, and cause of action arose in foreign county.* In an action before a J. P., a defendant may plead in bar before the justice, and on appeal in the district court, that he is a non-resident of the county, and that the action did not accrue in the county where the suit is pending, under section 103, R. S. 418.

Error to District Court, Gilpin County.

ACTION before a justice of the peace in Gilpin county,

and judgment for plaintiff for \$244.40, and the costs. Cause appealed to the district court where the plaintiff in error filed two pleas, the second of which was as follows: "And now the said defendant, William H. Latshaw, for a further plea in this behalf, in his own proper person, comes and says, that this court ought not to have, or take further cognizance of the action aforesaid as to the said supposed cause of action mentioned in the said note sued on, in the said cause, because he says, before, and at the time of the commencement of this suit, the said defendant was, and ever since has been, and still is, a resident of the county of Clear Creek, territory of Colorado, and has not resided in said county of Gilpin; and the said defendant further says, that the said cause of action on said note, if any cause of action accrued to said plaintiff, did not accrue in the county of Gilpin, but in the county of Clear Creek, nor did said note or any cause of action on which the plaintiff brings this suit; nor were they, nor either of them, specifically made payable in the county of Gilpin; and defendant further says, that on the first trial of this cause in the court below, it appeared, by the plaintiff's own testimony, that said note, on which said suit was brought, was given to said plaintiff by said defendant, in the county of Clear Creek, and the business transaction, by reason of which said note was given, was transacted in said county of Clear Creek; that therefore said defendant, by I. N. Wilcoxon, his attorney, moved the court to dismiss said cause for want of jurisdiction in said case, but that said motion was overruled; that said defendant made no further appearance in said cause, except to appeal from the judgment which said court afterward rendered against him; and the said defendant further avers, that there is a justice of the peace at Idaho, in the county of Clear Creek, which has jurisdiction of the person of said defendant, and which may lawfully have and take cognizance of the said supposed cause of action on which said plaintiff has brought this suit; and this the said defendant is ready to verify, whereupon he prays judgment, etc.

The first plea was the same, omitting the averment as to

the motion before the justice to dismiss the cause. The district court overruled a demurrer to the pleas, and gave judgment for the defendant. The statute referred to in the opinion (R. S. 418) is, as follows :

Section 103. Suit shall be commenced before justices in the township in which the debtor, or person sued, resides, unless the cause of action accrued in the township in which the plaintiff resides, in which case the suit may be commenced where the cause of action accrued or is specifically made payable.

MR. G. B. REED, for plaintiff in error.

MR. L. N. WILCOXEN, for defendant in error.

HALLETT, C. J. A defect of jurisdiction in an inferior court may be shown under the general issue, and, obviously, it may be pleaded in bar of the action. *Thomas v. Winters*, 4 Blackf. 161; 1 Chitty's Pl. 442. Indeed, Mr. Chitty says that where the court has no jurisdiction at common law, the want of jurisdiction is not properly the subject of a plea in abatement; and the court of a justice of the peace, under our statute, appears to be of that description. The pleas interposed in the district court conclude in bar, and, although the commencement appears to be in abatement, the subject-matter of the pleas may be allowed to give character to them. Gould's Pl., ch. 5, § 149.

As the want of jurisdiction may be given in evidence, under the general issue, there can be no reason for discouraging the practice of pleading it specially; and, as the plaintiff would not be entitled to final judgment upon demurrer sustained, the distinction to which Mr. Gould refers should not be applied. We are, therefore, inclined to consider the pleas as in bar of the action, and, upon general demurrer, sufficient in form.

As to the matter of the pleas, the defense was unquestionably good before the justice, for, by section 103 of the justices' act (R. S. 418), it is expressly provided that suit shall be brought in the township where the debtor resides, unless

the cause of action accrued in the township of the plaintiff. Whether, by appealing to the district court, defendant has waived the right to insist upon this defense is the principal question which, it is urged, should be determined upon the language of sections 46 and 47 of the justices' act. R. S. 407. By the first of these sections it is provided that, upon the trial of appeals in the district court, no exception shall be taken to the form or service of the summons issued by the justice, nor to any of the proceedings before him, but the court shall hear and determine the cause in a summary way, according to the justice of the case, without pleading, in writing; and, by section 46, it is provided that, if it shall appear that the justice had no jurisdiction of the subject-matter of the suit, the same shall be dismissed. Upon this, it would seem that, upon appeal, the inquiry as to the jurisdiction of the justice ought not to be extended beyond the subject-matter of the suit; but, if we read section 103 in the same connection, this conclusion cannot be supported. By the latter section, the residence of the defendant in the township where the suit is brought, or, in the absence of that, the fact that the cause of action accrued, or the sum of money was payable, in such township, is essential to the jurisdiction of the justice, and proof of these facts may be required consistently with the other sections mentioned. Those facts are not connected with the form or service of the summons, or the proceedings before the justice, to which the plaintiff is precluded from objecting by section 46. Nor can it be fairly inferred, from the language of section 47, that the court shall not dismiss the suit for want of jurisdiction of the person, arising from the non-residence of the defendant, and the fact that the cause of action did not accrue in the township where the suit is brought. The declaration that the cause shall be dismissed if the subject-matter of the suit was not within the jurisdiction of the justice might be regarded as excluding all other grounds of dismissal, if there was nothing more in the statute on that subject. But, by section 103, the residence of the defendant in the township, or, that being wanting, the fact that the cause of action

accrued there, is made a substantive ground of jurisdiction, of which the defendant may demand proof in the district court, as well as before the justice.

The judgment of the district court is affirmed, with costs.

Affirmed.

JURISDICTION OF JUSTICES OF PEACE.—A defendant may plead in bar before a justice, and on appeal in the district court that he is a non-resident of the county, and that the action did accrue in the county where the suit is pending (*Denning v. Florer*, 4 Colo. 209; *Denver S. P. & P. E. R. Co. v. Roberts*, 6 Colo. 335); but the objection is a personal privilege, which, like service of process, may be waived: *Hardenbrook v. Harrison*, 11 Colo. 11. But where the debtor resides out of the State he may be sued where found, notwithstanding the statute which provides that debtors must be sued in the county where they reside; and this does not conflict with the rule announced in the principal case: *Wagner v. Hallett*, 3 Colo. 182.

LISS v. WILCOXEN.

PRACTICE—*motion waived by answer.* In an action of unlawful detainer, a motion to quash the complaint is waived by an answer.

JURISDICTION OF J. P.—*must appear affirmatively.* Where a plaintiff in unlawful detainer relies on a judgment of a justice of the peace to establish his title, the jurisdiction of the justice as to the subject-matter of the suit in which the judgment was rendered must be shown.

And it is not sufficient that the judgment appears to be in debt and for an amount of which the justice had jurisdiction.

EVIDENCE—*as to jurisdiction of J. P.* But; if the record does not show that the justice had jurisdiction, the fact may be proved by evidence *abundant*.

PRACTICE—*as to the order of receiving testimony.* Whether the transcript of the judgment shall be received before or after evidence is given as to the jurisdiction of the justice, rests in the discretion of the court where the cause is tried.

Exception to judgment—*when necessary.* In a cause tried to the court without a jury, if no exception is taken to the judgment the sufficiency of the evidence cannot be questioned in this court.

UNLAWFUL DETAINER—*when it lies.* Under section 3 of the act concerning forcible entry and detainer (R. S. 332), a purchaser of real estate at a sheriff's sale may maintain unlawful detainer against the judgment debtor, and all who stand in the same situation, to recover possession of the premises so purchased.

Error to Probate Court, Gilpin County.

UNLAWFUL detainer in probate court of Gilpin county. Plaintiff in error, who was defendant below, moved to quash the complaint, but as he afterward answered, no question presented by that motion was considered in this court.

At the trial the plaintiff offered the docket of a justice of the peace showing a judgment as follows:

BELLE CABLE v. JAMES R. GRANT.

TERRITORY OF COLORADO, } ss.:
County of Gilpin.

October 12, 1876, summons issued, made returnable on the 18th instant, at 10 A. M., and delivered to A. H. Jones, constable (the service was good), October 18, 1870, at 10 A. M., and now this case came on for trial. Plaintiff appeared by I. N. Wilcoxon, attorney, defendant appeared in person and by John M. Ginn, attorney. After hearing the evidence and argument of attorneys, it is considered by the court that the plaintiff have and recover of the defendant the sum of \$170 debt, and the sum of \$22.82 costs.

To this the defendant objected that the record does not show jurisdiction in the justice as to the subject-matter, but the court permitted it to be read. Other proceedings before the justice upon the same judgment were given in evidence, and it appeared that the transcript of the judgment had been certified into the district court, and that an execution issued out of that court on said judgment was levied on the property described in the complaint on the 19th day of January, 1871; that on the 11th of February, 1871, the property was sold under that execution to Wilcoxon, the plaintiff below, and that the said Wilcoxon obtained a sheriff's deed for the same. The defendant admitted that he was in possession of the property, and that plaintiff had made demand in writing for the same. The defendant put in evidence a deed from James R. Grant to Daniel Grant, dated November 6, 1869; also a deed from Daniel Grant to defendant, dated February 4, 1871; he also gave evidence tending to prove that James R. Grant occupied the premises before he took possession, and that he, the defendant, had been in possession since the date of the deed to him; thereupon the defendant rested, and the plaintiff, in rebuttal, gave evidence tending to prove that the deed by James R. to Daniel Grant was without considera-

tion, and made with intent to hinder and delay the creditors of him, the said James R., and therefore fraudulent and void under the statute relating to frauds and perjuries.

The plaintiff also gave evidence tending to prove that Liss, the defendant, had notice of the circumstances under which the property was conveyed by James R. to Daniel Grant, and that he held an agreement from the said Daniel by which the purchase-money paid by him was to be refunded by the said Daniel, if the said defendant should be dispossessed of the premises under the sale upon execution issued on the Cable judgment.

The cause was tried to the court without a jury, and the judgment was for plaintiff.

Mr. L. C. ROCKWELL, for plaintiff in error.

Mr. I. N. WILCOXEN, in person.

WELLS, J. 1. It is insisted that the court below erred in overruling the motion interposed by the plaintiff in error to quash the complaint. It is sufficient to say as to this, that by pleading over, the error in this ruling, if any, was waived.

2. It is argued that the court below erred in receiving the transcript of the justice's judgment, through the execution, upon which, out of the district court, the plaintiff below claimed: as ground of objection to this transcript, it is said it nowhere appears thereby that the subject-matter of the action before the justice was within his jurisdiction. The statute (R. S., ch. L, § 4) requires that the justice shall note upon his docket, "the amount and nature of the debt sued for," which we conceive amounts to a requirement that the nature of the cause of action shall be set forth. This provision of the statute was not complied with in this instance, so that, in truth, there was nothing to show whether the matter adjudicated before the justice was or was not within his jurisdiction, unless we refer to the circumstance that the judgment was on a sum certain for the plaintiff's debt; and this, it appears to us, is not entitled to consideration upon the question of jurisdiction. *Barnes v. Holton*, 14 Minn.

358. The question remains, however, whether the jurisdiction of the justice must appear affirmatively by his record, or whether, when nothing there appears, to show the matter adjudicated upon, the omission may be supplemented by proofs *aliunde*; and upon this question, the majority of the court are of the opinion that when the docket is silent, the jurisdiction of the justice may be established by proof as to what in truth was the controversy litigated before him.

It follows from this that the transcript offered in evidence, though not in itself sufficient to establish the jurisdiction of the justice, or the validity of the judgment therein set forth, was admissible, for it rested in the discretion of the court below, to require proof of the jurisdiction in the first instance, or after the transcript of judgment had been received. In the admission of this evidence, therefore, there was no error. It is true that proof of the jurisdiction should have been required, and that none was produced; but the defendant below omitted to except to judgment, and cannot be heard now to question the sufficiency of the evidence upon which that judgment is based. *Phelps v. Spruance*, 1 Col. 414.

3. It was further argued that the action of wrongful detainer does not lie in cases like the present. While it may well be questioned whether the broad language of the section upon which the defendant in error relies (R. S., ch. 35, § 3), reaches to all cases of wrongful detainer of lands (which would be in effect, to supersede with this summary remedy the action of ejectment), we think it cannot be doubted that it includes, at least, that class of cases where privity exists between the parties, and the withholding possession is in violation of an express or implied promise to surrender; or a duty implied by the law from the relation of the parties; for example, where the tenant holds over his time, where the vendee, having obtained possession, refuses to proceed with his purchase; or where the judgment debtor retains possession after the period of redemption has expired, and the sheriff's deed has passed. If the section

referred to does not apply in such cases, it can have no operation whatever.

The present case is analogous to the one last suggested; for the court below has, in effect, found that the conveyance of the judgment debtor, under which plaintiff in error claimed, was fraudulent, and that the plaintiff in error purchased with knowledge of the fraud; he stands, therefore, precisely in the situation of the judgment debtor.

The fourth section of the statute, it is true, appears to have been intended as a qualification of that which precedes; and to afford this action, only in cases where the detainer is not only unlawful, but in bad faith, and without *bona fide* claim of right; and in this case it cannot confidently be said, that the possession of the defendant below is shown to be of this character. But if we admit that no proof of a detainer, in bad faith, was produced, the plaintiff in error is again met by the objection, that no exception to the judgment was reserved; and that therefore the insufficiency of the evidence cannot be assigned for error.

The other errors assigned not having been noticed on the argument, we shall not consider them.

The judgment of the probate court is affirmed, and the defendant in error will recover his costs.

Affirmed.

MOTION TO QUASH COMPLAINT IS WAIVED BY AN ANSWER: *Behymer v. Nordloh*, 12 Colo. 354. JURISDICTION OF JUSTICE MAY BE SHOWN BY EVIDENCE *altitude: Thorne v. Ormauer*, 8 Colo. 355; *Conway v. John*, 14 Colo. 34.

EXCEPTION TO JUDGMENT, WHEN NECESSARY. — In a cause tried to the court without a jury, if no exception is taken to the judgment, the sufficiency of the evidence cannot be questioned on appeal: *Martin v. Force*, 3 Colo. 200; *Patton v. Coen & Ten Broeke C. M. Co.* 3 Colo. 267.

UNLAWFUL DETAINER LIES by purchaser of real estate at a sheriff's sale, against the judgment debtor and all who stand in the same situation: *Wilcoxon v. Morgan*, 2 Colo. 473.

WALKER v. TIFFIN GOLD AND SILVER MINING Co.

PRACTICE — pleading after rule day. If a rule to plead expires in term time, a pleading may be interposed at any time before application for default.

But it is otherwise where the rule expires in vacation. In that case the defendant must plead within the time specified, and a demurrer filed after the rule day, may be struck from the files, and the bill taken as confessed.

MORTGAGE may be evidenced by an absolute deed and bond to reconvey. T. conveyed to W. his interest in certain mining property, and, upon the next day, W., the grantee, executed to T. his bond, and thereby agreed to reconvey the same property after he should take from the mine the amount of a certain note.

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Held, 1. That the deed and bond should be read in connection, and together they constitute a mortgage.

2. That a grantee of the equity of redemption, after satisfaction of the amount due on the note, was entitled to a release from the mortgagee.

DECREE should not extend beyond the case made in the bill. Upon bill to set aside a quitclaim deed, or procure a release of a mortgage, if there is nothing in the case to show that the defendant has no other interest in the property than that which he acquired by such deed or mortgage, it is error to decree an absolute release which may operate against another estate acquired by the defendant.

And where it is not shown by the bill that complainant is entitled to the possession of property, it is error to award such possession.

Error to District Court, Summit County.

THE bill was filed by defendant in error against plaintiff in error to set aside a deed made by one L. G. Tubbs to plaintiff in error conveying certain property in Summit county, and also procure a release of a certain mortgage executed by L. G. Tubbs, John Shock and Adam L. Shock to plaintiff in error upon the same premises. The bill charged that on the 5th of November, 1869, complainant acquired title to certain mining property from Ziba Surles, John, Adam L. and Daniel Shock. That on the 12th of October, 1864, John and Adam L. Shock received from L. G. Tubbs a bond for a deed to a portion of the same property. That John and Adam L. Shock performed the condition of said bond, and thereupon Tubbs conveyed to them the property therein described. That on the 16th of October, 1865, Tubbs, Adam L. and John Shock mortgaged a portion of the same property to Silas M. Walker, the defendant, to secure the payment of \$1,500, then due by promissory note, but there was no time fixed for payment of the same. The bill also charged that defendant Walker, knowing the property to be of great value, fraudulently intending to get possession of the property, gave to Tubbs his bond dated May 1, 1867, conditioned to work the property and indorse the net proceeds thereof upon the note described in the mortgage. That defendant Walker, on the 30th of April, 1867, in fraud of the rights of Adam L. and John Shock, and with full knowledge of the existence of the bond from L. G.

Tubbs to them, procured from Tubbs a quitclaim deed for the same property. The bill further charged that Walker had worked the property for nearly three years and had obtained therefrom the sum of \$12,000, for which he had never accounted to any one.

The special prayer of the bill was as follows: "And the said complainant prays that this honorable court will, by a decree thereof, cancel and declare null and void the deed given by the said L. G. Tubbs to the said Silas M. Walker, defendant, and marked herein as Exhibit "I," and by its decree cancel and release the incumbrance created on the said property in said bond, marked Exhibit "B" aforesaid, and included in the deed marked Exhibit "A" aforesaid, and that by a further decree of this honorable court, the complainant may be put in the peaceable possession of all and singular the property described in said bond, marked Exhibit "B" aforesaid, and now claimed and possessed by the said defendant."

Annexed to the bill as exhibits were the several conveyances and instruments referred to in the bill.

At the August term, A. D. 1870, an order was entered requiring the defendant to plead, answer or demur to the bill by the 1st of July, 1871. A demurrer was filed by defendant on the 14th of August, 1871, which the court, upon motion, struck from the files and ordered that the bill be taken as confessed. A decree was entered, in which the deed from Tubbs to Walker was declared to be fraudulent and void, and the defendant was required to deliver the same up to be canceled, and within ten days execute to the complainant "a deed of release of the said ditch and mining property in the said deed from the said Tubbs to the said defendant described," and upon default thereof, a commissioner was appointed to make the conveyance; the court also required the note and mortgage to be delivered up to be canceled, and awarded the possession of the premises described to the complainant.

Mr. C. S. EYSTER and Messrs. MILLER and MARKHAM, for plaintiff in error.

Mr. M. BENEDIOT, for defendant in error.

WELLS, J. I. It is argued that the demurrer put in by the plaintiff in error in the court below, though interposed subsequent to the expiration of the rule given at the previous term, was, nevertheless, in apt time, having been filed before any further steps taken in the cause, and this position seems to be warranted by the cases cited by counsel. *Castle v. Judson*, 17 Ill. 584; *Cook v. Forrest*, 18 id. 582; *Bingham v. Meries*, 7 Cr. 99. The case of *Dunn v. Keegan*, 8 Scam. 295, seems to countenance the same doctrine.

We agree that where the rule expires in term time and the pleading be interposed before application for default, it may well be considered as filed in apt time, even though after the lapse of the day named in the rule, for in such case the opposite party omitting to take advantage of his adversary's default, on the first day thereof, may be said to impliedly stipulate that the pleading may still be interposed, that is to say, that the rule shall be so extended to include that day. This is the fair inference from his silence. And this implied stipulation may be said to be renewed with each hour and moment which lapses, so that, if interposed at any time before default prayed, the pleading is in time. This I conceive to be the only reasoning upon which the usage obtaining in the courts in this respect can be supported, for unless a supposed stipulation of parties interposes to excuse the delay, it is in effect to say that the orders of the court in this respect are of no binding force. But it is clear that no such stipulation can be implied to excuse a failure to comply with a rule expiring in vacation, for, in such case, the party to be answered has no opportunity to take advantage of the default until the term sits, his silence in the meantime being enforced cannot give rise to any inference of acquiescence. And not only is the rule when applied in the last case unwarranted by the reasoning which supports it in the former, but it is manifestly against good policy that it should be applied in those cases where the time limited expires in vacation. If, when required to

plead or answer at an early day in the vacation, the defendant may defer his pleading until the day before the term convenes, it will lead to indefinite delays. In the present case the bill is of a nature to require the careful consideration of counsel in order to the preparation of the defense thereto, and the determination of the question whether the defendant should answer in the first instance; or except, plead or demur. It was eminently proper, therefore, the first term being of short duration, that a day in vacation should be fixed for the coming in of answer, and the day which was fixed, being forty-five days before the second term should convene, was a reasonable one; it afforded to counsel for the defendant ample time to determine the preliminary questions and interpose his defense understandingly; it also afforded to the complainant's counsel time to consider the defendant's demurrer if one should be put in and to prepare to resist it or to prepare amendments to the bill to be interposed as soon as leave should be obtained for that purpose, if the demurrer should appear to be well taken; or if an answer had been interposed, replication might have been put in and the testimony prepared in order to final hearing at the second term. The rule contemplated these mutual advantages and opportunities, and was framed in the interest of both parties. But by his disobedience and by demurring at the end of the vacation the defendant sought to engross all the advantages to himself. His course compelled the plaintiff either to submit to a further delay or else to proceed to the consideration of the demurrer or the preparation of amendments, precipitately and without that deliberation which, in all difficult and important litigation, appears to be necessary to avoid error. To say that the court was bound to accept the demurrer, at so late a day, is to prescribe a rule which will open the door to delays against which the courts will be powerless to afford relief, except by restricting all rules to plead or answer to a day in the term which, in many instances, would do injustice to defendants. Upon the same reasoning which was applied in *Castle v. Judson*, it might be held that the plaintiff's

omission to declare ten days before the term as required by the eighth section of the practice act, shall not subject him to the penalty of continuance which is there prescribed, provided the declaration be filed at any time before the defendant moves for the continuance.

The section here referred to is only a statutory rule to declare, and is of no more binding force than a like rule of court. Yet this construction of the statute was never indulged, nor, so far as I know, ever contended for. Whatever may be the weight of authority elsewhere, we conceive that a just distinction may be taken between rules to plead expiring in term time, and those which expire in vacation. In the latter case, we think a strict observance of the rule ought to be enforced. Clearly, for cause shown, the court may, in its discretion, excuse the default, and permit the party to interpose his pleading after the lapse of the day named in the rule; but unless some matter of excuse be shown, a pleading filed after the day limited ought not to be regarded, where, as in this case, the plaintiff, at the earliest opportunity, applies to have the pleading taken from the files.

2. It is argued that, by the conveyance of April 30, 1867, the defendant obtained the title which Tubbs, before that, had; and that the obligees in the bond of October 12, 1864, if they desired to perform the conditions thereby imposed upon them, should have applied to the defendant. The payment of the purchase-money to, and the conveyance by, Tubbs, it is said, work nothing; for Tubbs had then nothing to convey; therefore, it is said, there was error in requiring the defendant to release to the complainant. But this argument omits from view the bond to reconvey, which was executed by Walker to Tubbs, on the 1st day of May, A. D. 1867. This obligation gives to the former conveyance the effect of a mere mortgage; it is as if the condition of the bond had been written in the deed. If the obligation to convey had been conditioned upon payment at the day, or the like, then, in order to entitle the obligee to have performance of the bond, upon payment, at a later day, it might,

perhaps, be required of him to show that, in fact, the conveyance was made in contemplation of the subsequent execution of a bond to reconvey, and that, in truth, both instruments were one transaction. But here the condition of the bond is to reconvey, on payment, without limitation as to time, and it appears to us that, upon their face, these two instruments, the conveyance of April 30 and the bond of May 1, have the effect of a mortgage merely.

So far as the effect of the conveyance by Tubbs is concerned, therefore, Walker was never any thing more than a mortgagee in possession. Whenever his debt was satisfied, by the yield of the mine, or otherwise, he was bound to reconvey; and the obligee, Tubbs, having, by the conveyance of October 11, 1869, transferred his equity to the Shocks, the complainants, by their conveyance of November 5, 1869, succeeded to all the rights which Tubbs had, and the defendant, on the satisfaction of his debt, was bound to convey to the complainant, whether the Shocks had performed the condition of the bond or not. So far as this argument is concerned, therefore, there was no error in the decree.

But it is to be observed that the decree requires the defendant to release to the complainant the premises "in the deed from the said Tubbs to the said defendant described." This imports that the defendant shall release all present interest. It is nowhere alleged that Tubbs held paramount or perfect title, or even had any estate whatsoever in the premises; it does not affirmatively appear that the plaintiff in error received the possession from him; nor does the acceptance of a bare release, such as the conveyance of April 30, 1867, was, estop plaintiff in error from questioning the title of the releasor. For any thing that can be known then, the plaintiff in error may, since the conveyance from Tubbs, have acquired a superior title from another source. The effect of the release, which by the decree the defendant is required to make, would be to pass out of plaintiff this superior title. In this, therefore, there was error.

3. The decree of the district court directs that the defendant, on demand, surrender to the complainant possession

of the premises therein described to the complainant. The allegation of the bill is, that on, etc., the complainant acquired a title to certain property known as, etc., situated, etc., by virtue of a certain deed duly executed according to law, and delivered to said complainants by, etc. For a more particular description of the property, reference is made to a copy of the deed attached. Now, if we look to this allegation of the bill alone, it is altogether uncertain whether the complainant is entitled to what was decreed or not. For the word "title" imports not an estate, or the interest which one hath in lands, but "the means whereby the owner hath the just possession of his property." 2 Bl. Com. 195. And this title, it is said, may be, 1st, a bare possession merely; or, 2d, the right of possession; or, 3d, the right of property without either possession or a right of possession; or, 4th, the right of property, united with an actual and lawful seizin. By this allegation of the bill, therefore, if we look alone to this, while it appears to me that it cannot be said that the plaintiff holds otherwise than in severalty, it is utterly uncertain whether it is entitled to the present possession or not. It is entirely consistent with this allegation that another has an estate for life or for years, not yet determined. Neither do I discover any other allegation in the bill which supplements this. It is nowhere alleged that any of those from whom the complainant deduces title had any present estate at the time of these several conveyances, or ever had possession in fact, nor that the complainant is, or ever was, entitled to possession. And if we may look to what is contained in the exhibits, to explain the obscurity of these allegations (the propriety of which is not altogether clear), nothing appears to aid us, for none of the conveyances exhibited assume to pass a present interest, but only all the right, title and interest of the grantor, which may have been either present or reversionary.

Again, if we look to the exhibits to aid the bill, it would seem that we must give effect to every thing which appears there, whether favorable to the plaintiff or otherwise; and

by the exhibits it appears affirmatively that in a large part of the estate in controversy, the complainant has but an undivided moiety ; while the decree is susceptible of a construction which requires that the complainant be admitted to the full and absolute possession of the whole estate.

Sofar as the decree directs an absolute release by the defendant, Walker, and a surrender of his possession to the complainant, the decree is beyond the allegation of the bill, and must be reversed ; and if the decree of this court shall go no further than this, all questions presented by the present record will have been completely resolved. Inasmuch, however, as to pause here will leave the controversy between these parties still undetermined, and will require the complainant to renew the litigation in another form, we shall reverse the decree in all things, and remand the cause with direction to the district court to allow the complainant to file an amended bill.

Reversed.

WRIT OF ERROR, PRACTICE ON.—The office of a writ of error being fully explained by the common law, and Congress having authorized the territorial courts to issue it, causes brought into the supreme court by means of this writ would be complete without further action on the part of the legislature: *Vane v. Rockwell*, 3 Colo. 22.

THE PEOPLE ex rel. THE BOARD OF COUNTY COMMISSIONERS OF FREMONT COUNTY v. THE AUDITOR OF COLORADO TERRITORY, JAMES B. THOMPSON.

AUDITOR—*mandamus will not lie against, to enforce allowances of claim.* The power conferred upon the auditor to audit and allow claims against the territory (R. S. 78) is of a judicial nature, and mandamus will not lie to compel the auditor to allow a claim.

But if the auditor refuse to act upon a claim properly presented to him, the court will compel him to do so.

Where no appropriation has been made. If no appropriation has been made by law for the payment of a claim, the auditor cannot be required to draw a warrant on the treasury for the amount thereof.

Error to District Court, Arapahoe County.

IN the alternative writ the facts upon which the claim was based were set forth, and it was also alleged that the auditor had been requested to audit the account, and draw

his warrant upon the treasury in payment thereof. The command of the writ was, that the auditor audit and allow the said claim of the said county of Fremont, amounting to \$1,425.27, and draw his warrant in payment thereof, or that he show cause, upon a day named, for his refusal so to do.

That portion of the return in which the auditor relied upon the want of any appropriation to pay the claim, was as follows :

3d. Because, at the time when each of the supposed demands were made as set forth in said writ, I had no authority to issue said warrant, but was, by law, prohibited from so doing, there being, at the time, no money in the treasury appropriated to pay the same, or any part thereof.

It will be observed that the claim mentioned in the writ all accrued in the year A. D. 1871, and it is not pretended that any demand was ever made upon me to audit said claim, and issue my warrant upon the treasurer of the territory therefor, until about the 10th day of *January*, A. D. 1872. At that date the appropriation which had been made to pay such claims, had ceased to exist, the law by which the appropriation was made expired by its own *limitation* on the *31st day of December*, A. D. 1871, and from and after that date, the said claim became one of that class of claims "for money against the territory," and no appropriation "made by law to pay the same," and my duties relating to the same, were governed by sections 12 and 14, on page 78, of the Revised Statutes.

By reference to page 43 of the Laws of 1870, it will be seen that the *appropriation* to pay said claim, and claims of like character, was "for the fiscal years ending December 31, A. D. 1870, and December 31, A. D. 1871," two years. My construction of the law in this respect is made plain (if doubtful before) by section 4, page 62, of the Laws of 1872, which provides: "If any appropriation of any money heretofore made, or which shall hereafter be made, shall not have been, or shall not be expended within two years after the making of such appropriation, the same,

or any unexpended part thereof, *shall become a part of the general fund, provided, that if, by the terms of the law making an appropriation, the expenditure of the same is to continue through more than two years, the provisions of this section shall not apply thereto.*"

Other portions of the return are sufficiently stated in the opinion of the court.

The relator demurred to the return, upon which there was a judgment for the respondent, and thereupon the relator sued out this writ of error.

Messrs. BROWNE & PUTNAM, for plaintiff in error.

Mr. ORRIS BLAKE, for defendant in error.

BELFORD, J. This was an application for a mandamus against the territorial auditor, to compel him to audit a claim, and to draw a warrant for the same on the treasurer, in favor of the board of county commissioners of Fremont county, for the maintenance and custody of two lunatics. An alternative writ issued, and in the return thereto it is alleged, as an excuse for not allowing the claim, that, in the opinion of the auditor, it was not only excessive and fraudulent, but that no appropriation had been made by the legislature to pay such claims, and that to draw a warrant for its payment was to violate the law. To the return a demurrer was filed and overruled, and this is the only error assigned. Where an officer is charged with the performance of a purely ministerial duty, and he fails to perform it, a writ will issue; but where it appears that the officer, as in this case, is called upon to audit and examine claims, and in doing so is invested with judicial powers, a court, while it may compel him to take action, will never dictate what his decision shall be, and this is the exact thing the plaintiffs in error asked.

The act prescribing the duties of the auditor provides "that, whenever he may think it necessary to the proper settlement of any account, he may examine the party's witnesses, and others, touching any thing material to be known,

in the settlement of such an account, and, for that purpose, may issue subpoenas, and compel witnesses to attend before him and give evidence, in the same manner, and by the same means allowed by law to courts of record. That, if any person interested shall be dissatisfied with the decision of the auditor on any claim, account or credit, the auditor shall, at the request of such person, certify his decision, with the reasons therefor, specifying the items rejected, if less than the whole, and refer the same to the general assembly. That, in all cases where the law recognizes a claim for money against the territory, and no appropriation shall be made by law to pay the same, the auditor shall audit and adjust the same, and give the claimant a certificate of the amount thereof, if demanded, and shall report the same to the general assembly, with as little delay as possible. That no warrant shall be drawn by the auditor, or paid by the treasurer, unless the money has been previously appropriated."

From these various provisions, it will be seen that the powers and duties of the auditor are something more than mere ministerial ones. In *Brashear v. Mason*, 6 How. 102, it is said that the duties devolved on one at the head of one of the executive departments of the government, whether such duties are imposed by act of congress or by resolution, are not mere ministerial duties, and that the court could not act directly upon the officer, and guide or control his judgment or discretion in matters committed to his care in the ordinary discharge of his official duties. If a party were to present a claim against the territory, and the auditor should refuse to examine it, the court would issue a writ commanding him to do so. But this case is not of that character. We are asked to compel the auditor, not to audit the claim, but to allow and pay it, and this, too, when he believes that the same is excessive and fraudulent. It further appears; from the return of the auditor, that he has been ready, at all times, to audit said claim, and allow so much of the same as appeared just and proper. What more can be required of him? Can it, under any circumstances, be said that a court

can compel him to do more? If a court would enlist in such service, we might anticipate an organized raid on the public funds, and the court, instead of the auditor, would become the supervisor of accounts against the territory.

It is equally clear that, if the claim were a just one, we could not grant the writ.

No money can be drawn out of the treasury without an appropriation, and from a careful examination of the facts set out in the return, and which are admitted by the demurrer, we are of the opinion that no appropriation had been made for the payment of this claim. No fund was in existence. It being well settled that, before a writ will issue, a plain dereliction of duty must be established, and, seeing no evidence of such dereliction in this record, we must affirm the action of the court below, which is accordingly done, with costs.

Affirmed.

COFIELD v. CLARK.

DELIVERY — of personal property, when complete. Upon sale of personal property which is in the possession of a bailee of the seller, delivery of an order on the bailee may be sufficient to transfer the possession of the property to the purchaser.

BUT IF the bailee has not the property in his custody at the time of the execution of the order, the rule is otherwise.

And upon sale of cattle alleged to be in the possession of a third party, if the cattle were not in such possession, the seller's order for them, addressed to such third party and delivered to the purchaser, will not effect a delivery of the cattle.

CONTRACT — part performance — action not barred by. Upon sale of cattle, delivery and acceptance of part will not bar the purchaser's action to recover damages for a failure to deliver the remainder.

Not merged in a subsequent contract which is without consideration. And if the purchase-money was paid at the time of sale, and there was a failure to deliver according to the contract, the purchaser's right of action was then complete; and a subsequent agreement to the effect that the cattle should be delivered at a later day, was not binding upon either of the parties, there being no consideration to support it.

Discharge after day of performance. In so far as the purchaser was willing to accept, and did accept: the cattle under the new arrangement, the con

tract was discharged ; but as to all which were not delivered, the purchaser may have his action.

PLEADING — *special damages must be averred.* In an action to recover damages for a failure to deliver cattle pursuant to a contract of sale, evidence of the value of such cattle in a foreign market cannot be received upon the question of damages unless it is averred in the declaration that the cattle were bought for that market.

MEASURE OF DAMAGES in *action for non-delivery of chattels.* In such action where the purchase-money was paid at the time of sale, the measure of damages is not the amount of the purchase-money, nor the sum which might have been obtained upon sale of the cattle at any time after the day of sale and prior to the trial, but the value of the cattle at the time and place of delivery with interest thereon to the day of trial.

Appeal from District Court, Arapahoe County.

THE declaration contained five special counts, in some of which the plaintiff declared upon a promise to deliver sixty-eight head of cattle, and in others upon a promise to deliver sixteen head of cattle. In each count it was averred that the consideration had been paid but the amount of it was variously stated. The allegation of damage was substantially the same in each count, and in one of the counts was as follows : "Whereby the said plaintiff has lost and been defrauded of, as well the said sum of money so by him paid to the said defendant as aforesaid, as of divers great gains and profits which might and would otherwise have arisen and accrued to him from the delivery of the said cattle to the said plaintiff as aforesaid, to wit: at the county aforesaid." Nothing was averred as to the use which the plaintiff intended to make of the cattle nor as to the sale of them in any particular market. At the trial evidence was given tending to prove that at the time of the sale, Cofield, the defendant, said that the cattle were at Hamilton's ranch; that they were being coralled every night, and that they could be obtained without difficulty ; that soon after the sale the plaintiff, Clark, sent up to Hamilton's ranch for the cattle, but did not obtain them ; that upon sending again, some eight or ten days afterward, he received fifty-two head. Testimony was also given to show the value of the cattle in Cheyenne, Wyoming territory, and the plaintiff, Clark, was

allowed to testify that he bought the cattle for the purpose of sending them to Cheyenne for sale. The appellant also offered to prove that after the delivery of the fifty-two head, he got together the remainder of the thirty-four yoke and notified appellee of the fact and requested him to take them away, and upon objection by appellee's counsel, the testimony was excluded. Appellant asked the court to instruct the jury as follows: "If the jury believe from the evidence that the defendant sold the plaintiff a certain number of cattle and that the plaintiff afterward received and accepted a lesser number, then the plaintiff cannot recover unless the jury further believe that the plaintiff offered to return the cattle which he did receive from the defendant."

But the court refused to so instruct, and gave the following in lieu thereof: "The jury are instructed that if they believe from the evidence that under the contract of sale for the cattle in controversy, the defendant was to deliver the same at the ranch of J. G. Hamilton & Co., in Douglass county, as soon as the plaintiff applied for them at said ranch, and that the plaintiff, by his authorized agent or agents, subsequently applied for said cattle at said ranch, and that, upon such application, the defendant failed to deliver the whole of the cattle sold to the plaintiff, then the verdict of the jury should be for the plaintiff."

The instruction as to the measure of damages is substantially stated in the opinion of the court. The jury found for the plaintiff damages \$1,079.17, for which judgment was entered.

Messrs. SAYRE & WRIGHT, for appellant.

Mr. E. L. SMITH, for appellee.

BELFORD, J. Clark sued Cofield, to recover damages for breach of contract in failing to deliver sixteen head of cattle. It appears from the evidence that, on the 18th day of July, 1871, Cofield sold Clark sixty-four head of cattle, for the consideration of \$4,000, which consideration was made up of \$1,000 in cash, and the conveyance of a tract of land

valued at \$3,000. On the day the sale was negotiated, Cofield discovered that he owned four more cattle, which he agreed to put in at \$200, making, in all, \$4,200, which was paid, and upon the payment of which Cofield executed and delivered to Clark the following papers :

"DENVER, *July 18, 1871.*

"*George T. Clark, bo't of J. B. Cofield :*

"Thirty-four yoke of cattle, branded D. C. on right hip, and also branded on same side with H., being part of lot brought to ranch 5,'71. Price paid, forty-two hundred dollars (\$4,200).

"(Signed)

J. B. COFIELD."

"DENVER, *July 18, 1871.*

"*Mess. J. G. Hamilton & Co.:*

"Please deliver to George T. Clark thirty-four yoke of cattle now in your possession, belonging to me, branded D. C. on right hip, also branded on same side with H., and oblige

"Yours, truly,

"JOSEPH B. COFIELD."

On the 20th of July Clark sent Sherwood to Hamilton's ranch, located some twenty or thirty miles distant from the point where these negotiations took place, for the cattle. Sherwood failed to get them. It appears that, in the winter preceding, they were scattered by the severe storms, and that Hamilton had failed to collect them all. Eight days later, in pursuance of an arrangement made with Hamilton's herder, Sherwood returned to the ranch and received for Clark fifty-two head of these cattle, and from that time to the day of trial the residue had not been delivered. It clearly appears, from the evidence, that Clark's object in making the purchase was to take them to Cheyenne, but for what specific purpose is not apparent. It also appears that Cofield stated to him that the cattle were at Hamilton's ranch, and that they could be procured on demand. With this understanding the sale was negotiated, and in this light the subsequent transactions must be viewed. It is claimed

by the appellant that the sale was completed upon the payment of the money by Clark, and the delivery to him, by Cofield, of the order on Hamilton, and that Cofield is not chargeable, in damages, for the failure to deliver all the cattle.

Where personal property is, from its character or situation at the time of sale, incapable of manual delivery, the delivery of the bill of sale is sufficient to transfer the property and possession to the vendee. *Gibson v. Stevens*, 8 How. 384. And it has been held that a written order by the seller of goods or chattels to the buyer, directing the person in whose care the goods or chattels are to deliver them, is a sufficient delivery to vest in the vendee the right of property and possession. *Jennings v. Webster*, 7 Cow. 262; *McCormick v. Hodden*, 37 Ill. 370; *Pleasants v. Pendleton*, 6 Randolph, 473.

This doctrine, however, is qualified by one exception, which courts uniformly recognize, namely, that the order is only considered as the delivery of the chattels themselves, when they are susceptible of an immediate delivery. *Stevens v. Stewart*, 3 Cal. 140. It is clear, from the evidence, that, at the time of the sale, all the cattle were not at Hamilton's ranch, and had not been there since the preceding winter.

They were then not in a deliverable condition, and it would be doing violence to the spirit in which the sale was negotiated to hold that this order given by the vendor to the vendee, on a person in whose possession the cattle were not, and had not been for months, completed the sale, and exempted the vendor from all risk. Cofield assured Clark, before and at the time of the purchase, that the cattle were at Hamilton's ranch, and that they were in a condition for immediate delivery. In this, he was mistaken, and in this respect his contract has been violated and broken. When a time and place is appointed for delivery, the vendor is bound to have the chattels ready at such time and place. Story on Sales, § 391; *Smith v. Gillett*, 50 Ill. 290.

It is further claimed by the appellant, that in accepting the fifty-two head, Clark relinquished his right to recover

for the others not delivered. We have been unable to discover on what principle of law this claim rests, unless it be that the old contract which had been made, had been supplemented by a new one, and of this we will speak hereafter. Our attention has been called to the case of *Miner v. Bradley*, 22 Pick. 457. That was an action for money had and received. The plaintiff bought a certain cow, and four hundred pounds of hay, for the sum of \$17. He received the cow, and afterward demanded the hay, which was refused by the defendant, who had used it. The defendant objected to the plaintiff's recovery, on the ground that it was an entire contract, that the plaintiff could not recover back the price paid, or any portion of it, without rescinding the whole contract, and this could not be done without returning the cow. And the court held that this defense was good, for the very obvious reason that as the cow and hay were bought for one gross sum, there were no means of ascertaining how much was intended for one, and how much for the other. There being no price agreed upon and paid for the hay, none could be recovered back, and that in that form of action, only the exact amount of the money paid could be recovered back. It was further held, that if the plaintiff had brought his action on the contract for damages, the rule would have been entirely different, and the plaintiff could have recovered. The latter course is the one which Clark has pursued. He is not seeking to rescind the contract, but rather to enforce it. He is not seeking to recover back the price paid, but damages occasioned by a failure to deliver the property. On the trial the plaintiff was allowed to introduce evidence over the objection of the defendant, as to the price of cattle in Cheyenne. There was no allegation in the declaration that the plaintiff had bought these cattle to sell them in that market, and in the absence of such averment, we are clearly of the opinion that the evidence was inadmissible. In *Squire v. Gould*, 14 Wend. 159, it is said: "Where damages actually sustained, do not necessarily arise from the act complained of, and, consequently, are not implied by law, in order to pre-

vent surprise to the defendant, the plaintiff must state, in his declaration, the particular damage which he has sustained, or he will not be permitted to give evidence of it upon the trial." Mr. Chitty says, "general damages are such as the law implies, or presumes to have accrued from the wrong complained of. Special damages are such as really took place, and are not implied by law. It does not appear necessary to state the former description of damages in the declaration, because presumptions of law are not, in general, to be pleaded or averred as facts. But where the law does not necessarily imply that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration, that the resulting damage should be shown with particularity." It certainly cannot be said that when cattle are to be delivered in Colorado, that the law implies or presumes that they are to be, or will be, sold in Wyoming. It was, therefore, necessary to allege this fact specially, if he desired to recover the market price at Cheyenne, and the plaintiff having failed to do so, the action of the court, in admitting the evidence as to the value of cattle at that point, was erroneous.

On the trial the defendant offered to show that after the acceptance of the fifty-two head of cattle, and within a reasonable time, the remaining sixteen were found, and that the plaintiff was notified of it, and requested to take them away. This he was not allowed to prove. Let us inquire what the real relations of the parties were at the breach of the contract. Clark having paid the purchase-money, in other words, having done every thing he was required to do, had a perfect right of action against Cofield upon his failure to deliver the cattle at the appointed place. He could have rescinded the contract, and recovered back the purchase-money and interest, or he could have maintained an action for damages growing out of the breach. He resorted to neither at that time. After the breach he accepted part of the cattle, and it is claimed that he agreed to take all of them, if the same could be delivered within a reasonable time. Conceding that a new agreement

was made, it seems to us that in this case it is lacking in the essential element of a consideration. Clark had parted with his money, Cofield was under obligation by the contract of sale to deliver all the cattle. The new agreement did not, in any respect, alter the relations of the parties. The delivery and acceptance of the fifty-two head operated as a discharge *pro tanto* of the duties Cofield assumed when entering into the contract of sale, and the jury would be warranted in finding that the delivery was intended and accepted, as of the day specified in the original undertaking. The breach being complete, the delivery of these fifty-two cattle was but in affirmation of what the defendant was bound to perform by his original agreement, and all that was done was but in fulfillment of it. *Hansborough v. Peck*, 5 Wall. 497. So far as the new arrangement was executed, it was valid, not by reason of any inherent virtue it possessed of itself, but on the ground of performance and acceptance; beyond this point it was simply a nullity.

Had the action of Clark in entering into this new arrangement placed Cofield in a position wherein a non-acceptance of all the cattle under it would have worked a positive injury or loss to Cofield, the rule would be otherwise. But there is nothing here to show that the new arrangement contemplated or had that effect, and in this respect we think this case is clearly distinguished from those wherein it has been held that a promisee may recover for services rendered the promisor, although he had violated a written contract which stipulated for the performance of these same services. The principle on which these cases rest is, that the promisor, by entering into the new arrangement, has induced the promisee to assume a position from which he cannot extricate himself without loss; as for instance, where the latter has given his labor in erecting a house or the like for the former. In such a case the promisor has not only induced the promisee to labor, but has actually received and availed himself of the benefits of the same, and these circumstances constitute the consideration on which the new arrangement is maintained. In such a case the contract becomes binding

and effectual, because, to hold otherwise would be to allow one party to perpetrate a fraud or injury on the other. One has given his labor, which, for illustration, we may call his property, to the other; the relations of the parties have, by that act, changed; the former has suffered loss, the latter derived a gain; and it would be a manifest violation of the plainest principles of justice to hold that an arrangement, under which such relations sprung into existence, had not a consideration to support it. In the case at bar, Cofield has *not* parted with the sixteen head of cattle, for the non-delivery of which this action is brought. His condition, in no sense, is made worse by the new arrangement than it was at the moment it was entered into. For these reasons, we think that the court committed no error in rejecting the offer made by the defendants.

The instruction given by the court to the jury, on the subject of damages, seems to be erroneous in every respect. They were told that the measure of damages to which the plaintiff was entitled was, first, the amount of money advanced by the plaintiff for the cattle not delivered; second, in addition to such amount paid by him for the cattle not delivered, the excess of money, if any, which the jury believe, from the evidence, the plaintiff might have realized on the sale of such cattle, over the amount paid for them at any time after the sale of the cattle to the plaintiff; thirdly, interest on the amount paid for the cattle not delivered, from the time of payment, at ten per cent per annum. This instruction of the court contemplates at least two things: first, a recovery of so much of the purchase-money as was paid for the cattle not delivered; secondly, the profits the plaintiff might have realized by the sale of the cattle, any time between the date of the breach and the time of the trial.

As to the first proposition, it is only necessary to say that the plaintiff has not brought his action to recover the purchase-money. He paid a gross sum for a gross number of cattle, and, having received but part of them, it would be difficult to determine how the price, as to those not delivered, could be fixed. This difficulty would not exist in a case

brought to recover back the money paid upon a rescission of a contract, for the reason that the part of goods received is, in such case, returned. No circumstance would call for an apportionment, and none would be necessary. All the money, in such a case, is due, and not a part. But, in an action brought to recover damages for a breach, the party suing treats the contract as still in existence, and goes; not for the consideration advanced by him, but for the value of the article stipulated to be delivered. As to the second proposition, it may be said that, in general, where a man contracts to deliver any article besides money, and fails to do it, the rule of damages is the value of the article at the time and place of delivery, and the interest for delay. To this rule an exception has grown up in a number of States. It had its origin in sale of stocks, and amounts to this: that, when the money has been paid in advance, and the vendor subsequently refuses to deliver them, the purchaser is not confined to their value at the time when they should have been delivered; but, if the goods have risen in value, he may recover their value at the time of trial. This exception is made to rest on the principle that, had the article been delivered according to contract, the vendee might have had the benefit of that price; or, if he had not parted with his money, he might have rescinded, on failure to deliver, and with his money purchased the article elsewhere, and had the benefit of the rise; but, having parted with his money, it is out of his power to purchase such articles. It has been generally held in this country that a party who has failed to fulfill a contract cannot be held liable for remote, contingent and uncertain consequences, or for speculative results which may have ensued on his breach of duty, although this may be traceable to that cause.

The reason is that damages of such a nature cannot be deemed to have entered into the contemplation of the parties when they agreed together. Parties entering into a contract contemplate its performance, and not its breach. They expect to execute it, not violate it. If the delivery is to take place at a future day, it can be reasonably said that it was

in the contemplation of the vendor, that the vendee should realize the enhancement of price that takes place between the day of the contract and the day of the delivery. If the performance, and not the breach, is contemplated at the time of entering into the contract, can it be said that the vendor contemplated that not only a breach would take place, but that subsequently thereto the market price would rise.

In *Shauls v. Ten Eyck*, 3 Caines, 116, LIVINGSTON, J., says: "The safest general rule, in all actions on contracts, is to limit the recovery, as much as possible, to an indemnity for actual injury sustained, without regard to profits, which the plaintiff has failed to make, unless it shall clearly appear from the agreement that the acquisition of certain profits depended on the punctual performance, and that he had assumed to make good such loss." Was it in the contemplation of the parties that after the breach, Clark would go into the market, and buy more cattle? It seems to me that the exception lies entirely inside of the domain of speculation, and is a stealthy approach toward the overthrow of that doctrine which the concurrent authority of all courts has established, namely, that a party guilty of a breach of contract shall not be liable for damages not in contemplation of the parties at the time of making the contract. It seems to me that whenever a person, on legal consideration, agrees to do a certain act, and in the event of his not doing it, the damages are not stipulated by the parties, the law, on the ground of reason and justice, implies that the person in default shall pay the damages accruing from the non-performance. If he fails to perform what he has agreed to, it is just, as a reasonable substitute, that he should pay the precise value of the property he agreed to deliver at the time when it should have been delivered, and where the money has been paid in advance, the vendee should be entitled to recover, in addition to the value, the interest on the same, up to the trial. *Bickel v. Colton*, 41 Miss. 368. When you step outside of this rule, you at once enter the field of conjecture and speculation, which, in view of all

the decisions I have examined, is forbidden ground. I concede that when it clearly appears that the article was to be delivered for some specific object, known to both parties at the time, and that thus a loss within the contemplation of parties, has been sustained, the rule is, and should be, different. When a party knows the hazards that may attend his default, he is presumed to assume the burdens that grow out of his misconduct. Regarding the second proposition announced in the instruction given by the court, as tantamount to a declaration that profits which might have been realized by the vendee, had the vendor completed his contract, could be recovered, we cannot give it our sanction, especially where there is nothing in the evidence to show for what specific purpose these cattle were purchased.

Judgment reversed, and cause remanded for a new trial.

Reversed.

CRAIG v. YOUNG.

PRACTICE IN SUPREME COURT — *a motion to suppress a deposition will not be considered unless the causes assigned are set out in the bill of exceptions.*

NEW TRIAL — *error must be shown.* Instructions to the jury appearing to be correct upon the evidence given in the bill of exceptions, will be so regarded if all the evidence is not set out in the bill of exceptions.

In an action upon a promissory note, money paid by the maker after the date of the note and not indorsed thereon will not be allowed as a credit if there is nothing in the record to show that it was paid as such.

Appeal from District Court, Arapahoe County.

THE charge to the jury, to which appellant excepted, was as follows: "If any payments have been made by defendant since the giving of the note, the jury must believe from the evidence that each (such) payment was intended to apply upon the note before they should allow the same."

Messrs. MILLER & MARKHAM, for appellant.

Messrs. SAYRE & WRIGHT, for appellee.

BELFORD, J. In the court below the appellant made a motion to suppress the deposition of Jacob Young, which motion was overruled.

The motion is not set forth in the bill of exceptions, and therefore we cannot pass upon the action of the court in overruling it.

The instructions given by the court are also assigned for error. The action was founded on a note executed by Craig to Young, on the 7th of February, 1870. On the ninth of the same month one Noble paid Young the sum of \$800 on an order which Craig had given Young on Noble. It does not appear whether this order was given before or after the execution of the note. The bill of exceptions does not purport to give all of the evidence, and failing to do so we must presume that the instructions given were correct. This order, for aught that appears, may have sprung out of some transactions had between the parties subsequent to the execution of the note, and in no way connected with it. For aught that appears, the money paid on this order was to be expended for Craig's benefit.

Where every thing is open to conjecture, and the party fails to see that all the evidence is embodied in the bill of exceptions, he cannot complain if a wrong which he may have suffered is not righted.

The judgment must therefore be

Affirmed.

HOYT v. MACON.

PRACTICE—*service of process to warrant default.* Upon service of process within ten days of the return day, judgment of default cannot be entered on the first day of the second term. The defendant has all of that day in which to appear and plead.

PROBATE COURTS—*terms of.* By the act of March 8, 1865 (R. S. 527), terms of probate courts for the exercise of civil jurisdiction in matters not strictly relating to intestate estates, testamentary matters, and the like, were appointed to be held on the first Mondays of alternate months, commencing with February.

APPEARANCE — *which will support a judgment of default.* An affidavit for continuance filed by a defendant is not such an appearance as will warrant the entering of judgment of default.

CASE — *for maliciously resisting application to enter public lands.* An action on the case may be maintained against one who maliciously, and without probable cause, attempts to defeat a claim to public lands made in good faith, under the pre-emption laws of the United States.

PLEADING — *what must be averred in the declaration.* In such action, the plaintiff must aver that he is an applicant for the land under the pre-emption laws, and show what steps he has taken to obtain it.

He should also set out in his declaration the acts of the defendant of which he complains, and show in what way the defendant hath intermeddled with his right.

JUDGMENT OF DEFAULT — *will not cure substantial defects.* And where this was not done, the defects will not be cured by default and inquest of damages. The rule that defects in a declaration may be cured by a verdict is not applicable to a case of default which admits such facts only as are actually alleged.

Error to Probate Court, Fremont County.

ACTION on the case brought to the December term, 1871, of the probate court of Fremont county, which convened December 4th. The summons was served November 27, and the declaration was filed January 24, 1872, and was as follows:

“Augustus Macon, the plaintiff, complains of Samuel N. Hoyt, the defendant, of a plea of trespass on the case. For that, whereas, the said plaintiff, before and at the time of the commencement of this suit and proceedings, in the land office of the United States, at Denver, in said territory hereinafter next mentioned, had not committed any fraud in making the entry, by pre-emption, of the east half of the south-west quarter of section thirty-three (33), in township eighteen (18), south of range seventy (70) west, nor was in any wise subject or liable to have said entry impeached, annulled, or canceled, for any fraud or malfeasance of him, the said plaintiff therein, according to the course and practice of the land office of the United States.

Yet the said defendant well knowing the premises, and that the said plaintiff had made the said entry of the said land in good faith, and in compliance with the require-

ments of the statutes of the United States in such case made and provided, but falsely, wickedly and maliciously contriving and intending to injure, aggrieve and oppress the said plaintiff, and to bring him into great disgrace with and among his friends, neighbors and acquaintances, and other good and worthy citizens, and to put him, the said plaintiff, to great expense of his moneys and estate, and falsely and maliciously to cause and procure the said plaintiff to pay to him, the said defendant, large sums of money to be quit of the after-mentioned writ and proceedings, and to impoverish and wholly ruin him, the said plaintiff heretofore, to wit: On the 8th day of October, A. D. 1869, at the county of Fremont, and Territory of Colorado, under pretense that the plaintiff had made the entry of said land fraudulently and without right within the meaning and intent of the Laws of the United States, made and then in force concerning entry of lands by pre-emption, falsely, maliciously, and without any reason or probable cause whatever, sued and prosecuted, and caused and procured to be sued and prosecuted, before the commissioner of the general land office of the United States, an officer having jurisdiction in the premises, a caveat, impeaching the plaintiff's said entry on the ground and allegation of fraud, by reason of which caveat and the allegations therein contained, the said commissioner, according to the course and practice in his said office, suspended said entry and remanded the same to the local land office at Denver, aforesaid, with orders to the register and receiver of the said local land office at Denver aforesaid, to investigate the said entry of the plaintiff upon the charges and allegations in the said caveat contained.

And afterwards, to wit: On the 31st day of January, A. D. 1871, after due notice by them to plaintiff to appear at said local land office at Denver aforesaid, and show cause why his said entry should not be revoked, the said register and receiver of the said local land office at Denver aforesaid, in pursuance of said order of and from the said commissioner of the general land office of the United States,

did then and there have and hold an investigation and trial of said entry of plaintiff, when and where such proceedings were had, that the said suit, under color and pretense of said caveat, was determined, and the said entry of plaintiff was affirmed according to the course and practice of the local land department of the United States, by reason of which proceeding and rulings aforesaid, the president of the United States afterward, to wit: On the 11th day of April, A. D. 1870, executed and delivered to the plaintiff a patent for the land so entered by plaintiff as aforesaid, and the said suit and proceedings were and are by means of the premises wholly discharged, ended and determined.

By means of which said several premises, the said plaintiff, whilst he was so defending the said suit under color and pretense of said caveat as aforesaid, not only suffered great pain and anxiety of mind, and was greatly exposed and injured in his credit and circumstances, and was hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be performed and transacted, but was also forced and obliged to pay, lay out and expend, and did necessarily pay, lay out and expend, divers large sums of money in and about defending said suit and proceedings aforesaid, in the whole amounting to the sum of \$2,000, and in and about the premises, whereby he hath been and is greatly injured and damnified, to wit: at the county of Fremont, and Territory of Colorado, whereupon he brings suit.

On the 5th day of February, A. D. 1872, which was the first day of the February term of the court, judgment of default was entered against the defendant, and the cause was referred to a jury to assess damages. On the same day defendant filed an affidavit for continuance, as to which on the next day, being the sixth of February, the court made the following order: "This day came the said plaintiff by E. Bass and Thomas Macon, his attorneys, and on their motion it is ordered that said defendant's affidavit for a continuance of this cause be ruled out, as the same was filed after the order of this court was made herein on yesterday." Dam-

ages were assessed at \$1,974, for which sum, together with costs, judgment was rendered.

Messrs. FRANCE & ROGERS, for plaintiff in error.

Messrs. O. & A. S. BLAKE, for defendant in error.

WELLS, J. It was held in *Hoehne v. Rupear*, 1 Col. 405, that judgment for default of appearance, or for want of a plea, cannot be given on the first day of the return term of the process. In the present case the summons was served less than ten days before the return day; the cause was continued and the default was entered on the first day of the second term. A different question is therefore presented than in the case cited. By the fifth section of the practice act (R. S., ch. LXX), made applicable to the probate court, by the act of March 11, 1864 (R. S., ch. LXXI, § 28), it is provided that if the sheriff, or other officer to whom summons may be directed, shall be unable to serve the same ten days before the return day, he may make service thereof at any time before or on the return day, but in such case it is provided "the defendant or defendants shall be entitled to a continuance and shall not be compelled to plead before the next succeeding term."

It appears to me that the effect of this provision is that the cause shall stand continued to the second term in the same condition as if commenced to that term. The phraseology used only goes so far as to repel the idea that the plaintiff shall be required to *plead* before the second term, and it is not inconsistent with this to say that he must *appear* at the first term, but this, it has been expressly determined, is not required. *Pattison v. Hood*, 3 Scam. 152. And it would seem that if the defendant is not required to appear during the first term he should be allowed all of the first day of the second term in which to interpose both his appearance and his plea. Any other construction of the statute will require that not only the appearance but the defendant's plea shall be interposed at the furthest, by the first moment after the court convenes at the second term.

If the plaintiff may exact a plea at the last hour of the first day, or, in default, have judgment *nil dicat*, he may do so at the first moment of that day at which counsel can be heard. If he apply for it at any time before a plea is actually filed, though but the moment after the court is opened and proclamation made, the plaintiff will in strictness be entitled to have his judgment entered even though the defendant should then be prepared to plead on the instant.

Practically, the result would be to require the defendant to plead before the second term, which the statute forbids.

Moreover, this further incongruity is to be noted as resulting from the construction contended for, that while, if service be had to the first term, and the declaration is filed ten days before the term sits, the defendant has the whole of ten days preceding the term, and the first day of the term, in addition, in which to prepare his defense, and interpose the same, if service be had to the first term, but not in time, and the plaintiff file his declaration only ten days before the second term, as he may do, the defendant, without his own default, is deprived of one day of the period allowed to him in the other case.

No controlling reason can be assigned why a shorter day should be allowed in one case than in the other. It was contended on the part of the defendant in error, that the judgment was, in fact, taken at the third term, and reference was made to the 6th section of the act of November 7, 1861. R. S., ch. LXXI. But when this statute was passed, the probate court had no civil jurisdiction except in testamentary and intestacy matters; and when this jurisdiction was added by the amendment to the act of congress of March 2, 1863, the legislature, by the act of March 11, 1864, which was intended to regulate the exercise of the new jurisdiction, provided for terms of the court at the same time, "as now provided by law for the transaction of probate business." By the act of February 8, 1865, however, which professes to be an amendment of that of March 11, 1864, the terms of the probate court are limited to six, to be held on the first Mondays of alternate months, commencing with

February ; for the exercise of their civil jurisdiction, therefore, in matters not strictly relating to intestate estates, testamentary matters, and the like, that court has no term in the month of January, and the default in this case must be regarded as a default taken at the second term. It was argued on the part of the defendant in error, that to sustain the judgment below, this court may, and should, presume that the rules of that court warranted what was done. But if we are correct in the interpretation of the statute, the plaintiff has, by positive enactment, the whole of the first day of the term in which to appear and plead ; and clearly a right so reserved, and evidenced, cannot be restricted or taken away by rule of court. On the first day of the February term, the plaintiff in error filed in the court below, an affidavit for a continuance, which was afterward stricken off. Counsel on both sides agree that hereby a general appearance was entered ; and for the plaintiff in error it is claimed that this occurred before default taken, and therefore the default was irregular ; while for the defendant in error it is contended that the appearance having been entered after the default taken, any irregularity in the former proceedings was cured. We are of opinion that the mere filing of the affidavit, whether before or after the continuance, was nothing.

The affidavit was not a pleading nor a motion, but mere evidence to be used in support of the motion for continuance if one should be made. Of itself it had no effect whatever. *Morrell v. The People*, 32 Ill. 501. The conclusion to which we arrived on the first point seems to render it unnecessary to consider the questions which were raised as to the sufficiency of the declaration. Inasmuch, however, as these questions were very ably argued before us, and will probably be presented in the probate court, it seems to be best that we should consider them now. The action of the plaintiff below has been spoken of in argument as case for a malicious prosecution. The case made by the declaration, however, is an anomalous one. The proceeding which it is said the defendant caused to be set on foot against plaintiff,

is strictly not a suit or action. The plaintiff was seeking to have advantage of the provisions of the statute of the United States, which permit certain classes of persons in certain specified cases to purchase a part of the public domain in preference to other citizens; any private citizen had the right to intervene and resist the proceeding at any stage, for the pre-emptioner was asserting a claim in hostility to the common right. In strictness, therefore, the acts with which the defendant is charged in the present declaration amount not to a malicious prosecution of a suit; the attitude of the defendant was defensive throughout, and he cannot be said, in any sense, to have instituted a suit. If we look to their effect upon the rights of the pre-emptioner, however, the proceedings which it is said that the defendant below set on foot, were not different from a bill in chancery to set aside the pre-emption entry, after patent issued. In the case last supposed, it cannot be doubted, we think, that if instituted maliciously and without probable cause, the complainant's unwarrantable and vexatious proceedings might lay the foundation for an action upon the case against him. And upon principle I conceive no distinction ought to be made between the case where one, out of malice merely, and without probable cause, sets in motion the machinery of the law to the injury and oppression of his neighbor, and that other class of cases where one from the same motive unwarrantably interferes in a matter in which he is not directly a party, to delay or prevent another from obtaining that to which he is entitled. It is true that the defendant here was in some sort a defendant to the proceedings for pre-emption, but he was so in no otherwise than every other citizen, and to say that any citizen at any time before patent issued may, without cause, and out of mere malice, interfere to resist the pre-emptioner's application, and shall not be liable over for the damage occasioned by his wrong is, it appears to me, going far to impair the value of the privilege which the bounty of congress has extended. If one citizen may so intermeddle and, by a false suggestion that the pre-emptioner is not the head of a family, compel

him to attend with his witnesses to establish his qualification in this respect, another may compel him to renew the same journeyings and expenses by a like suggestion against his citizenship, and a third by questioning his settlement, and others upon other grounds; and so if the pre-emptioner be of that class for whose especial benefit the statute was framed, it may well be conceived that he will eventually be compelled to abandon his right from sheer exhaustion.

I think, therefore, that it ought not to be said that one may intermeddle to resist his neighbor's application to have the benefit of the act of congress, out of mere malice and without cause, and not be liable over for the wrong.

3. The question, whether the cause of action relied upon is sufficiently stated, remains. 1st. It may be inferred from the declaration that the plaintiff below had, before the institution of the proceedings of which he complains, made application to enter, under the pre-emption acts, the lands which are described; but it is nowhere directly averred, and in this respect we think the declaration is defective; for, if the plaintiff had never made such application, and made no claim to a pre-emption right in these lands, it was his own folly to expend time or money in the investigation of the defendant's allegation against a claim attributed to, but never asserted by him. 2d. The declaration nowhere shows with what particular acts the defendant is sought to be charged. It is averred that "under pretense that the plaintiff had made the entry of said land fraudulently, and without right, etc., he, the said defendant, falsely, etc., sued and prosecuted, and caused to be sued and prosecuted before the commissioner of the general land office of the United States, an officer having jurisdiction, etc., a caveat, impeaching the plaintiff's said entry, on the ground and allegation of fraud," etc.

But whether the suggestion interposed by the plaintiff in error was against his settlement, or against his qualifications in some respect; or upon the ground that he had settled and sought to pre-empt for the benefit of another, is not shown; and, therefore, while what is alleged may

include many things, the defendant is not advised thereby in what particular respect it is sought to show that he has wrongfully intermeddled with rights of the plaintiff. And this, we think, ought to be shown, for the plaintiff's action may be defeated by showing, either that the defendant never made the suggestion against the plaintiff's right, with which it is sought to charge him, or as it would seem, clearly, by showing that he had probable cause to believe his suggestion, whatever it was, to be true; but unless it be averred of what particular suggestion against the plaintiff's right it is proposed to show he has been guilty, the defendant can neither traverse, nor confess and avoid; nor whatever his defense may be, can he understandingly prepare himself with proofs to establish it.

And this seems to us to agree with the established precedents in the actions most analogous to the present, *e. g.*, in case for maliciously charging the plaintiff of felony, and causing him to be imprisoned thereon, the declaration sets forth, with particularity, the charge which was made before the magistrate (2 Ch. Pl. 607*, 12th Am. ed.); and it is doubted whether a count averring a charge of felony merely, would suffice. *Id.* 611*, n. (*d.*) In case for maliciously causing the plaintiff to be arrested in a civil action, the particulars of the command of the writ are recited. *Id.* 600*; *id.*, p. 611. In case for maliciously and wrongfully suing out an attachment, the precedents in common use set forth, it is believed, the substance of the affidavit upon which the writ issued. In case for a libel, the words published are always set forth; and this latter instance appears to have much analogy to the present case, for in that action the substance of the charge is, that defendant, by the publication of a falsehood respecting the plaintiff, hath injured him in his reputation; and here it is that by the false allegation against the plaintiff's right in a particular respect, he hath injured him in his estate.

It was argued that by the verdict, as it was called, all the defects in the declaration are cured. In Mr. Gould's work on Pleading, it is said that "The ground or principle

on which any fact not alleged is to be presumed in support of a general verdict is, that as the verdict must be considered as true, and as founded on legal evidence exhibited at the trial, the court, which can judge only from the record, must presume in support of it, that any and every fact not alleged, the proof of which was necessary to justify the jury in finding as they have done, was proved to them on the trial." Ch. X, § 14.

And if this be a correct exposition of the principle upon which intendments are indulged to supply omissions in pleading after judgment, the principle has clearly no application in the present case; for here there was no issue upon the declaration, and no finding by the jury as to any allegation contained therein; the judgment proceeding solely upon the confession which the law implies from the defendant's default. And this agrees with what is said in the same work before cited. Ch. X, § 26. "A default cures no defect in the declaration, which would not have been cured on general demurrer, for no fact can be presumed to have been proven where no trial has been had, and no proof exhibited."

And in another work of equal authority, it is said "that a judgment by default admits such facts only as are actually alleged." Ch. Pl. 673*.

Upon these authorities, therefore, it cannot be said that the inquest of damages had in the probate court can have the effect of a verdict, and supply by intendment what the plaintiff has omitted to aver; and if in any case an intendment of law can avail to support a judgment given by default, it must be upon some other principle than that here invoked.

The judgment of the probate court is reversed, and the cause will be remanded for further proceedings according to law.

Reversed

BARRETT MINING Co. et al. v. TAPPAN et al

EVIDENCE—*immaterial, will not be noticed.* Where a fact is conclusively established, as in an action upon an appeal bond by a recital in the condition of the bond, whether other evidence to the same point was properly received, will not be considered.

In an action upon a bond given on appeal from the judgment of a justice of the peace, it is not necessary to show at whose instance the appeal was dismissed in the district court.

PRESUMPTION—*as to judgment of dismissal.* In such action the court will presume that the judgment of dismissal was regularly entered and upon proper cause.

CORPORATION—*may deny its signature by oath of agent.* Under section 14 of the justice's act (R. S. 399), a corporation may deny its signature to a written instrument by the oath of its authorized agent.

But it must appear that the oath is made on behalf of the corporation, and that the person making it has authority from the corporation to make such denial.

AGENT'S AUTHORITY *to sign instrument can only be denied under oath.* Under section 14 of the justice's act (R. S. 399), a principal cannot deny the authority of his agent to sign a written instrument unless under oath.

The action of debt will lie upon an instrument not under seal.

Appeal from District Court, Gilpin County.

THE action was an appeal bond against Barrett Mining Company and George W. Barrett, before a justice of the peace, and thence removed by appeal to the district court, where judgment was given against appellants, and in favor of appellees. At the trial, the docket of Robert S. Wilson was produced, showing a judgment in favor of John G. Tappan and William H. Tappan, against Barrett Gold Mining Company, for the sum of \$95 and the costs of suit, taxed at \$8.70. To this, objection was made by appellants, but the court allowed it to be read, and appellants excepted. Appellees gave in evidence, also, record of the proceedings of district court of Gilpin county, showing:

1st. An order upon the appellant in a cause entitled William H. Tappan *et al.* v. The Barrett Mining Company, to file an amended appeal bond; and,

2d. That the same cause was dismissed by the district court.

To which objection was made, but the court allowed the

said orders to be read, and appellants excepted. Appellees then offered the bond, upon which suit was brought, the condition of which was as follows:

"The condition of the above obligation is such that, whereas, the said William H. Tappan and John G. Tappan did, on the 26th day of March, A. D. 1870, before Robert S. Wilson, a justice of the peace in and for the county of Gilpin, recover a judgment against the above-bounden Barrett Mining Company, for the sum of ninety-five dollars, from which judgment the said Barrett Mining Company has taken an appeal to the district court of the second judicial district in and for the county of Gilpin, aforesaid, and territory of Colorado. Now, if the said Barrett Mining Company shall prosecute its appeal with effect, and shall pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal, then the above obligation to be void; otherwise to remain in force and effect."

Which bond was signed "Barrett Mining Company, by George W. Barrett, Agt.," and "George W. Barrett." Opposite these names was a scrawl, with the word "seal" in the center, but there was nothing attached which appeared to be the seal of the corporation. Appellants objected to the instrument:

1. That it was irrelevant.
2. That no sufficient foundation had been laid for its introduction.
3. That no breach of the condition had been proved.
4. That it was not the bond or instrument of the Barrett Mining Company.
5. That the bond was not sealed with the corporation seal of said Barrett Mining Company.
6. That the scrawl attached to said company's name was not the corporate seal.
7. That it was not shown that said Barrett, by whom said company's name was signed to said bond, had any right or authority to execute the same.
8. That the execution of the bond was denied, under oath.

And, in support of said objections, counsel read to the court the following affidavit :

**TERRITORY OF COLORADO, } ss.:
COUNTY OF GILPIN, }**

John G. Tappan, William H. Tappan,

v.

**The Barrett Gold Mining Company
and George W. Barrett**

George W. Barrett, being first duly sworn, deposes and says that the bond offered in evidence in this case, signed "Barrett Mining Company, by George W. Barrett, Agent, George W. Barrett," was not, and is not, signed by the said Barrett Mining Company, but was signed by him.

Affiant further states that he had no right or authority from the said Barrett Mining Company to sign the same, and that the said company has not ratified the same.

(Signed) **GEORGE W. BARRETT.**

Subscribed and sworn to before me, {
this 15th day of April, A.D. 1871. }

(Signed) **C. M. LELAND, J. P.**

But the court overruled the objections, and the bond was read in evidence, to which appellants accepted.

Judgment was given against appellant, and in favor of appellees, for the sum of \$122 and costs.

Mr. HUGH BUTLER, for appellants.

Mr. L. C. ROCKWELL, for appellees.

HALLETT, C. J. The amount of the judgment against the company in the first action, and the fact that such judgment was rendered, was sufficiently shown by the recital in the condition of the appeal bond, and the entry in Wilson's docket was merely cumulative evidence. Conceding that this entry was not properly admitted in evidence, the facts are established by the recital in the bond, and the docket entry could not have affected the result. The same

may be said of the first entry in the record of the district court. It was not material to the issue, and was not prejudicial to appellants.

It does not appear at whose instance the district court dismissed the appeal, but this is not essential. Whether the order of dismissal was made at the instance of one party or the other, it was equally effectual in putting an end to the suit, and we must, in this action, presume that the order was regularly made, upon sufficient cause. Upon the point that the execution of the bond was not denied by the company, under oath, there is nothing to show that the affidavit of Barrett was made on behalf of the company. A corporation is, of course, unable to make oath, and must, of necessity, in this, as in other matters, act through and by its appointed agent. Although section 14 of the justices' act (R. S. 399), appears to require a personal denial of the signature, this being impossible to a corporation to avoid denying a substantial right, the affidavit of some one acting for and on behalf of the corporation must be received. *Trenton Banking Co. v. Haverstick*, 6 Halst. 171; *Commercial Ins Co. v. Mehlman*, 48 Ill. 313. But the denial must, nevertheless, appear to be the act of the corporation, for, otherwise, it might happen that a stranger would deny what was admitted by the real party in interest. And, although Barrett was a co-defendant, and might have denied the execution of the bond in his own right, yet, when he came to act for the company, he should show that he had authority from the company so to proceed, in order that it may appear that he is not now intermeddling in matters with which he is not concerned, as he alleges that he did when the bond was signed. Therefore, we think that the affidavit was not sufficient to put appellees to proof of the due execution of the bond, if, indeed, any affidavit was required. But it is said that the authority of Barrett, to execute the bond, is distinguishable from the signing, and, although the signature must be denied under oath, the authority of the agent need not be. Upon this we observe that the statute manifestly refers to the legal effect of the signature, rather than

the manual act of signing. If the name of the obligor, in a bond, is subscribed by one in his presence, and by his direction, the effect is the same as if his name should be signed with his own hand, and under such circumstances we do not doubt that the obligor must deny his signature under oath, in order to put the obligee to proof of the fact. *Qui facit per aliam facit per se*, and when the name is signed by one thereunto authorized, it is as much the signature of the principal, as if written with his own hand. Therefore, if the principal would deny the authority of the agent, as the validity of the signature is thereby directly attacked, the denial must be under oath. The effect of this statute, upon this point, is precisely the same as the 14th section of the practice act (R. S. 506), under which it has been held, that the execution of the instrument must be denied under oath. *Delahay v. Clement*, 3 Scam. 201.

The objection that the bond was not under seal of the company, if maintainable, will not defeat the action, for debt will lie upon an unsealed instrument. 1 Ch. Pl. 108. For the purposes of this action, it is sufficient that the bond was signed by the company, and, the signature not having been denied under oath, this fact was sufficiently established by the production of the instrument.

The judgment of the district court is affirmed, with costs.

Affirmed.

STILES v. FORD.

PRACTICE — *receiving verdict in absence of parties.* A verdict in a civil case may be received by the court in the absence of the parties to the suit. That the plaintiff in a civil case is not present in court when the verdict is brought in by the jury is not a ground of nonsuit.

Error to District Court, Arapahoe County.

THE action was replevin. When the jury retired from the bar to consider of their verdict, the court, being about

to adjourn, with the consent of the parties, directed the jury to seal their verdict and deliver it to the bailiff in charge and thereupon to separate to meet the court at its next incoming.

When the court again convened, the jury were present, and the verdict, being produced, was found to be as follows: "We, the jury, find the defendant guilty, and that the property in the goods and chattels in the declaration mentioned was, at the commencement of this suit, in the plaintiff, and we assess the plaintiff's damages for the detention thereof in \$200," following which the record recites:

"Whereupon the said plaintiff, though solemnly called, comes not to hear the verdict of the said jury, nor doth he further prosecute his suit aforesaid against the said defendant in the plea aforesaid, whereupon the said jurors are wholly discharged from giving any verdict of and upon the premises aforesaid. Therefore it is considered by the court that the said defendant go hence hereof without day and have and recover of and from the said plaintiff his costs by him laid out and expended, taxed at , and have execution therefor."

The plaintiff afterward moved the court to set aside the nonsuit and enter judgment on the verdict, which motion was denied and the plaintiff excepted.

Mr. M. BENEDIOT, for plaintiff in error.

Messrs. FRANCE & ROGERS, for defendant in error.

HALLETT, C. J. By the common law the plaintiff was required to be present in court in person or by attorney when the verdict of the jury was received, in order to answer to the amercement to which he was liable *pro falso clamore suo*. 3 Black. Com. 976. But this fine or amercement is not at the present day imposed for any cause, and the costs to which he is liable, if he fail in the suit, may be adjudged against him although he be not present in court at the time the verdict is rendered. It would seem, therefore, that the reason assigned by Blackstone for requiring the plaintiff to

attend to receive the verdict no longer exists, and although he may attend for the purpose of polling the jury, he may unquestionably waive that right. In *People v. Mayor's Court of Albany*, 1 Wend. 36, it was said that the plaintiff had the right to submit to a nonsuit at the coming in of the jury, and therefore the verdict should not be received in his absence. But under our statute the plaintiff must have taken a nonsuit before the jury retired from the bar, and he could not have claimed that right if he had been present when the verdict was received. R. S. 510. Therefore, the reason assigned in New York, as well as that which existed at common law for requiring the plaintiff to be present at the coming in of the jury, does not obtain here, and we do not perceive that there is any reason for saying that the court may not receive a verdict of a jury in the absence of the parties. Undoubtedly the parties have the right to poll the jury and to object to the form and sufficiency of the verdict, but if they will not attend for that purpose at the proper time they should be regarded as waiving the right.

The plaintiff not having been present when the verdict was received, he could not, thereafter, raise any question which, by the rules of practice, he was required to present at that time; but the right of the court to receive the verdict, and enter it of record, in his absence, cannot be denied, and, therefore, we must regard the action of the court, in respect to the verdict, as entirely regular.

From what has been said, it will be apparent that the judgment of nonsuit, following the reception of the verdict, cannot be supported upon the reason therein assigned. For, if the plaintiff was not required to attend for the purpose of hearing the verdict, his failure to do so was, of itself, no ground of nonsuit. And, although the plaintiff should have been present to move the court for judgment upon the verdict, or for a new trial, or to take some further action in the cause, we think that the court was not warranted in proceeding to judgment against him without any delay whatever. The defendant asked nothing of the court, and a short time could have been allowed the plaintiff to take some other step

in the cause, without seriously obstructing the business of the court. Usually, the time and manner of proceeding in a cause must be left to the discretion of the court in which it is pending, to be exercised according to established rules of practice, and with due regard to the rights of litigants, and, where there is unreasonable delay on the part of the plaintiff in speeding the cause, we do not doubt the power of the court to nonsuit him, even when the defendant neglects or refuses to move the court in that behalf. But here the judgment of nonsuit appears to have been entered immediately after the verdict was received, and this we are inclined to regard as an abuse of the discretionary power which we concede is conferred upon all courts to dispatch the public business.

The judgment of the district court is reversed, with costs, and the cause is remanded, with leave to defendant to move the court for a new trial, and also with leave to plaintiff to move for judgment on the verdict.

Reversed.

COOK v. RICE.

DENVER TOWN SITE — *title under act of congress.* A bill cannot be maintained to set aside a conveyance of lands in the city of Denver, made by the probate judge of Arapahoe county pursuant to the act of congress of May 28, 1864, "for the relief of the citizens of Denver" (18 Stat. at Large, 94), to an actual occupant and owner of improvements upon the lands so conveyed by one who has never occupied or improved such lands.

JURISDICTION of probate judge in town site cases. Where lands have been conveyed by a probate judge of Arapahoe county, pursuant to the act of congress of May 28, 1864, "for the relief of the citizens of Denver" (18 Stat. at Large, 94), his successor in office has no title to the lands so conveyed, and, therefore, no power, under the act of assembly (R. S. 622), to proceed in a summary manner to hear and determine controversies affecting the title to such lands.

Error to District Court, Arapahoe County.

THE bill was brought to the January term, A. D. 1869.

Complainant charged that on the 28th day of May, 1864, and the 6th of May, 1865, he was the actual occupant of lots 24, 25, 26 and 27, in block E, in the east division of the city of Denver, and the *bona fide* owner of one undivided half thereof, and of the improvements thereon; that H. R. Hunt owned the other undivided half; that on the 6th of May, 1865, James Hall, in pursuance of the act of congress, approved May 28, 1864, "for the relief of the citizens of Denver," entered the tract of land in which said lots are located, in trust for the several use and benefit of the rightful occupants of said land, and the *bona fide* owners of the improvements thereon; that on the 20th day of June, A. D. 1865, complainant and said Hunt filed with said Hall, probate judge of Arapahoe county, their claim for title to said lots in pursuance of the act of assembly, entitled "An act prescribing rules and regulations for the execution of the trust arising under the act of congress aforesaid," approved March 11, 1864; that on the 8th of June, 1865, Isaac N. Campbell also filed his claim for title to said lots, and that on the 8th of August, 1865, the city of Denver filed its claim for title to the same lots; that on the 24th of January, 1868, complainant sold and conveyed said lots to Edward Chase; that on the 24th of June, 1868, Chase sold and conveyed said lots to William R. and Hiram F. Ford; that on the 9th of December, 1868, the Fords sold and conveyed said lots to complainant; that on the 24th of January, 1868, the said Hunt sold and conveyed his interest in said lots to complainant; that on the 4th of March, 1868, one William Hodge, the complainant, the said Hunt and the city of Denver, each withdrew their claim of title in favor of the said Edward Chase; that there then remained only the claim of the said Edward Chase, and of the said Isaac N. Campbell, to said lots; that proceedings were instituted before the probate judge to determine the right of the said respective claimants on the 27th of January, 1868, in which all parties were duly served with notice, and that on the 5th of March, 1868, a final decree was entered in favor of the said Edward Chase, in pursuance of which on the 21st

day of December, 1868, the probate judge executed a deed to said complainant for said lots; that on the 23d of August, 1867, Omer O. Kent, being then probate judge and successor in the said trust to the said Hall, executed a conveyance for said lots to Alonzo Rice, the defendant; that Rice was never in possession of the lots, and never had any interest therein, prior thereto; that he never filed any claim of title to the said lots with the said probate judge; that the deed made by said Kent to said Rice was without authority of law; that the said Kent, as probate judge, never took any testimony as to the right of the said Rice to the said lots; that no notice was given of any trial before said judge, nor was any trial had, as to the right of the said Rice to said lots; and that neither the complainant, nor any of his grantees, ever had any notice of the claim of the said Rice to said lots, or of any conveyance thereof to him by said Kent, until after said Rice filed his deed for record, December 24, 1868; that, since the 28th May, 1864, complainant and his grantees have been in possession of said lots, and the *bona fide* owners of improvements thereon until the 20th December, 1868, when the said Rice wrongfully took possession. The complainant has paid taxes assessed against said lots for four years last past; that, on the 31st August, 1867, said Kent conveyed to his successor in office, Jacob Downing, all the lands entered by said Hall not reserved, and which had been previously conveyed by said Hall to him; that, prior to the 24th December, 1868, the said Downing had no notice of any conveyance by said Kent to said Rice.

The oath to the answer was waived. The prayer of the bill was, that the deed from Kent to Rice might be canceled, and the latter enjoined from disturbing complainant's possession.

The answer admits the entry of the land by Hall; that Isaac N. Campbell filed his claim for title on the 8th June, 1865; that Omer O. Kent was the successor in office of the said Hall; and that, on the 23d August, 1867, Kent conveyed to defendant the lots in controversy. Defendant avers that

he purchased the lots, and the improvements thereon, of Isaac N. Campbell, on the 7th day of June, 1866, and that he thereafter remained in possession of the same; that he had placed upon the lots improvements of the value of \$1,500. The other allegations in the bill were expressly denied, in some instances, and in others defendant disclaimed any knowledge, and demanded proof.

Complainant put in evidence, before the master, a transcript of proceedings before Jacob Downing, probate judge, showing:

1. A summons issued to the sheriff, or any constable of Arapahoe county, commanding him to summon Edward Chase, Isaac N. Campbell, and the city of Denver, to appear before the probate court, on the 7th day of February, 1868, to make their proofs and allegations respecting their claims to lots described in the bill, which summons was dated January 27, 1868.

2. A return of service upon Edward Chase and William R. Ford, alderman, and "not found" as to Campbell, dated January 30, 1868, and signed W. J. Benton, constable.

3. An affidavit of Edward Chase, filed January 31, 1868, setting forth that Isaac N. Campbell cannot, upon due inquiry, be found, and that service cannot be had upon him.

4. A certificate of Fred. J. Stanton, showing a publication of notice to Isaac N. Campbell, in the weekly *Denver Gazette*, for four successive weeks, the said notice requiring the said Campbell to appear at the office of the probate judge, and present his proof concerning said lots, on the 5th March, 1868.

5. The default of said Campbell, and the decree of the court entered March 5, 1868, awarding the lots to Chase.

Complainant also put in evidence a deed from William R. and Hiram F. Ford to himself, dated December 19, 1868, for the lots in controversy; also a deed for the same lots from Jacob Downing, probate judge, to complainant, dated December 21, 1868; also, a claim of title of Hamilton R. Hunt and Charles A. Cook to the same lots, filed with the probate judge.

The complainant testified, in his own behalf, that he had paid taxes upon the property described during a period of four or five years. No evidence was given to show that the complainant, or any of his grantors, had ever occupied the premises, or made any improvements thereon.

Defendant gave in evidence a deed from John Dalton to Isaac N. Campbell, dated August 8, 1864, conveying property described as follows: "The house and seven lots fronting on Wynkoop street, now occupied by me, in the east division of the city of Denver." Also the claim of title filed with the probate judge by said Campbell, on the 8th of June, 1865, for the property described in the bill; also, a deed from Isaac N. Campbell to Alonzo Rice, dated June 7, 1866, for the property described in the bill; also, a deed from Omer O. Kent to Alonzo Rice, for the same property, dated August 27, 1867.

Several witnesses testified to the occupancy of the property by Dalton, Campbell, and the defendant, successively, from and after the year 1860.

Upon the hearing, the bill was dismissed, and the complainant sued out this writ of error.

Messrs. BROWNE & PUTNAM, for plaintiff in error.

Messrs. MILLER & MARKHAM, for defendant in error.

BELFORD, J. The bill, in this case, was filed to set aside a deed executed by Omer O. Kent, probate judge, etc., to Alonzo Rice. Issue was joined, cause referred to a master to take proof, and on the final hearing, a decree was entered dismissing the bill. The land in controversy is a part of the Denver town site, entered by James Hall, for the benefit of the actual occupants, and owners of improvements thereon.

The evidence, I think, clearly establishes the following facts: First. That one John Dalton entered upon this land in 1860, erected a house or cabin, and occupied it with his family until 1863; he then conveyed it to Isaac N. Campbell, who entered into occupation, and resided with his

family until April, 1865. Campbell placed some additional improvements on the property, and on the 7th day of June, 1866, conveyed these lots to Rice, who, it appears, has been in possession ever since, and paid the taxes on the same. It further appears, that on the 6th day of May, 1865, Hall, probate judge, etc., entered the land, and on the 7th day of June following, Campbell made his filing, and asked for a deed. No deed was made to Campbell; Rice, as his grantee, however, received a deed from Kent.

It appears further, that Rice has placed on this property improvements, amounting in value to the sum of \$3,000. There is nothing in the record to show that the complainant ever was in the occupation of this property, or that he ever placed any improvements thereon.

The trust closed on the day the entry was made by Hall, and if the complainant was not in the actual occupation of the property, or the owner of the improvements thereon, at that time, he certainly cannot be regarded as a beneficiary of the trust. The only thing in the record upon which any claim in favor of the complainant could be based, is the filing he made; but even the date of this is undisclosed. Whether it was before or after that of Campbell, is a matter of conjecture.

In his testimony he does not assert that he ever occupied the land, or erected improvements on the same. This, certainly, is a very weak showing to be made by one who asks a court to divest another of property, whose possession, through his grantors, and himself, reaches back to 1860.

Great stress is laid on certain proceedings had in the probate court, before one Jacob Downing, probate judge, wherein Edward Chase appears as complainant, and Isaac N. Campbell appears as respondent, and in which proceeding it was adjudged that Chase was the owner of this property. Prior to the election of Downing, Kent had conveyed this property to Rice; indeed, it appears that Rice had been in possession of this property for some eighteen months prior to the commencement of this action. We think that Downing had no power to adjudicate between these parties.

Section 8, R. S., p. 622, seems to limit the jurisdiction of the probate judge to such lands as shall be held by him. It is clear, that at the time of this adjudication, the legal title was not in Downing. His predecessor in the administration of this trust had parted with the title to Rice, and in him the legal title was vested. We, therefore, attach no weight to these proceedings. If we look at this case outside of the conveyance made by Kent, and which the complainant, in this action, seeks to set aside, we find the equities are with the respondent. Dalton entered on this land in 1860, occupied it until 1863; was succeeded by Campbell, who actually occupied it until 1865, who was succeeded by Rice, whose possession has been continuous, ever since.

From the record it does not appear that the complainant ever occupied this land, or erected improvements thereon. He certainly is in no position, upon this showing, to question the title of the respondent.

Affirmed.

TOWN-SITE TRUST—ACTUAL OCCUPANTS are entitled to lots in a town site (*Smith v. Pipe*, 3 Colo. 195; *Adams v. Binkley*, 4 Colo. 248; *Aspen v. Aspen T. & L. Co.* 10 Colo. 203); and after a deed to such occupant, no third party can come in to question whether all the requirements to perfect the title have been complied with: *Adams v. Binkley*, 4 Colo. 248; *Murray v. Hobson*, 10 Colo. 4.

WRIT OF ERROR WILL LIE to decision of probate court: *Vance v. Rockwell*, 8 Colo. 243.

MILSAP et al. v. STONE.

PRACTICE—objection to witness. An objection to a witness, upon the ground of interest in the event of the suit, cannot be made after he has been sworn in the cause.

POSSESSION—prima facie evidence of ownership. Possession of a tract of land, by a party claiming to be the owner in fee, is *prima facie* evidence of ownership.

EVIDENCE as to the extent of plaintiff's claim. If the plaintiff in ejectment relies upon prior possession as evidence of title, a deed of the premises from one not shown to have had, at the date of its execution, either title or possession, is admissible evidence, in connection with proof of entry and occupation under it, to show the extent and boundaries of the premises claimed.

EVIDENCE—presumption as to continuance of tenancy. Where it is shown that a tenancy exists, in absence of evidence to the contrary, it will be presumed to continue as long as the tenant remains in possession.

LANDLORD AND TENANT—A tenant is estopped to deny his landlord's title. In an action of ejectment against a tenant in possession, and a third party to whom the tenant has attorned, a deed from the probate judge of Arapahoe county, made to such third party during the continuance of tenancy, will not defeat the landlord's recovery.

Appeal from District Court, Arapahoe County.

ELIZABETH STONE brought ejectment against William Milsap, to recover the possession of lots 15 and 16, in block 22, in the east division of the city of Denver. One trial was had, and the judgment set aside upon payment of costs. Thereafter, Edward Chase and Ellen P. Heatley, and several infant heirs of Francis P. Heatley, deceased, were admitted to defend with the said Milsap. Upon the second trial, plaintiff gave in evidence a deed dated March 7, 1866, from Frank Ripley and Phebe, his wife, conveying the lots mentioned, to plaintiff. She also produced testimony tending to prove that in the year 1867, the defendant Milsap took possession of the premises as her tenant, and that he had from time to time thereafter paid rent to her; that he had continued in the occupation of the premises up to the time of trial, which was in the month of May, 1872; that there was a house upon the premises, and that the lots were inclosed with a board fence at the time she purchased from Ripley, which house had been occupied by Milsap. The plaintiff was called as a witness, and after she had been sworn in chief, counsel for defendant asked that she be sworn upon her *voir dire*, which was denied. Counsel then objected, that she was not competent to testify under the act of 1870 (8 Sess. 63), as some of the defendants were infants; the objection was overruled, and the witness was permitted to testify. Defendants gave in evidence a deed from Jacob Downing, probate judge of Arapahoe county, to the defendant Chase, for the same property, dated March 6, 1868, which it will be observed was after Milsap had entered upon the premises as tenant to plaintiff; defendants also gave in evidence a lease of the same premises from the defendant Chase to the defendant Milsap, dated 26th of September, 1870, and for the period of six months. There was no evidence to show occupancy by any of the defendants except Milsap.

Mr. L. B. FRANCE and Mr. M. A. ROGERS, for appellants.

Mr. M. BENEDICT and Mr. E. L. SMITH, for appellees.

BELFORD, J. The first error assigned is the admission of the appellee as a witness in her own behalf. It is only necessary to say that no objection was made until after she was sworn. This was too late, the rule being that objection to the competency of witnesses must be made as soon as the opportunity to present it occurs, and failure to make it, at that time, must be considered as a waiver. *Donaldson v. Taylor*, 8 Pick. 390; *Snow v. Batchellor*, 8 Cush. 513; 1 Starkie on Ev., §§ 123-4.

It is further objected that the appellee's claim of title in fee set out in the declaration is not sustained by the proof. The evidence shows that Mrs. Stone purchased this property on the 7th day of March, 1866, from Frank Ripley, and entered into the possession of the same. Although it does not appear that a patent had ever been obtained from the United States, yet we take it to be well settled that in actions of ejectment and for injuries to the inheritance, the possession of a tract of land by a party claiming to be the owner in fee is *prima facie* evidence of his ownership and seizin of the inheritance, and throws upon his adversary the burden of rebutting the presumption thus raised. *Richard v. Williams*, 7 Wheat. 59; *Keane v. Cannovan*, 21 Cal. 291; *Davis v. Easley*, 13 Ill. 198.

It is further claimed that the deed from Ripley to the appellee was inadmissible, because it was not shown that at the time it was executed, Ripley was in possession of this property. The evidence is not very clear on this subject. It appears, however, that at a time anterior to the execution of this deed, Ripley was in possession, and in the absence of proof, we must presume that his possession continued until the making of this conveyance. The deed was properly admitted for another purpose. Where the plaintiff in ejectment relies upon prior possession as evidence of title, a deed of the premises to her from one not shown to have had, at the date of its execution, either title or possession,

is admissible evidence in connection with proof of entry and occupation under it to show the extent and boundaries of the premises of which possession was claimed. *Keane v. Cannoran*, 21 Cal. 291. It is insisted, however, that the plaintiff should not be allowed to recover, because Chase had a deed to this property from Downing. But little weight can be attached to this conveyance, as the evidence shows that Milsap entered into possession as a tenant to Mrs. Stone. He paid her rent and recognized her as his landlord. It is true that he afterward attorned to Chase and took a lease from him, but this cannot be allowed to affect the rights of the appellee. A tenancy once created is presumed to continue so long as the tenant remains in possession. *Wheelock v. Warschauer*, 21 Cal. 316. A tenant is estopped to deny his landlord's title during the existence of the tenancy. If he desires to set up title in somebody else he must surrender his lease and abandon his possession. The tenant may always show that his landlord's title had expired, or that he has sold his interest in the premises, or that it is alienated from him by judgment and operation of law, providing the tenancy has been determined or expired, but until this happens he cannot be heard to question his landlord's title. Nor is Chase in any better position. Milsap could enter into no arrangements with Chase that would impose on this land any burden or diminish any rights the appellee had. To permit such an arrangement would be to give our sanction to any collusion or fraud which a tenant might desire to engage in or practice. If Chase has title to this property he must assert it through some other channel than the tenancy of Milsap.

It is proper to allude to an objection made in connection with the deed from Ripley to Mrs. Stone. In addition to the acknowledgment which was taken before a proper officer, the execution of the deed is attested by certain witnesses and it is claimed that these witnesses should have been called to prove its execution. There is nothing whatever in this objection. Section 19, R. S., page 212, provides for the admission in evidence of deeds acknowledged before

competent officers. The acknowledgment in this form is sufficient without additional proof.

There are some other errors assigned, but no notice is taken of them by counsel, and we do not deem it necessary on that account to examine them. *Affirmed.*

TENANT ESTOPPED TO DENY LANDLORD'S TITLE: *Arnold v. Woodward*, 4 Colo. 255.

WESTERN UNION TELEGRAPH CO. v. EYSER.

PLEADING — *nul tiel corporation*. A defendant sued as a corporation cannot deny its own existence, either in abatement or in bar. If it is not a corporation, it cannot, as such, appear and plead.*

CONTRIBUTORY NEGLIGENCE — *in case against a telegraph company*, to recover for injuries resulting from the act of defendant's servants in suspending a wire over and across a public street in a city, the plaintiff's right to recover is not affected by his having contributed to his injury, unless he was in fault in so doing.

Therefore, the charge that it must appear "that the culpable negligence of the plaintiff did not contribute to occasion such injury; that is to say, that the plaintiff himself did not, on the occasion complained of, omit to exercise such effort and caution to avoid the accident and injury as a man of ordinary prudence and circumspection, placed in the same circumstances, would have exercised, was correct."

CORPORATIONS — *liable in tort as natural persons*. Corporations are liable in actions of tort in the same way, and to the same extent, as natural persons, and exemplary damages may be awarded against them in such actions.

Exemplary damages for gross negligence. In an action against a telegraph company to recover damages resulting from an injury occasioned by the gross negligence of defendant's servants, exemplary damages may be awarded.

NEGLIGENCE — *degrees of*. The distinction formerly observed as to slight, ordinary and gross negligence is of doubtful utility.

What is gross. But, however that may be, if a telegraph company, engaged in constructing its line through a public and frequented street of a city, allow its wire to remain suspended across the street in a manner which obstructs travel, without guards, flags, or other notice to the public of the obstruction, it is guilty of gross negligence.

INSTRUCTIONS TO THE JURY — *as to gross negligence*. The evidence being submitted to the jury to find the facts upon which gross negligence is predicated, they may be instructed to award exemplary damages, proportioned to the nature and extent or character of the injury.

PRINCIPAL AND AGENT — *acts of officers of corporations*. Evidence showing that

* See *The Mud Creek Draining Co. v. The State ex rel. Morley et al.*, 48 Ind. 235.

a telegraph line was put up by the direction of persons acting as superintendents of defendant's lines, and that it was paid for by one of such persons, and subsequently used by the company, will support a finding that the work was done by defendant, and that the persons employed were acting within the scope of their authority, although there was some evidence to show that a railroad company was also interested in the line.

ORDINANCES—*to show streets, and upon question of negligence.* In an action against a telegraph company, to recover for injuries resulting from an obstruction placed in a street of a city by the servants of the company, ordinances of the city are admissible evidence to show:

1. That the place obstructed was a public street.
2. That such obstruction was forbidden by law, and hence, that the company was guilty of negligence.

Appeal from District Court, Arapahoe County.

THE action was on the case, and the plaintiff alleged that on the 18th of April, 1870, the defendant, being a body corporate, was engaged in constructing a telegraph line along F street and across Blake street, which were public thoroughfares in the city of Denver; that at and near the corner of said F and Blake streets, the said defendant, its agents, servants and superintendents, unlawfully, wrongfully, and without proper and due care and diligence, placed, stretched and strung a wire across said Blake street at the height of eighteen inches above the level of said street, and that said wire was permitted to remain in that position for the space of one hour, during which time the plaintiff riding along said street on horseback, with reasonable care and speed, became entangled in the said wire and was thrown from his horse and seriously wounded and injured and thereby disabled for two months to his damage, etc.

The defendant pleaded, 1st. The general issue; 2d. That the defendant was not at the commencement of the suit, nor at time of the committing of the supposed grievances, and is not now a corporation as alleged; 3d. That at the time of the supposed grievances, the said plaintiff was riding carelessly, negligently, etc., and that the injuries occurred through his misconduct, and not by the fault of the defendant; 4th. That the city of Denver was, by its charter, charged with the care and control of its streets, and that the

city was primarily liable to plaintiff. A demurrer was sustained to the second, third and fourth pleas, and the trial was upon the general issue. The third and fourth pleas were not noticed in argument or in the opinion of the court.

As to the party or persons by whom the line was constructed, but one witness testified at the trial, and his testimony upon that point is given entire. B. F. Woodward having stated that he had knowledge of the line, also stated the work was being done by a force under Geo. J. Washburn. Washburn, I suppose, was under my charge. Difficult to say for whom I was then acting; can't answer that to my own satisfaction. The labor of putting up wire was paid for by me, and I was reimbursed by money from St. Louis from R. C. Clowrey.

Can't say who Clowrey acted for in paying this. I reported to Clowrey expenses incurred in building wire. Did so at direction of Hibbard of Omaha. I had suggested to Hibbard that I could, to advantage, use a force here to expedite building this line. A party was already building it from the east, and General Palmer had suggested his sending wire and insulators to Denver, if I'd make up a party here. I laid the matter before Hibbard, and received telegram to proceed. Hibbard was over me as superintendent of the third district of the Western Union Telegraph Company. He directed me to report to Clowrey. I did make the report to Clowrey in pursuance of that instruction. Clowrey settled the bill. I had already received the money covering these expenses. I received it from Clowrey by express. Some part of the money was sent through Mr. Johnson (of the Artesian well at Kit Carson). Don't know in what capacity Clowrey was acting. Hibbard's jurisdiction did not extend to this territory. I am under jurisdiction of Hibbard, but not under Clowrey. There was authority from Hibbard to me to do something outside of his district. Know Clowrey is superintendent of second district, because I have understood so. At this time I had charge of the second division of third district of defendant's

lines—that embraced the city of Denver. Had been acting for the defendant in that capacity for about a year; not before that in that capacity, but in another capacity. I had charge of Denver office previous to that for a few years. Have had charge of the interests of the defendant in Denver since October, 1863, in one capacity and another. After the wire was erected, it was operated very soon after—two or three weeks. It was operated mainly by operators of railroad company. We had the wire in our office. The operators in my office operated it there. Whatever proceeds there may have been, went into the general receipts of defendant's office in the city of Denver. I was present at the time of the erection of the wire near the crossing of F and Blake; saw the erection of a portion of it.

Several questions were here asked the witness concerning a paper alleged to be a copy of a contract between the Union Pacific Railroad Company Eastern division, and defendant. Nothing was drawn out respecting the contents of the contract, nor was the contract itself put in evidence. It will be observed that the court did not regard the objections to the questions as material, because neither the contract or its contents were put in evidence. The witness afterward stated: Two or three weeks after the erecting of this wire the proceeds of it, if any, went into general account of the office of defendant here, of which I am in charge. The proceeds are still—that is any pay business we send over that line—goes into the general receipts of that office—if we send any pay business over that line—think there has been pay business sent on the line since its erection. That particular line was taken down shortly after the completion of the railroad. So long as it was operated this condition of things continued. The line was taken down by a force sent here from the east; don't know particularly who sent them; have no positive knowledge as to Mr. Clowery's official position. I have corresponded with him and addressed him as superintendent of the second district; have had such correspondence for the last two and a half or three years; that correspondence was by letter and telegram.

The telegrams may have been sent over defendant's line. We send messages over any line that is working. I cannot say that I have ever sent any myself; have addressed messages to him and put them on file, and they have been sent either by way of Omaha or Kansas City; such messages may have been sent half a dozen times; can't say how often; the line by way of Omaha is part of defendant's line; think the line was operated both by the Denver office of defendant and by the Construction Company of the Kansas Pacific Railroad Company.

On cross-examination the witness stated that he sold General Palmer seventy-five or eighty miles of wire; that it was put up for the benefit of the Construction Company of the Kansas Pacific Railroad Company. I never heard any objection to its being used by our company. The wire was run into two offices in Denver. Till it was taken down that wire was the wire of the railroad company. Hibbard was superintendent of the third district. I know this only because I communicated with him as such. I suppose my appointment comes indirectly through Hibbard. The appointment was made by Hibbard through the recommendation of his superior officer, General Stager. Hibbard's general authority wouldn't extend into the territory when the wire was put up. His authority only extends to Denver city. It included Denver city. My authority as general superintendent didn't authorize me to erect this line then—my authority is only to look after the general interests of the company within a specified district. I have the employment of operators and the general charge of officers in the sub-district and also the general repairs of the line. As superintendent of the district I have no control over this wire furnished by the Kansas Pacific Railroad, excepting that as a rule all branch offices are subject to the principal office in the city where located, and if I knew of any violation of the rules of the company by operators in General Palmer's office, it would be my duty to report it to the officers of the company, though I might not have any authority to report it. Defendant here asked

Q. "You state Clowrey was superintendent of the second district in which this wire was; how do you know this, of your own knowledge or by hearsay?"

A. "I never saw his credentials; I only know he is recognized as such; I have no positive knowledge that defendant recognized him as such; I supposed him to be such; when I speak of two lines on which I corresponded with Crowley, I mean the two lines by way of Omaha and on the Kansas Pacific Railroad; I suppose the line on the Kansas Pacific Railroad was built by that company; I know that I sold wire to General Palmer for the line on the Kansas Pacific Railroad; the insulators were sent from the east; General Palmer made the contract for the poles; don't know who sent the insulators, at least, who paid for them; that part of the line from Cheyenne to Omaha is the defendants'; that part of the line from Cheyenne to Denver belongs to the United States and Mexico Telegraph Company; this line was taken down by a party coming from the east; I have no positive knowledge who paid the expense; I suppose I know; the wire was taken down by George Macy who was the line builder and repairer; it was taken down by nobody in my employ; it was taken down in order to change the route; the line was built originally for some distance east of Denver on wagon road, and when the railroad was completed, a line was finished through on that and then this wire was taken down and piled up at the junction of the Kansas Pacific Railroad; the wire taken down was the same I sold; a portion of it; no positive knowledge as to Palmer's relation to railroad company; he acted as superintendent of construction. Upon re-examination, witness stated that he had no positive information as to who employed Macy; he also stated that he supposed the defendant operated the line because the railroad company had no power to maintain a commercial line. He also stated:

We operated it and received proceeds, furnished battery for operating line, and operated it by permission of the railroad company. Arrangement with Palmer for building line was that I should set a party to work to build from

Denver eastward. It was in pursuance of this arrangement that wire was being put up at corner Blake and F streets, April 18, 1870.

The plaintiff also gave in evidence that he was riding on Blake street in the city of Denver, on a gentle pony in an ordinary trot, and that when he came to F street his horse became entangled in a telegraph wire and became unmanageable and fell with him; that he was thrown upon the ground and received injuries from which he was at first insensible; that some of his teeth were broken out, blood was discharged from the mouth, and that a contusion was inflicted upon the right knee and thigh, from which he suffered for a period of two months; that his thumb was dislocated; that he was prevented from attending to his ordinary business for a period of forty days, and was compelled to use crutches; that he incurred a physician's bill of \$150, which he had promised to pay, but had not paid. As to the speed at which plaintiff was riding at the time of the accident, several witnesses testified that the horse was going in an ordinary trot, and others stated that he was in a gallop, and that the horse appeared to be unbroken, and quite unmanageable. It was also in evidence that Washburn and Woodward were engaged in putting a telegraph wire upon poles, at the crossing of Blake and F streets, and that, at the time of the accident, the wire was suspended eighteen inches or two feet above the level of the street, to which position it had been elevated shortly before plaintiff came that way; that men were then engaged in raising the wire to the tops of poles, which were placed for the purpose of supporting it; that there was no unnecessary delay in getting the wire up; that there were no guards or signals of danger to the public at or near the wire, although persons in that vicinity called out to plaintiff, as he approached. Plaintiff himself testified that he heard such call just as he struck the wire, but not in time to stop or avoid it; that Blake street, at the point where the accident occurred, was a public thoroughfare, much used and frequented; as much as any place in the city.

Pursuant to 49th section of the charter of the city of Denver (5 Sess. 103), the published ordinances of the city were offered and received in evidence. And section 1 of an ordinance concerning streets and alleys was read, which prohibits any person from obstructing any street or alley with any building material or other thing, without first having obtained the permission of the mayor; also, a certain other ordinance fixing and establishing the grade of Blake and F streets.

The defendant presented eighteen prayers for instructions, none of which were given in the language used by him. Error was assigned upon the refusal of the court to give the following :

1. That the burden of proof is upon the plaintiff to show, not only that the defendant was guilty of negligence, but that he himself was not guilty of negligence or carelessness, before he can recover.

2. That, if the jury believe, from the evidence, that the injury to the plaintiff in this case was the result of the fault or negligence of the plaintiff, or of the fault or negligence of both the plaintiff and defendant, without any intention on the part of defendant, then the plaintiff cannot recover, and the jury must find for the defendant.

3. That the defendant in this case, being a corporation, is only held liable for ordinary care and diligence for the acts of its agents or servants, and if the jury believe, from the evidence in this cause, that ordinary care and diligence was used in putting up the wire at the time and place where the accident occurred, the jury should find for the defendant.

4. If the jury believe, from the evidence, that the plaintiff in this cause contributed to bring about the accident in this cause, by his own negligence or want of care, then they must find for the defendant, even though they should believe, from the evidence, that the defendant had also been guilty of negligence or want of ordinary care.

5. That, before the defendant can be held liable for the injury complained of in this case, it was incumbent on the plaintiff to prove that the persons engaged in stretching the wire across Blake street were the servants or agents of the defend-

ant, and, as such agents or servants, were acting within the scope of their authority at the time of the accident, and, if the fact has not been satisfactorily shown to the jury, they should find for the defendant.

6. That the fact that Mr. Woodward was superintendent of the defendant, in charge of the defendant's line of telegraph south of Cheyenne, and the defendant's office in Denver, is not sufficient to show an authority from the defendant to construct and stretch a wire across Blake street, at the time of this accident, and that, in this case, to fix the liability of the defendant, it should have further appeared in evidence that Mr. Woodward was acting within the scope of his authority in the construction of this work, and further, that the jury cannot infer an authority from this defendant to Woodward to order the stretching of the wire across Blake street, from the fact that he was the general superintendent of the defendant, in charge of its line south of Cheyenne, and its office in Denver.

8. If the jury believe, from the evidence, that the plaintiff received warning, no matter from what source, in time, so that a prudent man in the exercise of ordinary care and diligence could have averted the accident and failed to do so, then he himself is at fault, and the jury should find for the defendant.

9. That before the plaintiff can recover in this action he must show that he was exercising ordinary care and diligence himself to avoid accidents, and if the jury believe, from the evidence, that such ordinary care and diligence was not used by him, or that he was riding at such a gait and in such a manner as to render it impossible to avoid danger when warned of it in time, or that his horse was unmanageable by reason of such gait and manner of riding, or for any other cause, the jury will find for the defendant.

12. That under the pleadings in this case it is necessary for the plaintiff to prove that the defendant is a corporation, and if the plaintiff has failed to prove this fact, they will find for the defendant.

The court charged as follows:

In order to entitle the plaintiff to a verdict in this case it is incumbent upon him to establish :

1. That the injuries complained of by him resulted directly from the negligence of the servants or agents of the defendant while engaged in doing what was within the scope of their authority and agency to do.

2. That the culpable negligence of the plaintiff did not contribute to occasion such injury : that is to say, that the plaintiff himself did not, on the occasion complained of, omit to exercise such effort and caution to avoid the accident and injury, as a man of ordinary prudence and circumspection placed in the same circumstances would have exercised.

Before the jury can find that the persons who erected the wires were the agents of the defendant and acting within the scope of their authority, the jury must be satisfied by the evidence that the said persons had been before the time thereof directed or employed to erect said wires by the agents or officers of the defendant, or some of them, having authority to direct the construction of lines of wire within the district containing the city of Denver. If the jury believe, from the evidence, that the persons who erected the wires had not such original authority, then, there being no evidence in the case which will warrant the inference of a subsequent ratification by defendant, the jury must find for the defendant.

3. If the jury believe that those who erected the wires had authority from defendant in the first instance, and that said wires were erected in a negligent manner, and that the injuries complained of by plaintiff resulted in any degree from this negligence, then the jury will also consider whether the plaintiff was guilty of culpable negligence which contributed to produce such injuries.

4. And if the injury complained of resulted without negligence of the defendant or from the negligence of the defendant, and the culpable negligence of the plaintiff, as above defined, combined, the plaintiff cannot recover.

5. If, before the alleged accident, the plaintiff was called to, or warned, by persons standing near the vicinity, whether

employees of the defendant or not, and the call or warning was so definite as to apprise him of the existence and locality of the obstructions alleged to have occasioned the injury, and came in such time that the plaintiff, by the exercise of such care and effort as a man of ordinary prudence in the same circumstances would have exercised, might have escaped the injury complained of, and if, notwithstanding such warning, the plaintiff continued his progress, then the plaintiff was guilty of culpable negligence.

6. In determining whether plaintiff was, or was not, guilty of culpable negligence, the jury may consider the rate or gait at which plaintiff was riding at the time and place at which the accident is alleged to have occurred, and whether, with reference to that time and place, the rate at which plaintiff was riding was, or was not, immoderate or unreasonable.

If plaintiff was riding at a rate which a man of ordinary prudence would not have ridden at that place and time, and if riding at no faster rate than a man of ordinary prudence at that time and place would have ridden, plaintiff might have escaped the injury complained of, then plaintiff was guilty of culpable negligence.

7. But if the plaintiff was riding at a rate not faster than a man of ordinary prudence and circumspection would have ridden at that time and place, and notwithstanding the warning alleged to have been given could not have checked his speed by the exercise of such exertion as a man of ordinary prudence would have exercised upon the same warning and in the same circumstance, then the plaintiff was not guilty of culpable negligence in omitting to heed such warning.

8. In determining whether plaintiff was or was not guilty of culpable negligence contributing to the injury complained of, the jury may also consider whether the horse ridden by plaintiff was well broken and manageable, or otherwise.

9. If the plaintiff was riding an unbroken or unmanageable horse in a crowded thoroughfare, and the accident to plaintiff resulted from the inability of plaintiff to check his speed by reason of such unmanageability, and if the plain-

tiff, after the alleged warning given, might, by the exercise of such effort as a man of ordinary prudence would have exerted under like circumstances, have checked his speed, had the horse been a well broken and manageable horse, then the plaintiff cannot recover.

10. If the defendant's agents and servants, acting within the scope of their authority from defendant, were engaged in constructing a telegraph line in the city of Denver, and in such construction stretched a wire across one of the public and frequented streets of said city during the hours of the day when such streets are wont to be so frequented, and suffered such wire to remain stretched across said street, and elevated such distance above the ground as to obstruct or entangle the feet of a horse passing upon said street, for the space of one-half minute to a longer period, and if, unless such wire was of such size and character as to be easily seen by persons approaching at a moderate speed, defendant's agent omitted to station flag, sentinels or other sufficient means of warning, to warn or notify passers by of the place where such wire was stretched; or if defendant's agents did station such sentinels, and they failed to give warning to plaintiff, then the defendant was guilty of negligence; and if from such negligence the injury complained of occurred without culpable negligence on the part of plaintiff contributing thereto, then the jury ought to find for the plaintiff, and in fixing the plaintiff's damages, should compensate the plaintiff not alone for his actual loss in the loss of time during his confinement, or disability, if any, resulting from the alleged accident, but may award exemplary damages proportioned to the nature and extent or character of the injury. And all circumstances of aggravation or extenuation attending the alleged negligence of defendant, and the extent of such damages, is to be measured by the sound discretion of the jury in view of all the circumstances, but such damages are not to exceed the damages laid in the declaration, \$10,000.

11. The jury will not allow, in estimating the actual damages sustained by plaintiff, the expenses incurred or for

which plaintiff has become liable for the medical attendance of the witness McClellan.

12. The jury will consider the ordinances of the city of Denver, read before them only for the purpose of ascertaining whether the streets called Blake and F streets were or were not at the time of the alleged accident public highways.

The defendant assigned error in this court upon the second, third, seventh and tenth of the foregoing instructions.

Messrs. CHARLES & ELBERT, for appellant.

Mr. N. HARRISON and Messrs. BROWNE & PUTNAM, for appellee.

BELFORD, J. This was an action on the case instituted by the appellee against the appellant to recover damages for injuries sustained by the appellee by reason of the negligence of the appellant in the construction, erection and establishment of a line of telegraph through and over a portion of the city of Denver and across Blake street. The defendant filed four pleas: 1st. The general issues. 2d. *Nul tiel* corporation. 3d and 4th pleas set up that the injury was occasioned by the contributory negligence of the plaintiff. A demurrer was sustained to the second, third and fourth pleas, and the case was tried on the general issue. A verdict for the plaintiff for \$5,000. Motion for new trial overruled. Judgment on the verdict and appeal.

It is claimed first that the court erred in sustaining the plaintiff's demurrer to the defendant's second, third and fourth pleas.

It is no objection to a plea which is well pleaded in other respects that the matter of it may be given in evidence under the general issue. The right to plead as many pleas as a defendant may deem necessary for his defense is secured by statute. In so pleading, however, it is not his privilege to incumber the record with tautologous allegations, nor with pleas which while they pretend to be special amount only to a denial of the plaintiff's allegation. Where a plea

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amounts simply to the general issue, and when the matters set up in it may be given in evidence under the general issue, the usual course is to strike such plea from the files on motion. It has been held, however, by some respectable courts that a general demurrer will also be sustained. *Curtis v. The Central Railroad Co.*, 6 McLean, 401.

Any matter of defense which denies what the plaintiff on the general issue would be bound to prove, may and ought to be given in evidence under the general issue, and a plea setting up negatively such facts is bad. *Bank of Auburn v. Weed*, 19 Johns. 302. But any ground of defense which admits the facts alleged in the declaration, but avoids the action, by matter which the plaintiff would not be bound to prove or dispute in the first instance on the general issue, may be pleaded specially. Evidence that the plaintiff's negligence contributed to the injury sued for may be given in evidence under the general issue. *Indianapolis Railroad Co. v. Rutherford*, 29 Ind. 82; *Bridge v. Grand Junction Railroad Co.*, 3 M. & W. 244. If the negligence of the plaintiff did contribute to the injury, that was a fact to be proved by the defendant. *Railroad v. Glodman*, 15 Wall. 401. I therefore see no objection to the ruling of the court on the demurrer as to third and fourth pleas. The second plea—that of *nul tiel* corporation—seems to have been regarded by the court as a plea of abatement, and by the plaintiff's counsel as objectionable, not only on that ground, but on the further ground that the general issue filed in the case admitted that the defendant was a corporation, and the two pleas, being inconsistent, could not stand together. I think that both court and counsel were mistaken in the estimate placed on this plea. It seems to be almost uniformly held that when an action is brought by a corporation plaintiff and the defendant files the general issue, the capacity of the plaintiff to sue is admitted. *Phoenix Bank v. Curtis* 14 Conn. 438, and authorities cited. In Massachusetts and New York, decisions are to be found wherein it is held that where a corporation is defendant and files the general issue, it devolves upon the plaintiff to prove the corporate capacity

of the defendant. *Stoddard v. The Onondaga Annual Conference*, 12 Barb. 573 ; *Gott v. Adams Express Company*, 100 Mass. 320. It must be observed that in Massachusetts the plea of not guilty is made, by rule of court, tantamount to the distinct denial of each and every allegation contained in the plaintiff's declaration. While at common law in cases involving injuries to the absolute rights of persons, this only puts in issue the act complained of, but in injuries to the relative rights and to personal and real property, it puts in issue the existence of the right as well as the commission of the act complained of. 1 Chitty's Plead. 473. If the plea of the general issue admits the legal existence and competency of a corporation to maintain an action, I cannot perceive why the same rule should not apply to corporations when sued as defendants. The only effect of the admission is that at the time of the institution of the suit, the corporation a party thereto was capable of suing or being sued. That the rule is applicable in both cases is held by at least two respectable courts. *Gay v. Kay*, 30 Ill. 422 ; *Freeman v. Milles*, 38 Me. 345 ; *Oldtown v. Veasie*, 39 id. 571 ; also, 587. Was the special plea filed by the defendant, denying the corporate existence, in abatement or bar of the action ? Speaking on this subject, SHARSWOOD, J., says :

A plea in bar impugns the right of action altogether; a plea in abatement only the form or names in which it is brought. Stephen on Plead. 432. Hence the misnomer of a corporation as well as of a natural person must be pleaded in abatement. But the defense that there never was such a natural person as the plaintiff *in rerum natura*, or that such a corporation as that named as plaintiff or defendant never existed, which are pleas of precisely the same nature, go to the right of action altogether, and are, therefore, pleadable in bar, one reason is that, in the latter case, the defendant cannot give the plaintiff a better writ, which must generally be done in abatement. In a case reported in the Year Book 22 Edw. IV, it is held that in an action by a corporation or natural person, misnomer of the one or the other goes only to the writ, but to say there is no such person *in*

rerum natura, or no such body politic, this is in bar, for if he is misnamed, he can have a new writ by the right name, but if there be no such body politic or no such person, then he cannot have such action. This decision has been recognized and followed in subsequent cases both in England and in this country. *Mayor and Burgesses of Stafford v. Bolton*, 1 Bos. & Pul. 40; *Malden v. Miller*, 1 B. & Ald. 704; *Bank of Metropolis v. Orme*, 3 Gill. 444; *Town of Lewiston v. Proctor*, 27 Ill. 414; *Hoerett v. Franklin Mill Co.*, 30 id. 157; *School District v. Blaisdell*, 6 N. H. 198; *Proprietors of Sanopee v. Eastman*, 32 id. 473; *Northumberland County Bank v. Eyer*, 60 Penn. St. 439; *Gaines v. Bank, etc.*, 12 Ark. 769. The plea must show, when in bar, that it goes to the cause of action alleged in the declaration, and not to the form or name in the writ. It has been settled, therefore, from the earliest period, that it is not enough in such a plea in a suit by a natural person to aver that there was no such person in *rerum natura* at the time of the issuing of the writ, but it must allege that there never was such a person. The same rule applies to the plea of *nul tiel* corporation.

In Massachusetts the plea of *nul tiel* corporation is regarded as good whether plead in abatement or bar of the action. *Christian Society, etc., v. McCumber*, 3 Met. 235; *Townsend v. First Freewill Baptist Church*, 6 Cush. 281; *Greenwood v. Lake Shore Railroad Co.*, 10 Gray, 374, and to the same effect is the case, *The Society, etc., v. Paulet*, 4 Pet. 480. It has been suggested that it is an anomaly in the law for a corporation to interpose this plea. The right to do so is abundantly established by many respectable courts. See authorities last above cited; also, *Judah v. Ins. Co.*, 4 Ind. 336; *Stone v. Cong. Society Berkshire*, 14 Ver. 86. In the plea under consideration it is averred "that it, the said defendant, was not at the commencement of said suit, and is not now, and was not, at the time the said supposed grievances in the declaration mentioned were committed, a corporation as by the said writ and declaration is

above supposed, etc. Taking this plea as true, it goes to the whole cause of action.

It is a special traverse of a material allegation of the declaration, to wit: that the defendant is a corporation. If there is no corporation, then the action must be defeated. It is claimed, however, that the plea of the general issue and the plea of *nul tiel* corporation are inconsistent and repugnant. That one wars upon the other. That the one denies what the other admits. Our statute provides that the defendant may plead as many matters of fact in several pleas as he may deem necessary for his defense. I take it to be well settled that when several pleas in bar are pleaded in virtue of this statute to one and the same thing or demand, each of them is treated, and operates as if it were pleaded alone. It being an established rule that one of them cannot in the language of Chief Justice WILLES, "be taken in to help or destroy another, but that every plea must stand or fall by itself." Commenting on a similar statute in England, Mr. Gould, page 433, section 26, says: "Many questions have heretofore arisen, as to *what* several defenses in bar may be pleaded together under this statute to one and the same demand," and a copious catalogue of such pleas as may, and of such as may not, be thus pleaded together is presented in Comyn's Digest, Pleader, E. 2. For an opinion was formerly entertained that mere inconsistency between two given pleas was a decisive objection to their being pleaded together, under the statute. But if such a rule should prevail, the statute would, in a great measure, be practically repealed. For the general issue which is almost universally the first of the several pleas pleaded together under the statute, is, on strict common-law principles, inconsistent with almost every special matter of defense whatever. At this day, however, it appears to be generally understood, as a sound rule in the construction of the statute, that mere *inconsistency* between two or more pleas in bar is no objection to their being pleaded together. A rule which would appear to follow of course from one before laid down, viz.: "That each of several pleas thus pleaded together is to be

considered as independent of all the others, and to operate as if pleaded alone." Of course this doctrine only applies to those pleas which require the same mode of trial. Pleas of abatement and bar cannot be pleaded together even under this statute. It seems to me therefore that the plea of *null tiel* corporation filed by the defendant was a plea in bar, that it had a right to file the same, and that the sustaining of the demurrer thereto was error. On this subject, however, the majority of the court are at variance with me. A number of exceptions have been taken to the instructions, and it becomes important to examine them.

The first instruction given by the court is as follows: "In order to entitle the plaintiff to a verdict, it is incumbent on him to establish: 1st. That the injuries complained of by him resulted directly from the negligence of the servants or agents of the defendant while engaged in doing what was within the scope of their authority and agency to do. That the culpable negligence of the plaintiff did not contribute to occasion such injury, that is to say, that the plaintiff did not, on the occasion complained of, omit to exercise such effort and caution to avoid the accident and injury as a man of ordinary prudence and circumspection placed in the same circumstances would have exercised." It is claimed by the appellant that the instructions given do not embrace the law; that if the plaintiff was guilty of any negligence, that fact alone would preclude a recovery.

I am unable to accede to this proposition. It is conceded by text-writers, that all the American decisions upon this question have been professedly based upon the English precedents, and that if we can ascertain what was the real meaning of the English decisions thus cited, they should have controlling influence. Their conclusions are generally so reasonable and so clearly expressed, that but little hesitation can be felt in relying upon them as furnishing the true rule. In *Butterfield v. Forrester*, 11 East, 60, Lord ELLENBOROUGH says: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not himself use

common and ordinary caution to be in the right — one person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support the action; an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. In the case of *Bridge v. The Grand Junction Railway Co.*, 3 M. & W. 244, PARKE, B., says: "The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*, and that rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. If by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule as to the exercise of ordinary care is applicable to questions of this kind."

In the case of *Davies v. Mann*, 10 M. & W. 545, the same subject is considered, and it is there held that the plaintiff is entitled to recover, notwithstanding he may be guilty of some negligence, if the defendant might, by proper care, have avoided inflicting the injury." To the same effect is the case of the *B. & O. R. R. Co. v. Fitzpatrick*, 35 Md. 32; Am. Law Reg. (N. S.), vol. 11, 596. I think the true rule is, and should be, that if the plaintiff exercise reasonable care, though he may have been guilty of some negligence or want of caution, he is still entitled to recover for any injury sustained in consequence of the defendant's negligence. To defeat his action he should not only contribute to his injury, but he must be in fault in so doing. If his share in the transaction be innocent, and not faulty, it should furnish no excuse for a defendant. Shearman & Redfield on Negligence, § 28, and note 3, p. 16. And this doctrine seems to have received the warm approval of the court of appeals in New York. In *Fero v. Railroad Company*, 22 N. Y. 215, BACON, J., says: "It is very possible that by unusual precaution and watchfulness on the part of the plaintiff, the consequences of the defendant's wrong might have been

less disastrous; yet, if he was guilty of no culpable negligence, the mere fact that he might have been more vigilant will not excuse the wrongful act of the defendant, nor deprive the plaintiff of all redress for the injury he has suffered." So in *Cook v. Transportation Co.*, 1 Denio, 91, BEARDSLEY, J., says: "There must be some wrongful act or culpable negligence on the part of the plaintiff to bar him on this principle."

It seems to me, therefore, that the instructions given lay down the law correctly, and are in no way open to the objection urged by appellant.

The court further instructed the jury: "That in fixing the plaintiff's damages they should compensate the plaintiff not alone for his actual loss of time during his confinement or disability, if any, resulting from the alleged accident, but might award exemplary damages proportioned to the nature and extent or character of the injury." Saving the question of exemplary damages for subsequent comment, I am of the opinion that the court below was quite favorable to the defendant in laying down the rule of damages in this case. When an injury is received of such extent and character as must disable one from labor, and require nursing and medical treatment, the loss from inability to labor and the expense of medical treatment are the necessary and uniform consequences of such an injury. They are not special damages in the sense of the term as it is used in the law of pleading and evidence; they are not caused by an incidental fact, or by the peculiar situation of the party, but are the natural and uniform effects of such injury. In addition to the mere expense of nursing and medical treatment, it has been held that a party suffering from injury occasioned by the neglect of another is entitled to recover for his bodily pain and mental suffering. And evidence is admissible to show the loss he has sustained by reason of his failure to prosecute his business. *Swarthout v. New Jersey Steamboat Co.*, 46 Barb. 222; *Nebraska City v. Campbell*, 2 Black, 591; *Wade v. Leroy*, 20. How. 34, 43, 44. And speaking on this subject, Judge

REDFIELD says : " There can be no doubt of the construction of this rule, the courts all agree in this." Am. Law Reg., vol. 10, p. 36. It is claimed by the appellant that the court erred in instructing the jury that the plaintiff was entitled to recover exemplary damages. 1st. Because the negligence which is the foundation of the suit was the negligence of the defendant's servants ; and, 2d, because the facts of the case disclose no fraud, malice, violence or cruelty. Indeed, it is strenuously insisted on, that in the absence of *gross fraud, malice or oppression*, no exemplary damages can be awarded in any case. It is further intimated that in no event can such damages be allowed against a corporation.

Notwithstanding the divinity which was anciently supposed to hedge in a corporation and shield it from liability on account of the wrongs done by its agents, these institutions, like all others, have fallen under the dominion of the law, and courts have not only applied to them principles congenial to the present condition of society, but such as have been for a long time applied to the conduct of individuals. We recognize the fact that corporations enter into almost all the concerns of life, political, financial, eleemosynary. They build churches, erect colleges, construct railroads, operate mines, run newspapers, distribute charities, and in some instances claim to be the sole custodians of the keys that unlock the gates of glory. In every instance they act through agents, and so acting they may be made responsible in an action on the case for a tort ; and even in an action of trespass, if by their managers and authorized agents, they command the trespass to be committed, or sanction or approve the act when done. 1 Chitty, 87 ; *Underwood v. Newport Lyceum*, 5 B. Monroe, 130. Artificial, as they may be, there is still a human intelligence and volition controlling their affairs just like those of an individual, and which may act wrongfully, maliciously and recklessly, thus laying the basis for exemplary damages. Whatever may have been the doctrine anciently, it is now too well settled to be uprooted, that corporations like these defend-

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ants, which are established and conducted in whole or in part for the pecuniary benefit of the members, are liable in actions for torts in the same way, and to the same extent as individuals and natural persons. *Railroad v. Rogers*, 28 Ind. 1; *Chestnut Hill, etc., v. Rutler*, 4 S. & R. 6; *Hawkins v. Steamboat*, 2 Wend. 452; *Goodspeed v. Bank*, 22 Conn.; *Hopkins v. Railroad*, 36 N. H. 9. And it is equally well settled that where their conduct is characterized by gross negligence, although there may be an absence of malice and oppression, still they are amenable to exemplary damages. *Hopkins v. Railroad*, 36 N. H. 9; *Belknap v. Railroad*, 49 id. 358; *Henon v. McLaughan*, 32 Miss. 1; Sedgw. on Damages, 3d ed., 36. Text-writers have defined gross negligence to be the want of even slight care and diligence. In estimating the degree of care which it is incumbent on a person to use, regard must be had to the work to be done, and the place where it is to be done. If a switch were left open so that a passenger train jumped the track, this would certainly be a case of gross negligence, because it would indicate a heedless disregard for human life, and for the safety of passengers who intrust themselves to the care of the road. So the leaving open an area in a thoroughfare of a city, without putting up any thing to warn travelers of danger, has a strong character of cruelty and moral turpitude. So when a telegraph wire is found swinging across a public way at such height as to obstruct and endanger ordinary travel, it is in itself, unexplained and unaccounted for, evidence of negligence. *Thomas v. Western Union Telegraph Co.*, 100 Mass. 156. So, too, it has been held that where carriers undertake to convey persons by the powerful, but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence, and any negligence in such cases says GRIER, J., deserves the epithet of gross negligence. *Railroad v. Derby*, 14 How. 486. So in *Shields v. Blackburn*, 1 H. Bl. 161, it is said by HEATH, J.: "If a man applies to a surgeon to attend him in disorder for a reward, and the surgeon treats him improperly, there is

gross negligence;" and Lord LOUGHBOROUGH declares that omission to use skill is gross negligence. That which is harmless under one state of circumstances becomes highly reprehensible under another. It is claimed, however, that there is nothing in the evidence from which gross misconduct, amounting to recklessness, could be inferred, or that the persons who stretched the wire across Blake street were actuated by willful or intentional motives to injure the plaintiff, or any one else; that they were engaged in a great public work which commends itself to the protection of the law; that persons engaged in the erection of telegraph wires across the streets of a city are absolutely compelled by law to place such wires in position in the short space of one-half minute, or be liable for gross negligence, is a rule that must be regarded as unreasonable and harsh, for it is absolutely requiring of all who may engage in an enterprise of this kind an impossibility, and instead of making the law a protection to such persons, it would become an engine of oppression. It is but just to the court below to say that the counsel misapprehends and misconstrues the instruction. It does not require the erection of the wire in one-half minute, or in any length of time. What it does require is, that at no time during its erection shall it be left unguarded so that it may become an object of stumbling, and a snare to those who travel the public streets. And thus understood, it is far from being unreasonable and harsh. It may be conceded that a company has a right to construct a telegraph line through the streets of a city, but the exercise of this right or privilege is accompanied by a public duty, that cannot be ignored nor disregarded, and that duty is to see that the public suffer no detriment, and that individuals are exposed to no danger through the laches or negligence of the party doing the work. Every precaution must be taken to prevent mishap. Guards, flags, or other means equally efficacious, should be used to warn the people that the street is obstructed. In this case it does not appear that any precaution whatever was taken; the public were left to learn that there was obstruction by becoming

entangled in it. I can hardly conceive of a case that savors more strongly of gross and culpable negligence. *Clark v. Fry*, 8 Ohio St. 359; *Chicago v. Robbins*, 2 Black, 418. Nor is it necessary that an intention to inflict injury should exist. The law requires the plaintiff to show nothing of the kind. If the negligence of the defendant is such as to cause injury, and does cause injury, it is immaterial what his intentions are or may be, the result is the same, as is also his liability. *Amish v. O'Hana*, 6 Blackf. 258; *Tally v. Ayres*, 3 Sneed, 677. That is negligence which the law does not excuse, and it certainly does not excuse an injury inflicted on an individual through carelessness. It is objected to this instruction, that it takes away from the jury the determination of the degree of negligence. The language of the court is substantially, "That if the negligence of the defendant occasioned the injury, then the jury should award exemplary damages." It seems clear that every degree of negligence does not warrant the infliction of such damages. There is a class of acts extremely injurious to individuals, of which the criminal law takes no cognizance, and yet that which the public interests require shall be punished. I refer to those acts whose commission is attended with fraud, malice, oppression or gross negligence. When either of these elements mingle in the controversy, the law, instead of adhering to the system of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, it blends together the interest of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender.

When the wrong done to the party partakes of a criminal character, though not punishable as an offense against the state, the public may be said to have an interest that the wrong-doer should be prosecuted and brought to justice in a civil suit; and exemplary damages may, in such cases, encourage prosecution where a mere compensation for the private injury would not repay the trouble and expense of the proceedings. But it is only where these elements, or

one of them, enter into the act that this species of damages is allowed. Fraud and malice and negligence are by no means identical in their nature and effect. Fraud is a deceitful practice or willful design, resorted to with intent to deprive another of his right, or in some measure to do him an injury. It is always positive — the mind concurs with the act. What is done, is done designedly and knowingly ; but in negligence, whatever may be its grade, there is no purpose to do a wrongful act or to avoid the performance of a duty. There is, however, an absence of proper attention, care or skill ; it is strictly non-feasance, not malfeasance ; this is the general idea, and it makes the distinction between negligence and fraud. In the first, there is no positive intention to do a wrongful act ; but in the latter, evil is designed or intended, and this seems to be equally true of malice. *Gardner v. Hearth*, 3 Denio, 232, 237. BEARDSLEY, C. J., in *Railroad v. Munger*, 5 Denio, 267, says : "Negligence, even where gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act." It must not be overlooked, however, that there is a strong tendency in the courts to ignore these degrees of negligence which owe their birth to the civil law, and which were engrafted on the common law. Speaking on this subject, CURTIS, J., in *Steamboat New World v. King*, 16 How. 475, says : "It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so ; one degree, thus described, may not only be confounded with another, but it is quite impracticable to distinguish them. Their significance necessarily varies according to circumstances to whose influence the courts have been forced to yield, until there are so many real exceptions, that the rules themselves can scarcely be said to have a general operation." He further adds, "Recently the judges of several courts have expressed their disapprobation of these attempts to fix degrees of diligence by legal definitions, and have complained of the impracticability of applying them." *Wilson v. Bret*, 11 M. & W. 113 ; *Wylde v. Peckford*, 8 id. 443.

461, 462; *Henton v. Dibbin*, 2 Q. B. 646, 651. It may be added that some of the ablest commentators on the Roman law and on the civil code of France have wholly repudiated this thing of three degrees of negligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. In the case in 13 Wallace, it would seem to be clearly deducible from the language of Mr. Justice FIELD, that all degrees of negligence are ignored by that court. In the case of the *Railroad v. Heaton*, 87 Ind. 455, the court treat these degrees of negligence with manifest disfavor. So, also, in *Davis v. Graham*, 4 Ohio St. 362. In *Steinway v. Railway*, 43 N. Y. 123, the court say, "That the defendant, a corporation, was liable if there was negligence on its part, without regard to any supposed distinctions or degrees of negligence." It is strenuously insisted on by the appellant, that the court should have submitted to the jury the question of gross negligence; that it is a question of fact for the jury, and not one of law for the court. We cannot accept this as being the true doctrine in the broad language in which it is stated. Sometimes negligence is regarded as a simple question of fact, sometimes as a mixed question of law and fact, and not infrequently as a pure question of law. Speaking on this subject, Judge REDFIELD says: "The question, whether a party has been negligent in a particular case, is one of mingled law and fact. It includes, indeed, two questions, whether a particular act has been performed or omitted, and (2) whether the performance or omission of this act was a breach of a legal duty. The first of these is a pure question of fact, the second, a pure question of law. The extent of the defendant's duty is to be determined by a consideration of his circumstances, and though the law defines the duty, the question, whether the circumstances exist which impose that duty upon a particular person, is one of fact. When the facts are clearly settled, the court should decide the case as a matter of law." *Shearman & Redfield's Neg.* 12. The facts which show the existence of gross negligence are un-

controverted. We have the case of a company erecting a telegraph wire in the streets of a city, where people are constantly passing and repassing. We have the fact that this wire was suspended across the street, at a distance from the ground calculated to obstruct and entangle people as they passed. We have the further fact that no guards were stationed, nor flags put up to warn people of the pending obstruction. The omission to use these precautions was a plain breach of a public duty. Although these facts were uncontroverted, the court still submitted them to the jury, and they were told that if they found them to exist, they would be justified in awarding punitive damages. In this there was no error.

It is claimed, however, that the evidence fails to show that the wire was being erected under the direction of the defendant. We are of a different opinion. The facts disclosed are as follows: B. F. Woodward was in the employ of the defendant as operator and manager at this place; subordinate, however, to Hibbard, who was the defendant's superintendent for the third division, Clowry was also in the employ of the defendant, as superintendent of the second division. Woodward, under directions from Hibbard, employed Washburn to put up the line. The expenses were reported to Clowry, and the money to adjust them forwarded by him. Here, then, we have three superintendents of the defendant all engaged in the work of erecting a line, and their conduct supplemented by the further fact that the line is used by the company, and the money, arising therefrom, placed in the general treasury. If corporations are invisible and intangible, this one comes quite prominently into view through gentlemen who fill its offices, and manage its affairs.

It is claimed, however, that all this does not show that these superintendents had authority from the company to do this work. By the general rules of evidence, presumptions are continually made, in cases of private persons, of acts even of the most solemn nature, when these acts are the natural result or necessary accompaniment of other circum-

stances. For instance, it presumes that every man in his private and official character does his duty until the contrary appears. It will presume that a man acting in a public office has been rightly appointed. The same presumptions are applicable to corporations. Persons acting publicly as officers of the corporation are presumed to be rightfully in office. Acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. Each affords presumptions from acts done of what must have preceded them, as matters of right or matters of duty. *Bank v. Dandridge*, 12 Wheat. 69, 70; *Spilman v. Foster Iron Co.*, 56 Barb. 151; *Railway v. James*, 24 Wis. 392. In the absence of any direct proof, as to the authority of these superintendents, the jury were warranted in presuming that they had it. It is further objected, that the court erred in permitting the appellee to question Woodward about a supposed contract. This contract was not offered in evidence. The interrogatories simply went to its existence. What it did or did not contain, or whether it existed at all, does not appear. We do not think that this attempt to prove a contract had any influence with the jury. If any injury was apprehended from this, the appellant should have asked the court for an instruction, and failing to do so, the question cannot be raised here. *Penock v. Dunlogan*, 2 Pet. 15. Complaint is made because the court allowed the plaintiff to introduce the ordinances of the city of Denver. These were clearly admissible, not only to show that Blake street was a highway, but also on the question of negligence. *Railroad v. Taffe*, 37 Ind. 376; *Railroad v. Fitzpatrick*, 35 id.; *Chicago v. Rollins*, *supra*. Other points are made which we have carefully examined. We are all of the opinion that no

error was committed on the trial of this case, and the judgment is therefore affirmed.

WELLS, J. No opinion is expressed upon the question whether the plea of *nul tiel* corporation may be pleaded in bar, or not, but the majority of the court are of the opinion that the defendant cannot deny its own capacity by a plea pleaded either alone or with other pleas in abatement or in bar. If the defendant be not a corporation, then it is nothing; it cannot appoint an attorney, it cannot, by attorney or otherwise, be present in court; it cannot plead, for it is not; the plea is, therefore, *felo de se*. *The President & Trustees, etc. v. Wadleigh*, 6 Blackf. 297.

The demurrer to this plea was, therefore, properly sustained.

Upon the other questions the opinion of Mr. Justice BELFORD is the opinion of the whole court.

Let the judgment of the district court be *Affirmed*.

JUDGMENT REVERSED in 91 U. S. 495, on authority of *Milwaukee & St. P. R. R. Co. v. Adams*, 91 U. S. 489.

CONTRIBUTORY NEGLIGENCE: *Colorado Cent. R. R. v. Lea*, 5 Colo. 200.

EXEMPLARY DAMAGES, WHETHER PROPER: *Murphy v. Hobbs*, 7 Colo. 582.

PLEADING — NUL TIEL CORPORATION: *Gulf R. R. Co. v. Shirley*, 20 Kan. 664.

MACHETTE v. WANLESS.

CHATTEL MORTGAGE — *not acknowledged*. A chattel mortgage made upon good consideration, although it has not been acknowledged according to the statute (R. S. 102), is good against the mortgagor, and one claiming under him, by virtue of a void conveyance.

In a contest between mortgagees, respecting the possession of chattels conveyed to each, by one who is admitted to be the owner, neither mortgage being properly acknowledged: *Held*, that the defendant's mortgage, if executed without consideration, and to save the property to the mortgagor, must yield to the plaintiff's mortgage, the latter being made upon good consideration.

PRACTICE — *order of putting in testimony*. Whether a plaintiff shall be allowed to anticipate the defense of his adversary, and in the opening put in evidence, which might well be reserved for rebuttal, is so far in the discretion of the court at the trial, that the judgment will not, for that reason, be disturbed, unless it appears to have been prejudicial to the defendant.

PRACTICE — *assigning errors*. Exceptions taken to rulings of the court during the progress of the trial, in admitting and rejecting testimony, should be particularly set out in the assignment of errors.

A motion for new trial, and exception to the ruling of the court thereon, presents in this court only the finding of the jury, upon the evidence, and not the points determined during the progress of the trial, although such points may have been reiterated in the motion for new trial.

EVIDENCE—*privileged communications* between attorney and client do not include declarations made to one to whom defendant applied to have a mortgage prepared, because,

1. The person to whom application was made was not consulted as an attorney, but merely employed as a scrivener.
2. It did not appear in the evidence that the person to whom application was made was an attorney and counselor at law.

NEW TRIAL. Where the evidence is conflicting, the verdict will not be disturbed.

WITNESS—*instruction as to credibility.* Where there is no evidence in the case tending to corroborate a witness, the jury may be instructed, that if they believe any witness has willfully testified falsely to any material fact in the case, they are at liberty to disregard all of such witnesses' testimony, or any part thereof.

MEASURE OF DAMAGES *in replevin.* Where the property in dispute is intended for consumption, interest upon the value of it, at the rate fixed by law, is the true measure of compensation for the detention of it.

INSTRUCTION *as to form of verdict.* The court may prescribe the forms of verdict to be used by the jury, and the jury, being told that they are forms only, could not be misled thereby.

JUDGMENT FOR COSTS—*omission of.* Where each party is entitled to costs the circumstance that judgment has not been entered in favor of appellant is not an objection to that which has been properly entered in favor of appellee.

Appeal from District Court, Arapahoe County.

THIS is the second appeal in this cause, the first being reported in 1 Colorado, 225. The writ was in the *detinet* against Charles C. Machette and Joseph Zollinger, for three hundred bushels wheat, ninety bushels oats, twenty bushels barley, of the value of \$1,200. In the declaration there was a count in replevin and in trover. To the count in replevin, the defendants pleaded first, *non detinet*; second, property in the defendant, Machette; to the count in trover, not guilty.

At the trial the plaintiff gave evidence tending to prove that in the year 1867, one Edwin A. Goff occupied plaintiff's farm as a tenant; that plaintiff, from time to time, advanced money to the said Goff, and took notes therefor secured by

mortgage, on one-half of the growing crop on plaintiff's farm. This mortgage being offered in evidence, together with the notes, defendant objected, that it was not acknowledged within the precinct where the mortgagor resided, and offered to show, by testimony, that such was the fact, but the court rejected such testimony, and the mortgage was read; the defendant, also, objected to the notes, that they were not sufficiently identified with the mortgage, which objection was also overruled, and the notes were read. The plaintiff also gave evidence to prove that some effort was made by defendant, Machette, to conceal the property at, and before, the time the writ was issued; that the grain replevied was grown by Goff, upon the plaintiff's farm, and was the same as described in the mortgage to plaintiff; there was much testimony as to the amount and nature of the indebtedness from Goff to plaintiff.

Mr. Mitchell Benedict was called by plaintiff, and stated that Goff called on him professionally, on the 6th of June, 1867, in relation to drawing a mortgage; that Machette was there part of the time, and that he drew up a mortgage in the interest of Machette; he was the grantee. The witness was then asked to state what was then and there done, to which the defendant objected, that whatever the witness knew, he acquired professionally, and it was not proper as going to show the validity of the mortgage. The court overruled the objection, and the witness answered;

On that day, sometime in the forenoon, Machette and Goff came to my office, and wanted to know how long it would take to draw a mortgage; I replied, not more than five or ten minutes; Goff then stated to me — think Machette was present — Goff gave me a description of the property, and I drew the mortgage; Goff desiring I should be quick about it, as Sayre was drawing a mortgage of the same property in the interest of Col. Wanless; I drew the mortgage as speedily as I could and the note; Wilson was present, and took the acknowledgment in my office; Wilson was brought there — or sent for — I think Machette got Wilson; there was no money passed at all; I believe there

was a conversation as to something being wrong ; there was a note drawn at the same time, and signed by Goff ; Machette and Goff had a talk as to the amount to be inserted in the mortgage ; think there was some figuring as to the amount ; when I asked for the amount, Machette and Goff had a conversation among themselves, and had some figuring, and gave me the amount ; wouldn't like to say whether the figuring was as to the amount of the indebtedness or the value of the crop ; I recollect that at the time they were talking, the amount of ground in wheat and barley was talked about, and there were some other crops, and some potatoes ; that was all the conversation in reference to the figuring.

In answer to defendant, the witness testified as follows : Goff paid me for this work and advice ; wouldn't be positive about it ; they asked me the amount, and said they couldn't pay then, but would as soon as they should get the \$100 from Wanless.

Mr. Carlos Gove, a witness for plaintiff, stated, that defendant, Machette, declared to him, in the early part of August, 1867, as near as he could remember, that Goff had rented Wanless' place, and that Wanless had taken a mortgage of the crops on the place ; that he had also taken a mortgage, and had succeeded in getting it on record, in advance of Wanless ; that he was going to dispose of the grain, and make it a present to the wife and daughter of Goff, to enable them to go back to the States ; the witness asked defendant if he had any claim on the crops, and he said nothing further than to make it a present to them to get away with ; that it was a sham affair, or something to that effect. It will be observed that the evidence of these witnesses relating to the mortgage from Goff to Machette, was given by plaintiff, in the opening of the case, and before that mortgage had been offered by the defendant.

H. Machette, on behalf of defendants, testified, that an indebtedness was due from Goff to Charles Machette, and that a mortgage was given by Goff to secure it ; that he saw this mortgage at the ranch, where Goff lived, in the after-

noon of June 6, 1867, which was the date of the mortgage. Defendants also gave evidence to prove that Machette took possession of the crop, sometime before the grain was replevied, and that he employed men to cut and thresh it; they also put in evidence a mortgage from Goff to Machette, dated June 6, 1867, conveying one-half of the crop on the Wanless' ranch, to secure a note for \$1,500, of the same date, and payable thirty days thereafter.

In rebuttal the plaintiff called the recorder of the county, to prove that the mortgage from Goff to Machette was filed for record at 1:15 P. M., June 6, 1867, and that thereafter the mortgage remained in that office for a considerable time. There were many objections to testimony, which are not noticed in the opinion of the court, and, therefore, they are not here set down. Defendants presented several prayers for instructions, which the court declined to give. Among others, the following was especially urged in this court:

"That the evidence of the witness, Gove, of the verbal admissions of the defendant, given in evidence by the plaintiff, is no evidence to support the issue in this case, on the part of the plaintiff; that said testimony was admitted improperly out of its order, and tended only to prove a negative proposition, not then properly before the court, and the jury should disregard the same, in the consideration of this case."

The court charged as follows:

1. If the jury believe, from the evidence, that Goff was indebted to Machette, and that the mortgage given in evidence, on the part of Machette, was executed to secure such indebtedness, and that Machette obtained possession of the property in controversy, in advance of the plaintiff, then said Machette has the better right here, and the jury should find the defendant not guilty.

2. The mortgage of Goff, to the plaintiff, which was given in evidence on the part of plaintiff, not having been acknowledged and recorded in conformity with the statute (and possession of the mortgaged property not having been delivered to plaintiff), is, in contemplation of law, fraudulent

and void as to creditors and subsequent purchasers ; but as between plaintiff and Goff, it was, and is, valid and effectual, and so if the jury believe, from the evidence, that the mortgage executed to Machette was without consideration, and intended only to save the property to Goff, or was executed without any indebtedness by Goff to Machette in fact existing, then the mortgage of Goff to plaintiff binds the property as against Machette, provided the mortgage to plaintiff was executed to secure a subsisting indebtedness of Goff to plaintiff.

3. If the jury believe, from the evidence, that there was, in truth, an indebtedness existing by Goff to Machette, at the time of the execution of the mortgage to Machette, then the fact, if it be a fact, that, at the time of the execution of the mortgage by Goff to Machette, Machette knew of the indebtedness, if any, of Goff to Wanless, and also knew that plaintiff's counsel was then preparing a mortgage from Goff to plaintiff, on the same property, and that Goff had promised to execute such mortgage, cuts no figure in this case. If Goff was indebted to Machette, then Machette had the right to obtain security therefor, and to take precedence of any other creditor, if he could, and he is not chargeable with bad faith, by reason of any efforts to secure such precedence.

4. The jury are the sole judges of the credibility of the witnesses, and if they believe any witness, sworn in the cause, has willfully testified falsely to any material fact in the case they are at liberty to discard all of such witness' testimony, or any part thereof.

5. The jury will consider the evidence of the witness, Benedict, only for the purpose of determining the single question, whether Goff was, or was not, in truth, indebted to Machette at the time of the execution of the Machette mortgage.

6. Verbal admissions are the most unreliable of all testimony, and should be received, and acted upon by a jury, with caution. The jury, in considering the admissions alleged to have been made by the defendant, to the witness

Gove, should also take into account the length of time which has elapsed since such admissions were alleged to have been made, the state of feeling, as to whether friendly or unfriendly, existing between said witness and the defendant, the probability, or improbability, in view of the witness' manner of testifying, and his interest or lack of interest in the matter of the conversation, assumed to be related by him, and his powers of memory, so far as these appear by his evidence; and unless, in view of all these circumstances appearing in evidence, and which seem to the jury to afford a fair inference as to this, the jury believe that the admissions and statements testified to by said Gove, were made by Machette, and have been related by the witness, Gove, with substantial fidelity and truthfulness, then the jury should disregard the testimony of said Gove; and the jury, in any event, should disregard the conclusions or impressions of said witness from the words of the defendant testified of by him, and confine themselves in considering the witness' testimony to what the defendant said at the time of the alleged admissions, drawing their own conclusions therefrom.

7. There is no evidence in the case to charge the defendant with the detention of any part of the goods and chattels in controversy, except that mentioned in the sheriff's return. Plaintiff declares against defendant for the detention of sundry bushels of barley more than were found by the sheriff, and as to this part of the barley not found by the sheriff, the jury are bound to find the defendant not guilty, however they may find as to the residue.

9. The jury are instructed, that if they find for the plaintiff, they will assess the plaintiff's damages by reason of the detention of the goods and chattels found to belong to plaintiff, at such sum as will amount to ten per cent per annum of the value of the grain so belonging to plaintiff at the time of the commencement of this suit.

The court also prepared, and submitted to the jury, a form of verdict to be used by them in case they found the

issue for the plaintiff; also a form to be used in case they found the issue for the defendant.

The jury found for the plaintiff, and there was a motion for new trial, in which the usual causes were assigned, that the verdict was against evidence, that the court erred in admitting and rejecting testimony, and in giving and refusing instructions, etc. This motion was overruled and defendants excepted.

Upon this appeal, error was assigned upon the ruling of the court, in respect to the motion for new trial, but there was nothing in the assignment of errors respecting the rulings of the court in admitting and rejecting testimony, except in the 6th and 9th assignments, which referred to the testimony of Mr. Benedict.

There was judgment for the plaintiff, and the defendant, Machette, appealed.

Messrs. CHARLES & ELBERT and Mr. A. C. PHELPS, for appellant.

Messrs. SAYRE & WRIGHT, for appellee.

HALLETT, C. J. It appears that one Goff executed to each of these parties a mortgage upon one-half of the crop growing on appellee's farm, and that appellant first obtained possession of the mortgaged property. Appellee brought this action to recover the possession, relying upon evidence to show that appellant's mortgage was given without consideration, and with intent to embarrass him in the collection of his debt. There was plenary proof that appellee's mortgage was given to secure a debt due from Goff to him, and the mortgage was regarded as being good against Goff alone, apparently upon the ground that the docket-entry, made by the justice who took the acknowledgment, is not conformable to the statute regulating such instruments. Counsel for appellant contend, that without a proper acknowledgment, and a full compliance with the statute in every particular, the instrument could not affect his right to the property, a proposition which is entirely correct.

But if appellant had no right or interest in the property, of course his possession must yield to any demand which would be good against the mortgagor. And this was the point to which the evidence was mainly directed, and to which the court directed the attention of the jury. If the fact is as the jury found it to be, that the mortgage to appellant was given without consideration, he cannot resist the demand of one who has acquired title from Goff, any more than he could resist the latter, if he had made no transfer of the property. Holding, without right, appellant is not protected by the statute, or otherwise, from any legal demand acquired from the true owner, with whom the law will identify his possession. In this view it is not a question whether either of the mortgages was duly acknowledged before the proper officer, and such entry made in the docket of the justice, as the law requires; for with the most careful observance of these provisions, appellant's mortgage must fail for want of a consideration, and appellee's mortgage, without any acknowledgment whatever, is good against Goff, and all who stood in his position. In reply to the suggestion that appellee was allowed to set up title in appellant, for the purpose of overthrowing it, thus anticipating the defense, and putting in at the opening of the case evidence which should have been withheld until the close, it is proper to say that this is a matter of practice with which a court of review will not interfere, unless it is seen that mischief has grown out of it. In the present instance appellant appears to have accepted the defense indicated by his adversary, and to have relied upon the mortgage which had been previously assailed. To overcome the presumption of ownership arising from possession by appellant, it was necessary that appellee should show a title overreaching that possession, and this he did by showing the prior possession and ownership of Goff, and the conveyance to himself. I do not see that he was then required to meet appellant's case, but his doing so is not, under the circumstances, an irregularity of which complaint can be made here. As to the legal operation and effect of these

mortgages, the charge of the court to the jury is unexceptionable, presenting the points in controversy, fully and explicitly. So, also, the refusal of the court to admit testimony to show that the mortgage to appellee was not acknowledged in the precinct where the mortgagor resided, was not erroneous in the view which was taken of that instrument. The mortgage was good against the maker without acknowledgment, and therefore the certificate was not in question.

In connection with this last question, and some others relating to the admissibility of testimony, which have been discussed, it is proper to remark that they are not presented in the assignment of errors. The pertinency and admissibility of Mr. Benedict's testimony is drawn in question by the ninth assignment of error, and also by the sixth assignment, referring to the charge of the court, and the sufficiency of the evidence to support the verdict is the subject of the first and second assignments. Beyond this there is nothing to present the exceptions taken to the rulings of the court upon the evidence. If it is claimed that these were presented in the motion for new trial, the assignment of error upon the ruling upon that motion cannot be regarded as raising all the points contained in the motion. The twelfth rule of this court requires that errors shall be separately alleged, and particularly specified, and the object of it will be entirely defeated, if parties are allowed to present numerous questions by means of a single specification, based upon the action of the district court, upon such motion. Again, a motion for new trial, properly considered, is directed to mistakes of the jury as to the facts, or in applying the law to the facts; and although points decided by the court, relating to the testimony, or the charge to the jury, are frequently set down in the motion as grounds for new trial, and the court will always embrace the opportunity to correct errors in such points which may have been made, yet they do not arise upon such motion. All questions relating to the admissibility of testimony, and the charge of the court to the jury, arise upon the

trial of the cause, and exception must be taken to the ruling of the court, upon all such questions, at the time it is made, in order to secure attention to them here. The fact that such questions are presented a second time, in the motion for new trial, does not enlarge or diminish the right of the party aggrieved to be heard upon them here. A fair construction of our twelfth rule demands that all exceptions of this nature shall be particularly referred to in the assignment of errors.

The conversation between Goff and appellant in the presence of Mr. Benedict is not within the rule which excludes communications made to an attorney for the purpose of obtaining his professional opinion. Advice was not sought from Mr. Benedict in relation to any matter, nor was the communication made to him with a view to consultation as to the rights of any one. He was simply asked to prepare a mortgage, and in doing so he acted as a scrivener merely. Disclosures of fact, made to him in that capacity, are not subject to the rule referred to. 1 Greenl. Ev., § 239, n. Again, it was not shown that Mr. Benedict was an attorney at law, of which there should be evidence, to give appellant the benefit of his exception. That the testimony of this witness was entirely pertinent in connection with the testimony of Gove, upon the question of indebtedness of Goff to appellant, is, I think, quite plain. The anxiety of the parties to have the instrument drawn, before the mortgage to appellee could be perfected, is shown, by the statement subsequently made by appellant to Gove, to have arisen from a desire to shield the property from the just demands of appellee. The significant statement made at that time, together with the statement to Gove, and the conduct of appellant and Goff just prior to the service of the writ, made a case upon which the jury might well conclude that the mortgage to appellant was without consideration. If we look to the sufficiency of the evidence to support the verdict, no doubt can be entertained upon the point. The jury were properly charged as to the weight to be attached to appellant's admissions, and if they chose to

accept such admissions in opposition to the testimony of H. Machette, they were at liberty to do so. The facts were for the jury, and their determination, upon conflicting evidence, should not be disturbed. As to the instruction that the jury may disregard the testimony of a witness who has sworn falsely as to any material fact, we think that the jury could not have been misled by it. The possession of the grain by appellant, at, and immediately before, the commencement of the suit, was not denied; and, indeed, all of the witnesses who testified upon the point, agreed in relation to it.

The threshing, by appellant, if paid for by him, gave him no lien upon the property, and is not material to the case. That the note and mortgage to appellant were *prima facie* evidence of indebtedness on the part of Goff to him, is quite true, but these instruments were assailed, upon the ground that they were without consideration, and the testimony of this witness was offered in support of them. The witness was asserting the validity of the mortgage and note, and they were involved in his testimony, and became a part of it. The point in issue was the validity of the instruments; and while that issue was on trial, the instruments could not be invoked to support the testimony. To bring the presumption in favor of the instruments to the support of them, is not the corroboration which is contemplated by the rule under consideration. In respect to matters which were controverted, the testimony of this witness was not corroborated, and the case is within the principle of *Howard v. McDonald*, 46 Ill. 123.

The claim for damages for the detention of the property rests upon the statute, and the rule of computation adopted by the court is sanctioned by Mr. Sedgwick and numerous authorities. Sedg. on Dam. (5th ed.) 582. Where the property is domestic animals, valuable for service only, the value of the use of the animal is, of course, the measure of compensation; but where, as in this case, the article is intended for consumption, interest upon the value of it would seem to be the true compensation. If the owner of the grain

should wish to obtain the like quantity, he must purchase, in the market, at current rates, and he would be deprived of the use of the money thus invested. The best estimate of his loss, that can be made, is interest upon the amount of money which he would, for that purpose, be compelled to pay out.

It was entirely proper for the court to prescribe the form of the verdict to be rendered by the jury, and as they were told that it was merely a form, I do not see that it contained any suggestion as to what the finding should be. The court drew the form to be used in case the finding should be for appellant, as well as that to be used if the finding should be for appellee, and the suggestion was equally strong in favor of both parties. In addition to this, the jury were told that they were forms merely, and there were full instructions upon all the points in the case. Under such circumstances the instruction could not have had any influence upon the verdict of the jury.

If the appellant is entitled to his costs because of the failure of appellee to make out a case as to all of the property, described in the writ as claimed by his counsel, he should move the court below for judgment of that kind. The omission of the judgment in favor of appellant is not fatal to that which has been regularly and properly entered in favor of appellee. The cases cited by counsel are to the effect, that as to costs, cross-judgments shall be entered in favor of each party, and if one party has obtained his judgment, and the other has not, the remedy would appear to be plain. *Lansing v. Bates*, 11 Ill. 551.

The judgment of the district court is affirmed, with costs.

Affirmed.

EVIDENCE TO SUPPORT VERDICT.—Verdict will not be disturbed if not manifestly wrong and the evidence is conflicting: *Kansas Pac. Ry. Co. v. Twombly*, 3 Colo. 129; *Barker v. Hawley*, 4 Colo. 227, 241.

COMMUNICATION IS NOT PRIVILEGED where made to a person employed merely as a scrivener and not consulted as an attorney: *Caldweller v. Davis*, 10 Colo. 492.

REPLEVIN—MEASURE OF DAMAGES.—When the property is intended for consumption, interest upon the value of it, at the rate fixed by law, is the true measure of compensation for detention of it (*Tucker v. Parks*, 7 Colo. 70); but the interest is allowed, not as interest, but as damages: *Omaha & G. S. & E. Co. v. Tabor*, 13 Colo. 59.

BUCK et al. v. FISCHER et al.

PRACTICE—*notice of hearing before a master.* Upon bill to foreclose a mortgage taken as confessed, and referred to a master to take proofs, and report the amount due on the mortgage, defendants are not entitled to notice of the hearing before the master.

MORTGAGEE'S ESTATE *goes to his personal representative.* Upon the death of a mortgagee, his estate in the mortgaged premises passes to his personal representative, and a bill to foreclose the mortgage cannot be maintained by his devisee and legatee.

PLEADING—*complainants, who sue as representatives* of an estate, should show that they are such in the bill, and it is not sufficient that the fact appears in an exhibit attached to the bill.*

*Error to District Court, Arapahoe County.**

THE bill was filed by Amelia L. Fischer and C. F. A. Fischer against Wm. Buck, Karl E. Ammann and A. K. Buck, to foreclose a mortgage given by the said William Buck to Frantz A. Bocker. The bill was dismissed as to Ammann, and the other defendants demurred. As originally framed, complainants appeared to claim in their own right, and the demurrer was sustained, apparently on that ground. The bill was subsequently amended so as to show the death of Bocker, leaving the said Amelia his sole legatee and devisee, and that she, before the commencement of the suit, intermarried with the said C. F. A. Fischer, who was, at the time of the bringing of the suit, and at the time of making the amendment, her lawful husband.

There was filed with the bill, as an exhibit, the last will and testament of Bocker, from which it appeared that the said Amelia was appointed sole executrix of his estate, and also that he had bequeathed all his property to her, but there was not in the bill any allegation or statement that she was executrix, or that she sued as such. After the amendment, the bill was taken as confessed, and referred to a master to compute the amount due.

The other facts are stated in the opinion of the court.

* S. C., post.

Mr. E. L. SMITH, for plaintiff in error.

Messrs. BROWNE & PUTNAM, for defendants in error.

BELFORD, J. This was a bill in chancery, brought by Amelia Fischer, sole devisee and legatee of Frantz A. Bocker, to foreclose a mortgage. The respondents appeared, submitted to a rule to plead; made default, and thereupon the bill was referred to the master. Upon the incoming of his report, numerous exceptions were taken, and, among them, that the respondents had no notice of the time and place where the evidence was to be taken, and had no opportunity to cross-examine the witnesses, etc. They, at the same time, moved to have the cause re-referred to the master, so that the witnesses might be cross-examined. The exceptions and motion were both overruled. The first question to be considered is, whether the respondents were entitled to notice of the proceedings to be taken subsequent to the default. Mr. Daniel, in his Chancery Practice, vol 2, 1152, states that the general rule, that all persons having an interest in the result of the proceedings should have notice of the attendance before the master, extends to cases in which a defendant, after appearance, has allowed the bill to be taken *pro confesso*, and a decree to be made for want of an answer. In such cases, as well as in cases where the decree has been made upon the answer of the party, it is necessary to serve him with notice upon all proceedings, in the master's office, by which his interests are in any way affected. It is to be remembered, however, that a distinction exists in this respect between decrees *pro confesso*, for want of appearance, and decrees *pro confesso*, for want of an answer. In the former, there being no one whom the plaintiff can serve, all the necessary proceedings must necessarily be *ex parte*. In New York the same decision as to notice is announced, and the same distinction maintained. *Hart v. Small*, 4 Paige, 551. It must be observed that in England, although a party who has appeared, but who has allowed a decree to be taken against him *pro confesso*, for want of an answer, is entitled to have notice of the proceed-

ings against him under the decree in the master's office, he will not be entitled to appear upon such notice before the master, without previously obtaining an order for that purpose. The order will not be granted, except upon terms. In the case of *Moore v. Tilman* a different rule is announced. The court there restricts the right to notice to those cases only where there is a contest. That is, where there is an issue formed. 33 Ill. 358.

We are of the opinion that a decree *pro confesso* admits all the allegations of the bill that are well pleaded. Nor do we conceive it necessary, in such a case, to refer the cause to the master. Why prove what is already admitted? Or why should the party in default be notified of the time the complainant will submit evidence to the master of a fact that the respondent has already conceded to exist?

A party engaged in a cause is presumed to be in court, and taking note of events as they occur. When the complainant seeks to have his decree entered, the respondent may resist the same, if the nature and extent of the decree goes beyond the relief to which the complainant is entitled. Beyond this, his rights do not go, and, if he would avail himself of this privilege, he should be where the law presumes him to be—in court. We think, in cases of this character, no notice is required.

A more serious question arises in reference to the capacity of the plaintiff to maintain this action. The rule universally obtains in this country that the interest of the mortgagee will always go to his personal representative, whether it be for a term of years or in fee, it being regarded, in all cases, as mere personalty, and strictly a chattel interest. Redf. on Wills, vol. 3, p. 144.

PARKER, C. J., in *Scott v. MacFarland*, 13 Mass. 311, says: "The mortgage is a mere chattel, of which the administrator has the control. He is responsible for the debt for which it is a pledge." The money, to secure which the mortgage is given, having come out of the personal estate of the mortgagee, it is deemed just that it should be returned to it, and stand as a fund, out of

which to satisfy his creditors. It is to the personal representative that the creditors look for the payment of their demands; and as the law requires these demands to be satisfied in the first instance out of the personal estate, it is indispensable that the administrator or executor should have full control of the same. If a devisee or legatee has the right to maintain an action on a mortgage, the right must extend to all other instruments, such as notes, bonds, and bills of exchange. If we concede this right, we introduce into the settlement of decedents' estates a principle that has not been heretofore recognized, namely, the duty of joining legatees with the personal representatives in all actions brought for the collection of claims due the estate, for it will hardly be contended that the administrator or executor is incapable of suing. To one or the other belongs the exclusive right of managing the personal estate, of marshaling the assets, granting discharges and acquittances, paying the debts, and the uniform practice of all courts recognizes this right to exist and abide in the personal representative. Who is required to account to the court for the administration of this class of property? Clearly not the legatee, nor is he required to do it jointly with the executor. It seems to me, therefore, to be clear that this action cannot be maintained. It is claimed, however, that the exhibits attached to the bill show that the complainant is executrix. This is conceded, but the majority of the court are of the opinion that the exhibits cannot be allowed to supplement the allegations of the bill. The allegations of the bill must show a case without regard to the exhibits, because they cannot be taken as a part of it. Such being the case, we must regard this suit as brought by Mrs. Fischer as devisee, and not otherwise, and therefore the action cannot be maintained. The decree of the court below is reversed and cause remanded, with leave to the complainant to amend her bill so that it may show that she is the executrix, if such is the fact.

Reversed.

COMPLAINT MUST STATE CAUSE OF ACTION IN ITSELF, WITHOUT REGARD TO EXHIBITS ATTACHED TO IT: *Brooks v. Padlock*, 6 Colo. 36.

WRIT OF ERROR, PRACTICE ON.—The office of a writ of error being fully explained by the common law, and Congress having authorized the territorial courts to issue it, the jurisdiction to hear and determine causes brought to the supreme court by this writ is complete without further legislation: *Tance v. Rockwell*, 3 Colo. 243.

BERRY v. UNITED STATES.

JURISDICTION — *of district court under laws of United States.* The acts of congress of 1856 and 1858 (11 Stat. at large, 49-866), limiting the number of courts which have jurisdiction in cases arising under the constitution and laws of the United States, are applicable to this territory.

But one court in each judicial district can entertain such pleas, and the jurisdiction of that court extends throughout the district.

For a crime committed in the county of Park, in the first judicial district, the offender may be indicted and tried in the county of Arapahoe in the same district.

Of the power of the legislature to designate the court which shall have such jurisdiction. Under the act organizing the territory, the legislative assembly has authority to designate the court in each district, which shall have and exercise the jurisdiction of a circuit and district court of the United States.

Of the manner in which that may be done. The act of 1870 (8 Sess. 59), which provides that terms of court, for the transaction of business arising under the constitution and laws of the United States, shall be held at the county seat of the county of Arapahoe, at the times herein provided for holding courts at that place, sufficiently designates the district court of Arapahoe county, as the court which should have such jurisdiction in the first district.

That act is not regarded as creating terms of court for the trial of causes arising under the laws of the United States, but rather as designating the court which should exercise such jurisdiction.

Of the terms of court. And where, in a subsequent act (9 Sess. 89), changing the terms of court, nothing was said as to causes arising under the laws of the United States, the court had jurisdiction of such causes at the newly-appointed terms.

LARCENY — *of a letter or packet from a mail or post-office.* Section 22 of the act of 1825 (4 Stat. at large, 108), defines as separate and distinct crimes:

1. Stealing a mail letter or packet which does not contain an article of value, from or out of a post-office,
2. Taking a letter or packet, which contains an article of value, from or out of a post-office, with or without the consent of the person having custody thereof, and embezzling or destroying the same.

An indictment which charges that the prisoner *stole* from a post-office, a packet containing \$40 in currency and \$1,000 in gold-dust, which was intended to be conveyed by post, and secreted and embezzled the same, is sufficient under the clause last mentioned.

Whether the currency and gold-dust was mailable matter is not material. It is enough that they were articles of value.

Of the power to summon jurors. The power to select and summon jurors in cases arising under the laws of the United States, although not given by statute, exists by force of the common law.

In the absence of statutory regulation, the court, when sitting for the trial of

causes arising under the constitution and laws of the United States, may cause jurors to be summoned from the body of the district under an open venire directed to the marshal.

By whom the process shall be executed. The marshal of the territory, as the executive officer of the court when sitting for the trial of such causes, may lawfully serve a venire for jurors.

Whether the jurors should come from the county. That the jurors were not summoned from the county in which the offense is alleged to have been committed, is not a ground of challenge to the array.

Whether the jurors should come from the district. That the jurors were not summoned from the body of the district is however a good objection, and this being averred in the challenge and admitted by demurrer, was well taken.

Of the practice in cases of federal jurisdiction. In cases arising under the laws of the United States, the practice and method of proceeding is the same as in cases arising under the laws of the territory.

Of the right to challenge jurors. And one who is charged with crime under a law of the United States may have advantage of a law of the territory which gives the right to challenge a certain number of jurors without assigning cause therefor.

EVIDENCE — *of confessions improperly obtained.* Where a prisoner was induced to make confession of guilt by promise of favor, such confession should not be received against him.

And where such confession was reiterated at a subsequent meeting between the prisoner and the prosecuting witness, and there was reason to believe that the prisoner was then under the influence of the previous promise, and the promise was in fact renewed, the subsequent declarations were also inadmissible.

Of acts accompanying admission. That the prisoner produced gold-dust and identified it as that which had been stolen, may be shown.

But the accompanying declaration, if it amount to a confession of guilt, and it was drawn from the prisoner by promise of favor, cannot be received.

Admissions voluntarily made. Declarations made to another witness at another time and place, when no improper influence was used against the prisoner, were properly received.

Error to District Court of the First District.

This indictment, which was presented at the April term, A. D. 1872, contained four counts. In the first it was alleged that on the 21st day of July, 1871, at the Fairplay post-office, in the county of Park, in the first judicial district, the prisoner feloniously did steal from and out of the post-office a certain packet contrary to the form of the statute, etc. The second count was substantially the same.

In the third count it was alleged that the prisoner entered the post-office at Fairplay, and took therefrom a certain packet containing certain articles of value, to wit: forty dollars in currency and one thousand dollars in gold-dust, which said packet was intended to be conveyed by post, and secreted, and embezzled the same. In the fourth count it was alleged that the prisoner feloniously did steal from the post-office at Fairplay a certain registered packet, which had lately, before then, been put into the mail at Oro City, to be conveyed by post to Denver, which packet contained articles of value, to wit: \$40 in currency, the property of William Stoner, and secreted, and embezzled the same. The prisoner moved to quash the indictment, and assigned numerous objections, some of which are noticed in the opinion of the court. The motion was overruled. At the October term the prisoner challenged the array of petit jurors, and assigned the following reasons:

1. That the jurors had not been selected and summoned according to the law of Colorado.

2. That they were not summoned according to any law of the territory, nor of the United States.

3. That the jurors were summoned by the U. S. marshal, without authority of law, and contrary to the laws of the territory.

4. That the jurors were not selected and summoned from the body of said district, or from Park county, where the offense was alleged to have been committed.

5. That the *venire facias* to the marshal was issued without authority of law, and contrary to the laws of the territory, and every other law, and was improperly tested.

6. That the U. S. marshal is not authorized to summon jurors in Colorado territory, but it is the sheriff's duty.

A general demurrer to this challenge was sustained. At the trial John B. Furay, a special agent of the post-office department, testified that he visited Fairplay about the 29th of October, 1871, and received from the prisoner thirty and one-half ounces of gold-dust and \$100 in currency; that he had conversations with the prisoner at this time, and sub-

sequently in the month of January, 1872, at Denver; that the meeting in Denver was in pursuance of a previous arrangement with the prisoner. The witness also stated that at the first conversation with the prisoner, in Fairplay, he advised the prisoner to make full restitution, and, if he did so, it would go easy with him; that it would be better for him to confess; that the door of mercy was open, and that of justice closed; that he threatened to arrest him, and expose his family, if he did not confess, and the like; that at the meeting in January he made similar promises and threats, to prevent the prisoner from running away. Upon this the prisoner's counsel objected, that the declarations were made under the influence of promises of favor and of threats, and the objection was overruled. The witness then detailed a conversation with the prisoner, in which the latter stated that the gold-dust, by him returned, was all that remained of that which he had taken, and promised to pay the balance. The prisoner also made some statements concerning an envelope in which the gold was inclosed at the time it was stolen, and which was subsequently found in the cellar of the building where the post-office was kept. Other admissions, made at the meeting in Denver, were also admitted. In addition to this, one David Browner testified that he had a conversation with the prisoner in the month of February, 1872; at another place, in the county of Park, during which he asked the prisoner why he confessed, and the prisoner replied that he could not bear to have the blame rest on innocent parties; that it was too much of a load. Upon this occasion nothing was said by Browner, or any others, to induce the prisoner to make any declarations. Testimony was also given tending to prove that a package, which had been mailed at Oro City, containing currency and gold-dust, as alleged, was stolen from the post-office at Fairplay, in the night-time, as alleged. Much evidence was given respecting the search for, and discovery of, the wrapper in which the package was inclosed. The prisoner was found guilty, and, upon

motion for new trial, the objections to evidence were renewed. A motion was also made in arrest of judgment, in which it was alleged that the court was not held at a time appointed by law, and that there was no law authorizing the court, when sitting in the county of Arapahoe, to transact business arising under the constitution and laws of the United States, in the district at large. This motion was also overruled, and judgment was given against the prisoner.

Mr. J. Q. CHARLES, for plaintiff in error.

No brief filed by the United States Attorney.

Mr. JUSTICE WELLS dissented.

HALLETT, C. J. The constitution of the district court is impeached upon the ground that it was not held at the proper time and place, and that the jurors, grand and petit, were not regularly selected and summoned. As to the place, it is contended that the court sitting in Arapahoe county could not take cognizance of an offense committed in another county, although in the same judicial district, a position which, it is said, is supported by the language of the organic act. Touching the judicial power, the act establishing this territory is substantially the same as that by which the territory of Wisconsin was organized in 1836, and which has served as a model for all territorial governments erected since that time. *Clinton v. Englebrecht*, 13 Wall. 444; 5 U. S. Stat. 10-12; *id.* 176. It provides that the territory shall be divided into three judicial districts, in each of which a district court shall be held, at such time and place as may be prescribed by law. In the Wisconsin act, and in some others copied from that, the language is, a district court, or courts, shall be held at such times and places as may be prescribed by law, by which provision was made for more than one court in each district, if more than one should be required. That the language of our act was inadvertently changed to the singular number, suffi-

ciently appears from the 15th section, by which the governor was authorized to define the judicial districts, and appoint the times and places of holding courts *in the several counties and subdivisions in each district*, until the legislative assembly should otherwise provide. *Klopfer v. Keller*, 1 Col. 410.

In the territories of Wisconsin and Iowa, and probably in others, prior to 1856, the several courts of each judicial district held and exercised the jurisdiction of circuit and district courts of the United States. *U. S. v. Morgan*, Morris (Iowa), 341; *U. S. v. Dickey*, id. 412; *Mau-zau-ne-kah v. U. S.*, 1 Pinney (Wis.), 124. In the acts organizing those territories, as in our own, it was provided that each of the said district courts shall have and exercise the same jurisdictions in all causes arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States, and the first six days of every term of said courts, or so much thereof as shall be necessary, shall be devoted to the trial of causes arising under the said constitution and laws. Upon this, it is plain, that within the territory assigned to each, the several courts of each district had the same jurisdiction under the laws of the United States; for the reference is to each of the said districts' courts, a phrase which comprehends all of the courts, whatever their number. Our act, being a copy of the Wisconsin act, must have received the same construction if there had been no further legislation upon the subject. In 1856, however, congress conferred upon the judges of the territories, power to appoint the times and places of holding courts in the several districts, and declared that courts should not be held at more than three places in any one territory. 11 U. S. Stat. 49. It was not in that act provided that the three places, therein referred to, should be in the several judicial districts; but as all the acts establishing territories, which were then in force, contained the provision for three districts, it was obviously the intention of congress that one court should be held in each district. By another act, passed two years later, the prac

tice which had obtained prior to 1856 was restored "for the purpose of hearing all matters and causes, except those in which the United States is a party." 11 U. S. Stat. 366. We have then the act of 1856, reducing the number of courts to one in each district, which, by the organic act, was invested with the jurisdiction of circuit and district courts of the United States, and the act of 1858, again increasing the number but declaring that the courts thus added should not have jurisdiction in United States cases. Considered without reference to prior legislation, perhaps the act of 1858 would deprive all of the courts of federal jurisdiction, for it declares that the courts, held in the several counties, shall have jurisdiction in all matters and causes, *except those in which the United States is a party*, and does not, in terms, provide that any one of the courts shall have jurisdiction in the excepted cases. This ambiguity is explained by the acts preceding, and, to some extent, by the proviso to this act from which it appears that the object of the act of 1856 was to diminish the expense of these courts to the general government. To serve the convenience of the people, the number of courts was again increased in 1858, and probably this was the only purpose of the act of that year. Following the history of congressional legislation upon this subject, we find that all territorial courts were first invested with the jurisdiction of circuit and district courts of the United States; and for the purpose of diminishing the expenses of such courts to the general government, the number was in 1856 restricted to three in each territory. In 1858 provision was made for additional courts in the several counties of each district, in which cases arising under the laws of the territory should be determined, but not those in which the United States was a party. Obviously, the effect of the acts of 1856 and 1858, considered with reference to the practice which previously obtained, was to provide that but one court in each district should exercise the jurisdiction of circuit and district courts of the United States, and it appears to me that no greater effect should be given to them. But it may be contended that these acts of 1856 and 1858

although amendatory of the acts establishing territories then in force, cannot be applied to one which like our own was subsequently enacted in the language of the Wisconsin act, without reference to the pre-existing amendments. If this was a case in which congress had revised the organic law of a territory with a view to correct errors therein, we should, of course, reject every thing not embodied in the text, for in such case the presumption is, that things omitted have been rejected. But the act establishing this territory does not present a case of revision, but rather the creation of a new government, in form and character the same as others already existing. This territory was carved out of Kansas, Nebraska, Utah, and New Mexico, all of which were existing when the acts of 1856 and 1858 were passed, and the government was framed upon the model of its predecessors. Indeed, it has never been the policy of congress to confer exceptional powers upon any of the territories, and, although slight changes in the form of government have been made, such changes have affected all alike. Under these circumstances, the adoption of the Wisconsin act by congress, without adverting to the amendments of 1856 and 1858, has not here been regarded as sufficient to exclude the acts last mentioned from all connection and association of the former. It will also be observed, that the acts we are considering are not limited to the territories existing at the time they were passed; they are general laws, applicable to all the territories alike, although some of them may have been established after the laws were enacted. But, if inconsistent with an act subsequently passed, of course they cannot be regarded, and, therefore, we resolved, in *Klopper v. Keller* 1, Col. 410, that the provision of our organic act, which requires that the times and places of holding courts shall be designated by the legislative assembly, must prevail in opposition to the act of 1856, which vests the same power in the judges of the territory. As to the courts which shall have jurisdiction under United States law, the organic act does not appear to be inconsistent with the prior acts referred to, for the phrase, "Each of said supreme and

district courts," which is used in the organic act to designate the courts which shall have such jurisdiction, may well enough, so far as it relates to district courts, refer to one court in each district, as prescribed by previous laws. To give effect to prior acts, we must accept the language of the organic law, in this restricted sense, a construction which is supported by the usage and practice of our courts and legislative assembly from the organization of the territory to the present time. As to the manner of designating the court in each district, which shall be invested with the extraordinary jurisdiction of circuit and district courts of the United States, and the time and place of its sitting, there appears to be but little room for doubt. As we have seen, the Wisconsin act conferred upon all district courts jurisdiction under the United States law, and the number of such courts, as well as the times and places of holding them, was regulated by the legislative assembly of the territory. The first six days of each term of court, or so much thereof as should be necessary, was to be devoted to business arising under United States law, from which it appears that a separate term of court, for transacting such business, was not required. Whenever regularly and lawfully convened, the courts were authorized to administer the laws of the United States in the same manner as the laws of the territory were administered. In Iowa and Arkansas, and probably in other territories, prior to 1856, prosecutions, under territorial law, as well as under the laws of the general government, were conducted in the name of the United States, and, so far as we can learn from reports, the method of proceeding was the same in both classes of cases. *U. S. v. Ross*, Morris (Iowa), 164; *U. S. v. Morgan*, id. 341; *U. S. v. Dickey*, id. 412; *U. S. v. Crittenden*, Hemp (Ark.), 61; *U. S. v. Flanakin*, id. 30.

The circumstance, that jurisdiction to administer the laws of the United States was conferred upon these courts, did not make them courts of the United States in the sense of the constitution, a proposition often affirmed by the supreme

court, and very fully elucidated in the late case of *Clinton v. Engelbrecht, supra*. It is plain that the extraordinary jurisdiction thus conferred on the courts was intended to be, and was, in fact, exercised at the time and place appointed for transacting the ordinary business of the court, arising under the law of the territory. As to the extraordinary jurisdiction of the court, neither the legislative assembly, nor any other authority, was required to appoint the time and place for exercising it, but the sessions of the court being fixed by law, without reference to the nature of the business to be transacted, the court was at liberty, at the time and place designated, to proceed in the exercise of all its powers, whether conferred by the laws of congress or of the territory. Upon this point no change was wrought by the act of 1856, which, as we have seen, reduced the number of courts to one in each district; but by the act of 1858, which restored the former practice as to the number of courts in each district, it became necessary to designate one, which should exercise federal jurisdiction. This is not expressed in the act of 1858, nor in the prior act of 1856, but it results from the course of legislation, which I have endeavored to trace. When the jurisdiction was limited to one of several courts, it became necessary to point out that one, and the peculiar phraseology of the acts last mentioned warrants the construction that this duty was to be performed by the judges of the territory. By our organic law this duty is devolved upon the legislative assembly, as a rightful subject of legislation, and we have now to inquire, whether it has been performed in the first district. The language of the act of 1870 (8 Sess. 59) is somewhat ambiguous, but I think that it may be regarded as conferring the federal jurisdiction upon the district court of Arapahoe county. If the legislative assembly acted in the belief that the court, when sitting for the trial of causes arising under the laws of the United States, was a separate tribunal, having no legal connection with the district court of Arapahoe county, the intention to refer such causes to that court is, nevertheless, sufficiently expressed, and

should be regarded. But, as we have seen, the declaration that such causes should be heard at the times appointed for the ordinary business of the court was entirely unnecessary, for the reason that, when invested with such jurisdiction by the organic law, the court was required to proceed in the exercise thereof at the regular terms. Therefore, that provision should not be regarded as fixing terms of court, but rather as the declaration of the legislative assembly in respect to the duty of the court to proceed with that business, at the regular terms, a duty which was fully enjoined upon the court by the organic act. I shall not, at this time, affirm or deny the power of the legislative assembly to appoint terms for transacting business arising under the laws of the United States only, as the decision of that question is not material to this case. The act of 1870 is regarded, not as appointing special terms, for the business of the United States alone, but rather as requiring such business to be transacted at the regular terms, and inasmuch as that provision was supererogatory, the omission of it from a subsequent act (9 Sess. 89), by which other terms of court were appointed, is entirely immaterial. Having been invested with jurisdiction in the first district, under the laws of the United States, the district court of Arapahoe county will retain that jurisdiction at all of its terms, until the legislative assembly shall otherwise provide. If, as I have attempted to show, it was the intention of congress to confer upon one court only in each district the jurisdiction of federal courts, no argument will be required to show that the jurisdiction thus conferred will extend throughout the district. Therefore, the objection that the county of Park, constituting a part of the first district, is not within the jurisdiction of the court, is untenable.

In our opinion the act of 1825 (4 U. S. Stat. 108) will not admit of the construction for which counsel contend. The provision of section 22, that if any person shall steal the mail, or shall steal or take from or out of any mail, or from or out of any post-office, any letter or packet, is disconnected from those which follow, and defines distinct offenses. The

first and second counts of the indictment are founded upon this clause, while the third and fourth counts appear to be based upon the succeeding clause. In the clause last mentioned, the offense defined is that of taking a mail, letter or packet with or without the consent of the person having custody of it, which may be a very different thing from stealing or taking it as defined in the first clause, and in this instance the mail, letter or packet must contain an article of value or evidence of debt, etc. In the third and fourth counts the charge is, that the prisoner stole from the post-office at Fairplay, a packet containing an article of value, and embezzled the same, and since every stealing involves a taking, it may be said, that the offense is described substantially in the language of the statute.

Whether the gold-dust and money mentioned in the third count was or was not mailable matter is not material to the offense. The language of the law covers every thing of value, and cannot be limited to those things which the law authorizes to be carried by mail. *United States v. Randall*, Deady's Rep. 524. That the law should justify depredations upon the mail, upon the ground that matter has been wrongfully transmitted, is a thing which challenges belief. Other objections to the form of the indictment have not been urged in this court, and in those which have been considered, I find nothing which can be entertained.

The selection of jurors by the marshal, under open venire directed to him, was made the subject of a challenge to the array interposed by the plaintiff in error, which challenge was overruled by the district court. In the civil case, *Clinton v. Engelbrecht*, *supra*, which originated in a district court of the territory of Utah, this practice was condemned by the supreme court, and it is claimed that the opinion of the court, in that case, is decisive of the point here presented. That was an action founded upon a statute of the territory of Utah, to recover a penalty for the destruction of certain goods of the plaintiff, which belonged to the ordinary jurisdiction of the court, and did not fall within the jurisdiction of a circuit or district court of the United States.

For the trial of such issue, a law of the territory of Utah had provided a mode of selecting and returning jurors, which was openly disregarded by the district court, and, for this error, the judgment was reversed. The case at bar, being founded upon a statute of the United States, and appertaining to the federal jurisdiction of the court, differs materially from that decided by the supreme court in several important particulars. Conceding that the qualifications of jurors, and the manner of selecting and summoning them, are to be regulated by territorial law, as well in cases arising under the laws of the United States, as in other cases, no provision has been made by the legislative assembly, in this territory, for selecting or summoning jurors in the first-mentioned cases. By article 6 of the amendments to the constitution, a person accused of crime is entitled to a speedy trial by a jury of the district in which the crime shall have been committed, which district shall have been previously ascertained by law, and, unquestionably, the same provision should be observed in selecting a grand jury. The law of the territory (Rev. Stat. 387), respecting the manner of selecting juries, relates to the courts of the several counties, and cannot be applied to the district at large. Unlike *Clinton v. Englebrecht*, in which the law of Utah, relating to jurors, had been disregarded, this is a case for which the legislative assembly has made no provision, and the question presented is, whether, in the absence of statutory regulations, the court might lawfully proceed in the manner set forth in the record. As the court was sitting for the trial of causes arising under the laws of the United States, it will be assumed, upon the language of section 10 of the organic law, that the venire was properly directed to the marshal of the territory, and the discussion will be confined to the manner in which the jury was selected. It will not be claimed that the powers possessed by courts are entirely derived from the written or statute law. As is well said in a late edition of a standard work, courts did not originate in constitutions. They were known to the common law, and their powers are there well defined.

If courts possessed only such powers as are granted in constitutions and statutes, they could not protect themselves from insult and outrage; they could not compel the attendance of witnesses, or obligations to testify when present; they could not compel the attendance of jurors, nor punish them for improper conduct. Potter's Dwarrior on Statutes, 340. In our own law, not only the method of proceedings, but the remedies given to suitors are defined almost entirely by the common law. Of late the judicial power has been regulated by statute more fully than ever before, and still very much of it rests in the common law. That authority is not conferred by statute, is no evidence that it does not exist, for the common law continually supplements the statute law supporting it at every point, and providing for all its deficiencies.

Of this, the law relating to juries is a good illustration, for, although the qualifications and selection of jurors are now usually regulated by statute, the process for bringing them into court is given by the common law, and their powers and duties are derived almost entirely from the same source. When the courts of the United States were organized, the qualifications of jurors, in the State or district in which the court was held, and the manner of designating them in such State or district, so far as the same could be practiced in the courts of the United States, was adopted, but the number of jurors was not specified, nor was there any mention of grand juries. Yet, no doubt was ever entertained as to the number of jurors required in those courts, or as to their proper function in the trial of causes, civil and criminal, and a great jurist has observed that grand juries were by a necessary and indispensable implication. *U. S. v. Hill et al.*, 1 Brock. 156. Above all other features of the common law, the grand jury, and the trial by jury, were especially cherished and elaborated, and as Mr. Justice BLACKSTONE, with much eulogy of the common law, has explained, not only the qualifications of jurors, but the time and manner, and

nature of their service, is fully defined in that law. 4 Black Com. 350; Bacon's Abr., title Juries.

In most, if not all, of the States and territories, some changes in the common law, relating to jurors, have been made upon grounds of policy or convenience, but the sufficiency of that law to secure the attendance of jurors upon the courts, has not been doubted or denied. The observation of the chief-justice, in *Clinton v. Englebrecht*, that if the subject were not regulated by territorial law, it would be difficult to say that the selection of jurors had been provided for at all in the territories, is not opposed to this view. Although the subject is regulated by territorial law, all of the laws of the territory are not written in the statute book. The courts, being invested with common-law powers, may, in the absence of statutory regulation, draw from the pure and inexhaustible fountain of that law. The marshal being the executive officer of the court, when sitting as a circuit or district court of the United States, and performing, essentially, the duties of a sheriff at common law, it is no objection that the selection of the jurors was intrusted to him, for, by the common law, he was clothed with authority to that end. 4 Black. Com. 350; *Stone v. The People*, 2 Scam. 331. The point decided in *U. S. v. Woodruff*, 4 McLean, 105, does not arise here, for we are not governed by the act of congress which assimilates the practice in United States courts to the State practice. *Clinton v. Englebrecht*, *supra*.

If the manner of selecting jurors in the several districts were regulated by statute, we should, unquestionably, pursue the statute; and inasmuch as there is no statute, we resort to the common law, without attempting to conform to the method of selecting jurors to serve in the courts of the counties. In the challenge to the array of the petit jury, no objection was made to the qualifications of the jurors, except that they were not drawn from the body of the district or the county of Park, and, therefore, I have not discussed the general subject of the qualification of jurors. It may be useful to remark, in this connection, however,

that it will appear further on, that I entertain the opinion that the laws of the territory, upon that subject, should control. With respect to the ground of challenge referred to, I am not acquainted with any rule which requires that the jurors should be drawn from the county of Park. But, if the marshal did not obey the precept, which required him to select the jury from the body of the district, it cannot be said that the jury was legally constituted. While the venire appears to have been regular, the distinct averment of the challenge, that the jurors were not taken from the body of the district, is confessed by the demurrer, upon which the judgment was erroneously entered against the plaintiff in error.

Some other points, which will probably arise from another trial of the cause, still remains to be considered. From what has been said of congressional legislation in the territories, and the practice in cases arising under the laws of the United States in the courts of the territories, it will, I think, appear that such cases were committed to the territorial courts, to be instituted, prosecuted, and determined, in the same manner, and according to the practice adopted in other cases, arising under the laws of the territory. The primary purpose in establishing territorial courts was to provide for administering the laws of the territory, and when they were equipped for that purpose, the jurisdiction of circuit and district courts of the United States was superadded, to be exercised in the manner, and with the means adopted in other cases, except that a marshal was provided to execute the processes of the court. The argument in the case of *Clinton v. Englebrecht*, which affirms the power of the territorial assembly to regulate the practice of the courts, in all cases, leads to this conclusion, and such I understand to be the force and effect of the maxim, *Cursus curiæ est lex curiæ*. When a new power is conferred upon a court, and a method of exercising that power is not specified, the right of the court to proceed in the usual way, and according to the methods previously known, would seem to be undeniable. In this view, the criminal laws of the United States must

be regarded by the courts of the territory, with respect to the manner of enforcing them, and proceedings upon trials of causes arising under them, in much the same way as if they had emanated from the territorial assembly. That the crime and the punishment are prescribed by act of congress, does not essentially affect the proceedings to enforce the law, except in the matter of the territorial jurisdiction, and the executive officer of the court. In all other respects, a law of the United States is to be administered in the same manner as one enacted by the territorial assembly, and all rules relating to the qualifications and mode of impaneling juries, the competency of witnesses, and the admissibility of evidence, the manner of conducting trials, and instructing jurors, the form and effect of verdicts, the power and duty of the court in respect to new trials, and signing and sealing bills of exceptions, the form of the judgment of the court, and the mode of carrying it into execution, which are observed in the trial of other causes, arising under the laws of the territory, are to be equally observed, and enforced, in cases of federal cognizance. The power of the legislative assembly, to provide special rules of practice in the cases arising under the laws of the United States, is not doubted, but, as there can be no reason for making such special rules, so there should be no presumption that the ordinary rules are not applicable to such cases. If the legislative assembly should make an act criminal, which was not so before, without specifying the mode of proceeding, trials, under such law, would be governed by the general rules of practice, and I submit that the case is not different where new jurisdiction is conferred upon the court by act of congress. The circumstance, that in some of the acts relating to criminal practice, reference is made to "the people," should not be regarded as limiting the operation of such acts to cases arising under the laws of the territory, although, if in the legislation of the territory, a distinction had been raised between the cases arising under federal and territorial law, they might, perhaps, be so regarded. In the acts referred to, the term is used, generically, to indicate

the prosecution, and obviously the legislature intended, in these acts, to establish general rules of practice in criminal cases. Of this character is the act of 1872 (9 Sess. 94), and prior acts, regulating the right to challenge jurors, which are, I conceive, applicable to cases arising under federal, as well as territorial, law, and, therefore, the action of the district court, in denying the right of challenge, cannot be sustained.

The confessions to the witness, Furay, were, unquestionably, made under the influence of promises of favor, which rendered them inadmissible in evidence, unless the circumstance, that a portion of the stolen gold-dust was at the same time produced by the prisoner, was sufficient to exclude the operation of the general rule. Proof of the act of the prisoner, in producing the gold-dust, was entirely competent, but, as to the accompanying declarations, extending beyond the identification of the gold-dust, the weight of authority appears to be against their admissibility. Thus, in *Rex v. Griffin*, Russell & Ryan's C. C. 151, evidence of the prosecutor was admitted "that the prisoner brought to him a guinea and a £5 Reading bank-note, which he gave up to the prosecutor, as the guinea and one of the "notes that had been stolen from him," although the confession was obtained under promise of favor. In *Rex v. Jones*, Russell & Ryan's C. C. 152, determined by the same court, on the same day, the prosecutor asked the prisoner for the money he had taken from the prosecutor's pack, upon which the prisoner produced 11s. 6½d., and said that was all he had left of it, and this was held not to be admissible, apparently, upon the ground that it amounted to a confession of the prisoner's guilt. In other cases the rule has not been carried further than to admit testimony that the property was found in a place designated by the prisoner, without giving the statements made by him. Bennett & Heard's Leading Criminal Cases (2d ed.), 615. It is said that confessions, improperly obtained, may be safely received whenever the truth of them is established by accompanying acts, of which proof is

made. 1 Greenl. Ev., § 231. Whether all the adjudged cases in which the question has been presented, can be made to stand upon this proposition, may be doubtful, but it is sufficient for our present purpose to say, that they do not extend beyond the doctrine of *Rea v. Griffin*; *Deathridge v. The State*, 1 Sneed, 80; *People v. Ah-Ki*, 20 Cal. 178; 2 Bennett & Heard's L. C. C. 615; according to these authorities the fact that the prisoner delivered gold-dust to the witness, Furay, representing it to be that which was stolen, was a proper subject of proof, but the accompanying declaration that the gold-dust was taken by him, having been improperly obtained, was not admissible. If, after the government has elicited evidence showing that the property was delivered, which had been stolen, the prisoner, upon cross-examination, calls for the statements made by him to the witness, as to the identity of the property, he must, of course, accept the testimony given in reply to his own question. The meeting between the prisoner and Furay, in January, was, according to previous appointment, and the promises of favor being then reiterated, there is no reason to believe that the hopes or fears first excited, had been dispelled. The time which intervened between the meeting in October and that in January, was considerable; but, as the parties were under appointment to meet a second time, and the adjustment of the matter was pending and awaiting further restitution of gold-dust to be made by the accused, he probably came to the second meeting with a hope that he would be able to escape criminal punishment. Where a confession has been induced by promise of favor, all subsequent admission of the same, or the like facts, must be rejected, if they have resulted from the same influence. 2 Stark. Ev. (ed. 1842), 36; 2 Bennett & Heard's L. C. C. 608. The principle upon which the confessions should have been excluded as first made in October is equally applicable to the repetition of them in January, but this is not true as to the statements made sometime afterward to the witness, Browner. With him the prisoner's relations were not such as to excite either

hope or fear, and there is nothing to connect this statement with the inducement previously held out by Furay. The time which had elapsed since the meeting with Furay, and the circumstances under which the prisoner met Browner, are sufficient to show that the statements to the latter were voluntarily made, and therefore they were properly received. Other objections to the record are passed without comment, as they will not probably arise on another trial of the cause.

The judgment of the district court is reversed and the cause is remanded for a new trial.

WELLS, J., dissenting. I dissent from the opinion of the chief-justice upon these points: The cause assigned by the prisoner for his challenge to the array, and in the overruling of which error is said to have intervened, is as follows: "Because the said jurors have not been selected and drawn from the body of said district, or county of Park, in Colorado territory, where it is alleged in the indictment preferred against this defendant, the said crime was committed." The allegation, like every other pleading, is to be construed against the challenger. Applying this rule, it will, I think, be apparent that the cause of challenge asserted goes to the poll only, and not to the array; for while it may be that the prisoner intended to assert that none of the jury came from the body of the district, yet clearly, as I think, it is entirely consistent with his allegation that some of the jurors were drawn from the district, and others from beyond it. If any one of the jury was taken from beyond the district, then what the defendant has alleged as cause of his challenge is true; the jurors considered collectively, were *not* drawn from the body of the district; yet clearly, if one only of the panel had been drawn from another district, this should not be ground to quash the whole array, but goes only to the poll.

Again, it is manifest that the prisoner's challenge is a traverse of the marshal's return, which, according to the

only authority which I have seen, is not admissible. *Hare v. Brown*, Cro. Eliz. 369; *Ree v. Higgins*, Raym. 484; Bac. Ab., Juries, B. 3 E.

2. That the courts of this territory, while exercising their jurisdiction in causes arising under the constitution and laws of the United States, are still territorial courts, and not courts of the United States, is conceded; that the practice and course of proceedings in these causes, as well as in causes arising under the laws of the territory, is within the scope of the powers conferred by the organic act upon the territorial legislature, I also concede; but that they have regulated or assumed to regulate it, as to the number of challenges allowed to the accused in an indictment under the laws of the United States, the only point in question here, I deny.

The 141st section of the act concerning criminal jurisprudence contains the first attempt of the legislature of this territory to regulate the number of challenges to be allowed to an accused person. By the act under consideration, the legislative assembly, after defining in detail the several crimes against society and individuals, under several divisions and sections, proceed to the 13th division of the statute. By section 133 of the statute, which is the first section of this division, it is provided that the district court, when any indictment shall be found, shall fix the sum in which the accused, when by law the offense is bailable, may be admitted to bail, and the officer who shall make the arrest is required to let the accused to bail upon his entering into recognizance in the sum specified, "which recognizance" it is provided "shall be made payable to the people of the territory." By the next section it is provided that it shall be the duty of the clerks of the district courts to issue process of *capias* for the apprehension of all persons indicted in said courts, respectively, to be directed "to the sheriff, coroner and constable of the county where such indicted person shall then be," and then follows a provision as to the arrest and return of the accused.

By section 135 it was provided that the clerks of the dis

trict court shall issue subpoenas "either on the part of the people or the accused, in any indictment." Sections 136 and 137 provide for the manner of summoning the jury, supplying vacancies in the panel, and that the prisoner shall in certain cases be entitled to a copy of the indictment and a list of the jury. By section 138, the manner of pleading is prescribed, "and such plea," it is declared, "shall constitute the issue between the people of the territory and the prisoner." Sections 139 and 140 provide for the cases in which the prisoner shall stand mute, or shall plead the plea of guilty. And by the 141st section it is provided that every person arraigned for any crime punishable with death shall be admitted on his trial to a peremptory challenge of ten jurors and no more; and every person arraigned for any offense, that may be punished by imprisonment for a term exceeding eighteen months, shall be admitted to a peremptory challenge of four jurors; and in all other criminal cases the defendant shall be allowed a peremptory challenge of two jurors. The attorney prosecuting on the part of the people shall be admitted to a peremptory challenge of one-half the number of jurors that the accused is entitled to, and no more." The sections of the act of 1861, to which I have referred, continued in force until the revision of the statutes in 1868, and were then re-enacted in the same words (R. S., ch. 22, §§ 208, 212) and so the law continued until the passage of the act of February 9, 1872, concerning criminal proceedings (Laws 1872, p. 94), and in this act, which still remains of force, the provision is, that "the people and the accused shall be entitled each to fifteen peremptory challenges, in capital cases," etc. Therefore, the law stands at present, as it did after the adoption of the criminal code of 1861, save that the number of challenges without cause shown, has been increased; the same enactments in the same words, are still of force, and apply in the same cases to which the act of 1861 was intended to apply, and in no others. The question is, did the legislature, by the enactment of 1861, re-enacted in the revision of the statutes of 1868, intend to regulate the number of challenges to be

allowed upon the trial of indictments, for offenses against the laws of the United States. If we look to the letter of the particular section merely, I think it is clear that they did not. The concluding words would seem to make it apparent that the purpose of the legislature was to prescribe the number of challenges to be allowed to the accused on one side, and to the people of the territory upon the other; statute can apply, therefore, only to those cases in which the people are party, *i. e.*, to causes arising under the laws of the territory. If any doubt remains after consideration of this section by itself, it will, I think, be dissipated by reference to the context. The organic act provides, section 10, that the marshal shall execute all processes issuing from the district courts, when exercising their jurisdiction as circuit and district courts of the United States; but by the 134th section of this act, as before seen, the legislature provide that process for the arrest of any indicted person shall be directed only to officers appointed under territorial law. Certainly, it is incongruous that, in prosecutions for offenses against the laws of the United States, the accused should be recognized as a penalty payable to any other than the United States, or the executive thereof, and in practice the recognizance of an accused person admitted to bail has, I believe, been invariably made to the president, yet, by the section 133 above cited, it is provided that whenever any person indicted in the district court shall be let to bail, the recognizance shall be made to the people of the territory. If these sections were intended to regulate the proceedings of the courts when exercising the jurisdiction of the circuit and district courts of the United States, the latter is in direct violation of the organic act, and both the former and the latter have from the beginning been persistently set at defiance by the courts. The inference is, I think, irresistible; that they never were intended to be of force in such cases, and that the courts never understood them to be so intended. If these sections do not apply, how can it be said that that touching challenges shall? What reason can be assigned for attributing to the latter section an effect broader

than the former? The argument to be drawn from the other sections, to which I have referred appears to me equally convincing. It would seem impossible, by argument, to make more clear the particular class of criminal prosecutions to which the mind of the legislature was directed in this enactment. If we look to the contemporary usage and practice of the courts, it will serve to fortify the argument drawn from the words of the statute, for I believe that, until a period dating since the last session of our legislature, it had not been suggested by any one that, in causes arising under the laws of the United States, the courts were governed by the rules of practice prescribed in the criminal code of the territory; but, on the contrary, the courts in general assumed to conform, in their procedure, to the acts of congress, regulating proceedings in the federal courts. It was not, I believe, until the announcement of the opinion of the supreme court, in *Clinton v. Engelbrecht*, that any doubt was suggested as to the propriety of the usage which had obtained in this respect. In the opinion of the chief-justice, it is asserted, in substance, that the purpose of congress was, that the jurisdiction of the territorial courts, in causes arising under the laws of the United States, should be exercised according to the practice adopted in other cases arising under the laws of the territory.

and conceive that all questions as to the purpose of congress is beside the mark. By the organic act, full power was given to the territorial legislature to regulate the practice of the territorial courts, in all cases which might come before them under whatsoever jurisdiction arising (*Palmer v. Cowdery*, Feby. T., 1873), and there is no syllable or word in the organic act, or elsewhere in the legislation of congress, which looks to a purpose in congress to control the power of the legislature in this respect. The whole subject was remitted to them to provide the rule which shall govern. Was it the intention of the legislative assembly, in the statutes which have been referred to, to exercise this power? For the reasons before set forth I am clear that such was not their intention.

It remains to consider whether the legislature have elsewhere declared their purpose as to this matter. By the act of October 11, 1861 (Laws 1861, p. 35), it was provided in substance, that the common law of England, so far as applicable, and certain acts of parliament in aid thereof, shall, so far as applicable, and of a general nature, be deemed and taken to be of full force within this territory, until repealed by legislative authority. The common law of England, therefore, whenever and so far as capable of application, affords the rule of decision as to cases in which the legislative assembly have not otherwise provided, and from hence I conceive is to be drawn the rule to govern the present case.

The offense of which the plaintiff in error was indicted is misdemeanor merely. *U. S. v. Mills*, 7 Pet. 141. By the common law, no peremptory challenges of jurors are, in such case, allowed. 2 Hawk. P. C. 580, 581; *U. S. v. Cottingham*, 2 Bl. O. C. 470. Therefore, the challenges made on behalf of the prisoner were properly denied.

3. The doctrine asserted in the opinion of the chief-justice, touching the admissibility of the confessions of the prisoner, is, I concede, fully sustained by the current of authority. There are, it is true, *dicta*, which assert the admissibility of the confession made in like cases. *State v. Crank*, 2 Bailey, 77; *State v. Moore*, 1 Hogue, 482; *State v. Jenkins*, 2 Tyl. 377; 1 Phill. Ev. (5th Am. ed.) 555*, note 159. But I am ~~not~~ prepared to assert that there is any authoritative decision which is at variance with the doctrine generally received in the courts.

Nevertheless, this is one of those venerable errors abounding in the law which rest altogether upon authority, and are respectable only for their antiquity, as I shall attempt briefly to show.

The reason uniformly assigned for the exclusion of confessions extorted by promises or threats is the unreliable character of confessions delivered under such influences. That the courts pay no regard to the indecency of subjecting an unfortunate person, accused of crime, to flatery, torture or artifice, in order to induce inculpatory

statements, is well established. The rule resting solely upon the supposed probability of the untruth of the confessions, it is to be observed.

1. That the rule established in this instance is at variance with the rule in other cases, where, as is conceded, there is equal probability of deception; *e. g.*, the case of accomplices, approvers, and persons notorious among their associates and acquaintances for their disregard of the truth. The testimony of such witnesses, notwithstanding its admitted unreliability, was, I believe, never rejected.

2. In the other instances in which the probability of deceit has heretofore sufficed to exclude the testimony of witnesses, that is, in the case of parties and interested persons speaking in their own behalf, and persons deficient in religious faith, the rule established by the courts has, with us, and I believe almost everywhere else, been abrogated by legislation; and the general acquiescence with which the new rule has everywhere been received, impels the belief that the fear which excited the courts to the exclusion of such evidence in the beginning, was without just foundation.

3. I think that no one at all acquainted with the practical workings of the rule in question can doubt that it has served more frequently to defeat than to promote justice; and upon this I quote the declaration of a learned commentator, that "The cases probably are rare in which such unfounded self-accusations occur, or at least, where a jury would be misled by them; and certainly the rule occasions, in a multitude of instances, the escape of the guilty. 1 Phill. Ev. (5th Am. ed.) 543.*"

4. If the exclusion of the confession rests altogether upon the probability that the confession is untrue, as we have seen, then, if the prosecution produce evidence tending to show and sufficient to warrant the jury in finding that it is *true*, it ought to be received; for in such case the reason of the exclusion is done away. All the courts recognize the propriety of this reasoning, but illogically decline to pursue it to its legitimate results.

If one accused of larceny, being put to torture, confess the crime and produce the goods from his own possession, or disclose the place of their concealment, and they are afterward found in the place indicated, you may, it is agreed, give in evidence the fact of the finding of the goods, conformably to information given by the prisoner; but you may not, in the same case, according to the received doctrine, give in evidence the prisoner's statement that he deposited the goods in the place where they were found, or that he stole them. But why may you not? The reason assigned for receiving so much of the confession as is received is, that in so far it is shown to be true, notwithstanding the improper influence by which it was extorted, *i. e.*, it is shown that it is probably true, for, considering the possibility of perjury in the testimony as to the fact or the place of the finding of the goods, it cannot be asserted that the truth of the prisoner's declaration even as to this is incontrovertibly established; therefore the doctrine amounts to this, that, in so far as the prisoner's confession is shown to be probably true, it shall be received. But I assert, in the case supposed, the finding of the stolen goods at the place indicated not only tends to corroborate the declaration of the prisoner that they will be found there, but also his declaration that he stole them and concealed them at that place, if he make this statement; for the courts, without dissent, agree to this, that the jury will be warranted in finding the prisoner guilty of the larceny upon the mere circumstance that the place of concealment is disclosed by him. And this amounts to saying that the finding of the goods at that place tends to show and warrants the belief that when he confessed to the larceny he spoke truthfully.

In other words, the received doctrine involves this absurdity, that while, in passing upon the primary question whether the evidence shall be received, the court, notwithstanding the corroborating circumstances, shall find the confession probably untrue, and therefore exclude it, the jury, considering the same evidence, may find the very fact confessed to be absolutely true.

For these reasons I am of opinion that the rule which the authorities establish ought to be abandoned. It was in the beginning illogical, at variance with all the analogies of the law, and I am persuaded that only the unfortunate complacency with which the courts have always regarded thieves and malefactors has so long maintained it. I am of the opinion that the judgment of the district court ought to be affirmed.

Reversed.

WYMOND v. AMSBURY.

TRESPASS against officer for seizing goods; exempt. If goods exempt from seizure and sale under legal process are taken in execution during the temporary absence from home of the debtor and his family, he may, nevertheless, maintain an action of trespass under the statute (R. S. 880), for treble the value of the goods so taken.

EVIDENCE as to process under which seizure was made. In trespass against an officer for taking goods which are exempt from seizure and sale under legal process, it is not necessary to prove the official character of the officer who issued the writ under which defendant acted.

As to official character of defendant. Nor is it necessary to prove the official character of the defendant in the suit.

As to kind of goods taken. In such action if the alleged wrongful seizure was of household goods, it should appear that they were kept for the use of the debtor and his family, and that they were such as mentioned in the statute (R. S. 880), or if of other kinds, that they were of no greater value than the statute allows.

PRACTICE — verdict may be for single or treble damages. In such action treble damages may be returned by the jury, or single damages may be returned, and the court may give judgment for three times the amount so returned.

But if the jury are instructed that, upon making out his case, the plaintiff will be entitled to treble damages, the court cannot assume that the damages returned are single, and render judgment for three times the amount.

Verdict where there are counts upon the statute and in the common form. And where the declaration contains counts for treble damages, and a count in the ordinary form for single damages, a general verdict upon all the counts cannot be applied to those which are founded upon the statute.

Error to Probate Court, Clear Creek County.

TRESPASS by defendant in error against plaintiff in error in probate court of Clear Creek county. It was averred in

the declaration, that defendant was a constable of the county of Clear Creek, and that, in virtue of a writ of attachment issued by L. F. Yates, a justice of the peace, at the suit of one Webster, and against the plaintiff below, the defendant levied upon certain wearing apparel, household furniture and books belonging to the plaintiff, which were by law exempt from such seizure, the plaintiff being the head of a family and a resident of the said county. This is the first count of the declaration; in other counts, after setting forth the seizure under the writ of attachment, it was averred that judgment was obtained in the action and execution issued, upon which the goods were sold; the last count was in the ordinary form trespass *de bonis*. The defendant pleaded not guilty, upon which a trial was had before a jury. The statute under which it was claimed that the goods were exempt from seizure and sale is as follows:

"The following property, when owned by any person being the head of a family and residing with the same, shall be exempt from levy and sale upon any execution or writ of attachment or distress for rent. * * * * *Fourth.* All wearing apparel of the debtor and his family; all beds, bedsteads and bedding kept and used for the debtor and his family; all stoves and appendages kept for the use of the debtor and his family; all cooking utensils, and all the household furniture not herein enumerated, not exceeding one hundred dollars in value. * * * * *Seventh.* The library and implements of any professional man, not exceeding three hundred dollars."

Four counts of the declaration were founded upon the following statute:

"SEC. 35. If any officer or other person, by virtue of any execution or other process, or by any right of distress, shall take or seize any of the articles of property hereinbefore exempted from levy and sale, such officer or person shall be liable to the party injured for three times the value of the property illegally taken or seized, to be recovered by action of trespass, with costs of suit."

Upon request of the plaintiff, the court charged as follows:

1. The court instructs the jury that if they believe from the evidence that the defendant levied upon the goods mentioned in the declaration by virtue of a writ of attachment, and that said goods were exempt by the statute of this territory, the plaintiff is entitled to recover three times the value of such goods, unless the defendant has shown that such goods were liable to attachment by reason of the departure of the plaintiff from this territory with intent to change his residence.

2. That the burden of proof is upon the defendant to show a removal from this territory after a residence once shown in the territory, and that a temporary absence with intention to return is not a removal so far as this case is concerned.

Mr. Justice BELFORD took no part in the decision.

Mr. HUGH BUTLER, for plaintiff in error

Mr. R. S. MORRISON, *contra*.

HALLETT, C. J. The declaration contains five counts, four of which are based upon the statute giving treble damages in case of an illegal seizure of property exempt from execution and attachment (R. S. 380), and the fifth count is in the ordinary form of trespass *de bonis*. It appears that defendant in error set out with his family upon a visit to the east, leaving his goods stored in the house which he had previously occupied, where plaintiff in error found them, and levied on them immediately afterward, under a writ of attachment issued by a justice of the peace at the suit of one Webster, and against the property of defendant in error. We are not informed by the evidence whether the journey was made with a view to a change of residence, but it appears that defendant in error returned after an absence of four or five months. The fact that he went out of the territory and returned after a time is not alone sufficient to show a change of residence. Nor is it material that at the

time of seizure the goods were not in actual use. The property exempt from levy and sale is, of course, designed for the use of the debtor and his family, whenever they are at their place of abode, but if called away from his home, the law will protect the debtor's property as well in his absence as when he is present with it.

The essential thing is, that a residence shall be maintained; and when this is done, I conceive that the property mentioned in the statute may remain for the use of the debtor and his family whenever they may return to it. Of course an absence long protracted may become evidence of a change of residence, and numerous circumstances may arise to prove the same fact. But this does not disprove the proposition that the statute affords its protection during the temporary absence of the debtor from his home, which is so reasonable and just, that I think it should be maintained.

The objection, that the official character of the justice who issued the attachment and execution is not shown, is met by the fact that the plaintiff in error received those writs and acted in obedience to them. He should not repudiate the authority under which he acted in seizing the goods, because, in accepting it, he gave full assurance of its validity. So, also, as to his own official character, if plaintiff in error assumed to act as a constable, for the purposes of this suit, he must be regarded as such officer. Defendant in error testified that he was the owner of the goods taken. And as to the wearing apparel, this was probably sufficient, for as to such goods, the ownership may show the use to which they were applied. But in household goods, such as beds and bedding, and the like, the statute protects only such as are kept for the use of the debtor and his family, and these must be of certain kinds, which are described, or if of other kinds, not exceeding one hundred dollars in value. The evidence is silent as to the use of the goods by defendant in error, and his family, and the value of those not enumerated in the statute, points upon which it should be explicit. Nothing was said in argument as to the sufficiency

of the evidence in this regard, and these remarks are made for the guidance of parties in another trial. The court instructed the jury that if the goods were taken in attachment, and were exempt by law, the plaintiff below was entitled to three times their value. The verdict returned is, in terms, for the value of the goods, but whether this was the single or treble value, we are not informed. If we could look into the evidence, and determine what was accepted by the jury, perhaps we could ascertain whether the amount specified is the single value or a greater sum, but this we are not inclined to do. There are authorities to the effect that the amount returned should be regarded as the single value of the goods taken. *Beekman v. Cholmen*, 1 Cow. 384; *Warren v. Doolittle*, 5 id. 684; *Newcomb v. Butterfield*, 8 Johns. 264; *Cooper v. Maupin*, 6 Mo. 634. But this rule cannot be applied to a case in which the jury have been instructed to find treble damages. *Brewster v. Link*, 28 Mo. 148. Where, as in the case at bar, such an instruction has been given, it is fair to presume that the jury have obeyed it, and obviously in such case the court can add nothing to their verdict. That single damages may be returned, and that the court may, when the facts will warrant it, enter judgment for treble the amount so returned, is shown by the authorities cited, but there can be no objection to the practice of requiring the jury to return treble damages, and so the court declare in the case in 5 Cowen. It is needless to say, however, that but one of these methods of proceeding can be adopted, and here there is reason to believe that both were resorted to. It will be observed, also, that the verdict is general, and we are unable determine whether it was found upon the statutory or common-law counts of the declaration. This was considered a fatal objection in *Brewster v. Link*, *supra*, and upon good reason; for if the verdict was based upon the common-law count of the declaration, neither the court nor the jury could treble the damages.

The judgment of the probate court is reversed with costs, and the cause is remanded for a new trial.

Reversed.

GOOD v. MARTIN.

PROMISSORY NOTE—*party indorsing may become maker.* One who puts his name on the back of a note at the time it is made and before it comes to the hand of the payee, there being nothing to show with what intention, is liable as maker.

The opinion of the court at the former term in this cause, on this point, re-examined and affirmed.

The ground of his liability. In an action on a promissory note against one who is charged as maker, upon the ground that he indorsed the note at the time it was made, and before it was delivered to the payee, the circumstance that he did not participate in the consideration does not tend to explain or rebut his liability as maker.

INSTRUCTIONS—*error without prejudice.* A party cannot complain of a charge which is favorable to his defense and which has not misled the jury, although it may appear to be wrong in the statement of a fact, or incorrect in principle.

WITNESS—*competency of a party to the suit.* Prior to the act of 1870, relating to the competency of witnesses (8 Sess. 62), a defendant who had suffered judgment of default to pass against him, was not a competent witness for his co-defendant, upon the trial of an issue of fact joined by the latter.

Parties to the suit were then excluded from considerations of public policy, and not because of their interest in the result.

Appeal from District Court, Arapahoe County.

THIS is the third appeal in this cause, the first and second being reported in 1 Colorado, 165 and 406. Appellant was charged in the declaration with William N. Shepherd and Parker B. Cheney, as maker of a promissory note. In the last count it was alleged that Cheney and Shepherd made the note and that it was indorsed by appellant before it was delivered to the payee. The cause was tried upon the general issue. At the trial, plaintiffs gave evidence tending to prove that the note was indorsed by appellant before delivery to Davidson, the payee; that it was given for the purpose of taking up another note executed by the same persons in the same manner as the present note. That the note in controversy was given for a balance of principal and interest due on a prior note, a portion of the old note having been paid at the time this was given. The note in suit is in the ordinary form, dated June 29, 1866, for the sum of \$800,

payable sixty days after date, with interest at five per cent per month from date until paid. It was signed P. B. Cheney, William N. Shepherd, and the names John Good, Alexander Davidson, indorsed. A witness for the plaintiff was asked on cross-examination, for whose indebtedness the note was given, and upon objection by the plaintiff, this was excluded. Wm. N. Shepherd, against whom a judgment of default had been taken, was offered as a witness for appellant and rejected. Appellant also offered himself as a witness and was rejected. It appeared that issue was joined in the cause before the act of February 11, 1870, relating to the competency of witnesses in civil cases, was passed. The court charged the jury that appellant was liable upon the note if he placed his name upon the back of it, and before its delivery to the payee therein, and without any statement, at the time, of his intention in so doing. The court also charged that appellant was liable if he placed his name upon the back of the note in part discharge of a prior indebtedness of Cheney, Shepherd and himself. Referring to the question of prior indebtedness, the court gave the following, which are mentioned in the opinion of this court.

3. Upon the question whether the note in controversy was given in part payment of the previous debt of Cheney, Shepherd & Good, there is evidence tending to show that such prior indebtedness, if any existed, was by virtue of a promissory note subscribed by Cheney and Shepherd, and bearing the name of Good on the back thereof, and if the prior indebtedness, spoken of by the witnesses, consisted only in a promissory note such as here supposed, then the jury will not be warranted in considering such prior note as the debt of Good in such sense as to render him, by reason of his signature upon the back of the note in evidence in the case, liable as joint maker with Cheney and Shepherd.

4. If, however, the promissory note in question was given in renewal of a former note signed by Cheney and Shepherd, and with the name of Good upon the back thereof, payable to Davidson and held by him, and if the understanding of the parties at the time of such renewal

was that the new note should be executed by the same parties and in the same manner as the old one, then the jury will be warranted in inferring that the intention and understanding of all parties, at the time of the execution of the new note, was that Good's liability upon the new note should be the same as upon the old ; and if the jury make this inference, then the jury cannot find that Good intended to be liable as joint maker with Cheney and Shepherd upon the note now in suit, unless they can first ascertain and determine from the evidence that Good's liability upon the original note was that of joint maker with Cheney and Shepherd; and the jury are further instructed that there is no evidence in the case from which the jury can infer that such was Good's liability upon the old note.

The charge was very full upon other points.

There was judgment for the plaintiff, and the defendant Good appealed.

Mr. Justice BELFORD took no part in the decision.

Mr. E. L. SMITH, for appellant.

Messrs. BROWNE & PUTNAM and Mr. N. HARRISON, for appellee.

HALLETT, C. J. On a former appeal, we considered the facts presented in this case with reference to the rule announced in *Rey v. Simpson*, 22 How. 341, as to the liability of one who becomes a party to negotiable paper by indorsing it in blank, before it had passed from the hands of the maker. 1 Col. 165. It is now urged that we have gone beyond the authority of the principal case, in saying, that, in the absence of evidence to show the intention of the parties, the indorser may be charged upon such an indorsement as a maker of the note jointly with the parties whose names appear upon the face of the instrument. In *Rey v. Simpson*, it is true that it was alleged in the declaration, that the indorsement was made for the purpose of guaranteeing the payment of the note and of becoming surety to the payee for the same, and this was admitted by the

demurrer. But if this statement had been omitted from the declaration, it is believed that the principle would be the same. Without such an averment, the case would stand upon the allegation that the indorsement was made while the note was in the hands of the maker, and before delivery to the payee, and with nothing to show what was the purpose of the indorsement, excepting the mere fact that the party had written his name upon the back of the note, that purpose must be made out. The case then presented is of one who has not received any portion of the consideration of the note, and who, by his signature, has manifested a disposition to become a party to it, but has not declared, except by his signature, in what character he will be bound. In such case it is necessary that the law should declare the intention with which the signature was affixed, for if this were left to the jury, there could be no certain rule governing his liability. One jury might find that he was not liable as maker, and another, that he was not liable as guarantor, and a third, that he was not liable as indorser, and thus, by successive juries, he would be absolved from all liability. If, then, the law is to supply the purpose and intention with which the indorsement was made, it can only be said, that it was for the credit and accommodation of the maker of the note, and this, for the reason that there is as yet no other party to the instrument. The payee not having received the note, it cannot be claimed that the indorsement is for his accommodation, and there is, in fact, no one but the maker who can receive any benefit from it. According to the practice in Minnesota, from whence *Rey v. Simpson* was removed, the purpose of the indorsement was properly set forth in the declaration, but such an allegation would find no place in a common-law pleading. The evidence to support the allegation upon issue of fact joined is said to be the circumstances under which the signature was placed upon the back of the note. If this evidence goes no further than to show that the signature was put upon the note in the hands of the maker, I cannot doubt the sufficiency of it. The law will then impute to the indorser,

a purpose to accommodate and give credit to the maker, because this is the most reasonable interpretation of his act. In common-law pleadings, as before stated, the intention is not alleged, but it is quite as much in issue, and the same effect will be given to the evidence of the circumstances under which the indorsement was made. Whether the pleadings be in one form or another, the object is to ascertain the intention of the party in signing his name, and if there is no distinct expression of intention, the law must interpret the act, for the purpose of ascertaining it. I conceive, therefore, that the views expressed upon this point on the first appeal may be maintained upon the principle recognized in *Rey v. Simpson*, and the charge of the court to the jury, enforcing those views, is entirely correct. It was not claimed upon the trial, or in the charge to the jury, that appellant participated in the consideration of the note, and it seems to have been conceded that he did not. If appellant's liability had been put upon the ground that he shared in the consideration, evidence to disprove the fact must have been received from him, but this was not the theory upon which the case was tried. The fact which he offered to prove was not in issue, and in the view which was taken of the case, did not affect his liability. He was to be charged as a surety if at all, and the offer was to show that he was not a principal. The argument is that non-participation in the consideration is a circumstance from which the jury might judge of appellant's liability, and so it is as to the question whether he is principal or surety. But whether he is to be charged as maker, indorser, or guarantor of the note, that circumstance will not explain, and therefore it was rightly rejected. It appears by the evidence that the note in suit was given in renewal of another note, executed by the same parties, and in the same manner as this one, in pursuance of an agreement to that effect. Upon this state of facts the charge of the court that appellant's liability upon the old note would measure his liability upon the new one, was based, and upon that point it was entirely correct. This was, however, followed by the further statement that there

was no evidence in the case from which the jury could infer that appellant's liability upon the old note was that of a joint maker, a proposition which was not accepted by the jury. The testimony is, that the new note was to be executed by the same parties, and in the same manner, as the old one, and, so far as we can learn, this was done. If the parties pursued the same course in making the new note which had been adopted in making the old one, the jury, being informed as to one, were equally well informed as to the other. The new note was found to have been executed in a manner to charge appellant as maker, and if the old note was executed in the same manner, his liability upon that was of the same character. The charge of the court was, therefore, too favorable to defendant, and the jury have drawn a correct conclusion from the evidence in opposition to it. The evidence upon this point is entirely harmonious, and the misdirection could not have prejudiced appellant upon the trial. Error has not been alleged upon this instruction, but as to the finding of the jury, and these remarks are directed to the point last named. Objection is also made to that portion of the instructions in which the jury are told that appellant might be charged upon evidence that the note was given in part discharge of a previous indebtedness of the three defendants, upon the ground that there is no evidence to which it can be referred. The only evidence of prior indebtedness of the three defendants was the original note of the parties which was taken up at the time the note in suit was given, and this the jury were informed, in the third instruction, was not sufficient to fix upon appellant the liability of maker. Connecting these portions of the charge they served to inform the jury that the original note was not evidence of prior indebtedness upon which appellant could be bound as maker of the note in suit, and this, if not useful to the jury, was certainly not misleading.

The remaining question to be considered relates to the competency of Shepherd, one of the defendants, who had suffered judgment to pass against him, as a witness upon

trial of the issue against appellant. As this cause was at issue before the act of 1870, by which the parties in a suit are admitted as witnesses therein, was passed, it is conceded that the provisions of that act cannot control, and the case must be governed by the common-law rule as modified by the act of 1872, which provides that a judgment may be taken against one of several joint defendants in an action upon contract. It is said that the interest of Shepherd, in the result of the suit, was determined by the default; for, by the act of 1872, judgment would go against him, although appellant should succeed upon the issue of fact. It is to be observed that the amount of damages to be assessed against Cheney and Shepherd was to be determined by the jury which tried the issue joined by appellant, and as to that matter Shepherd was certainly not competent to testify *Bowman v. Noyes*, 12 N. H. 302. According to some authorities he was competent to testify to any fact which would go to the discharge of appellant alone, but he was not offered as a witness to prove any such matter. The record states that he was called as a witness further to maintain the issue on the part of appellant, and the plea being the general issue, the question of damages in which Shepherd was directly interested, and most other defenses in the action of assumpsit, was provable under it. It is true that the note determined the amount of damages, but for aught that appears the intention may have been to prove payment, or accord and satisfaction, which was admissible under the general issue, and which would diminish the amount to be recovered from Shepherd himself, as well as the other defendants. Without, however, discussing this view of the question at length, it is sufficient to say that in the courts of the United States the parties to a suit were forbidden to testify therein on the ground of public policy, and not because they were interested in the result of the suit. In those courts, according to the old rule which has recently been changed by statute, a party to the record could not testify, although divested of all interest in the suit. *Bridges v. Armour*, 5 How. 94. This is decisive of

the question presented both as to Cheney and Shepherd, and renders any reference to decisions of State courts unnecessary. The points in the assignment of errors number thirty-three, in all of which those only to which I have referred have been mentioned in the argument. To go through with all of these points, and beyond those which counsel have deemed worthy of attention, would be tedious and unprofitable. The judgment of the district court is affirmed, with costs.

Affirmed.

PROMISSORY NOTE—INDORSEMENT BEFORE DELIVERY.—Indorser of note before delivery to the payee is liable as maker if there is no evidence of any intention to the contrary: *Kilbuck v. Allen*, 7 Colo. 228, 229, and *Good v. Martin*, 96 U. S. 91, affirming the judgment.

PARTIES TO ACTION ARE COMPETENT WITNESSES.—The act of Congress excluding parties or persons interested in the result of a civil action does not apply to the courts of the Territories: *Good v. Martin*, 96 U. S. 91. Territorial act of 1870, rendering parties competent as witnesses, did not apply to cases at issue when it was passed: *Good v. Martin*, 96 U. S. 91.

EYSTER v. GAFF et al.

PARTIES IN ERROR—semble. Only parties and privies to a judgment can assign error thereon.

TIME OF APPLICATION TO BECOME PARTY Those who desire to become parties to a judicial proceeding wherein they are interested, must apply in apt time.

The petitioner had omitted to apply to become party in the district court, though then interested. Nothing appearing to excuse the omission, leave to appear in the cause upon appeal was denied.

Appeal from District Court, Arapahoe County.

GAFF and others brought ejectment against Eyster in the Arapahoe district court, and at April term, 1872, judgment was given in favor of the plaintiffs. An appeal was prayed by Eyster, and the cause being brought to issue in this court, was argued at the February term, A. D. 1873. Judgment being reserved, one John Meechling, at the September sitting of the court, presented his petition to be let in to defend in this court, assigning for ground of his petition, that by the record it appears that the estate in controversy was lately the property of one George W. McClure, from whom the plaintiffs derive title, and who, before the beginning of this action, had been adjudged a bankrupt, and to whom petitioner had been appointed assignee. The petitioner also produced a certified copy of the assignment in bank-

ruptcy executed to him by the register, and bearing date before the institution of the ejectment. Nothing was shown to excuse the omission to apply in the lower court.

WELLS, J. The petition must be denied. The issues were made in the district court and tried there. The only questions to be considered in this court arise upon that record. To admit a new party now, unless in substitution for a deceased person, or one adjudged a bankrupt since the judgment below, or the like, would violate the rule that only parties and privies to judicial proceedings may assign error therein. Inasmuch as the assignee was not a party below, he cannot be prejudiced by the judgment, and he ought not to be heard to question its regularity. If those interested in a litigation of this character desire to interfere therein, they should apply for permission to do so in seasonable time. The case of *Herndon v. Howard*, 9 Wall. 664, which was relied on at the bar, seems not in point. In that case, Herndon, who was defendant below, became a bankrupt after perfecting his appeal. His assignee was properly admitted in the supreme court. Here the bankruptcy occurred long before the action was brought, and the bankrupt never was a party.

Petition denied.

UNION GOLD MINING COMPANY v. THE BANK.

CORPORATE SEAL—*presumption of authenticity*—When the corporate seal appears affixed to an instrument, which purports to be the deed of the corporation, and which bears the signature of the president of the company, it will be presumed to have been affixed by proper authority.

The seal itself is *prima facie* evidence that it was affixed by lawful authority of the corporation.

Vote of directors not required. The presumption of authority which arises from the presence of the corporate seal affixed to an instrument will not be overcome by showing that no vote of the directors or other body exercising the corporate authority is shown.

PRESUMPTION — *of authority to execute appeal bond.* The approval by the district court of an appeal bond, which appears to have been executed by the appellant through an agent, raises a presumption that the authority of the agent was then investigated and satisfactorily shown.

To overcome this presumption upon motion to dismiss the appeal, the appellant must present an affidavit, showing reasonable ground to doubt the agent's authority.

Appeal from District Court, Jefferson County.

THIS was a motion to dismiss an appeal for defect of authority to execute the appeal bond. The bond was subscribed in the name of the corporation by one Becker, its president, and the corporate seal, or what appeared to be such, was affixed.

The authority of Becker to use the corporate seal, or execute the bond in the name of the corporation, did not appear, and the motion went upon this ground: no affidavit or other evidence of want of authority was given.

Messrs. H. M. TELLER, GORSLINE & CHARLES, for the motion.

Messrs. BUTLER and G. B. REED, *contra*.

Mr. Justice WELLS dissented.

BELFORD, J. The appeal bond in this case is signed in the name of the Union Gold Mining Company, by Theodore H. Becker, its president, and is attested by the seal of the corporation. The appellee moves to dismiss the appeal, because it is not shown that Becker had authority as president to execute the bond. When the common seal of a corporation appears to be fixed to an instrument, and the signatures of the proper officers are proved or admitted, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority; the contrary must be shown by the objecting party. The presumption of authority to affix the common seal, from the fact that it is affixed to the instrument, will not be overcome by the mere

fact that no vote of the directors authorizing it is shown, since it often appears that large powers are exercised by corporate officers with the tacit approval of the principals of the corporation, although the nature and extent of their authority have never been defined by any direct act of the corporation. *Ang. & Ames on Corp.*, § 124; *Lovet v. The Steam Saw-mill Association*, 6 Paige, 60; *Kochler v. Black River Falls Iron Co.*, 2 Black. 716. This presumption, however, is not conclusive. The bond in this case was approved by the judge, and we must presume, in the first instance, that Becker submitted to him the evidence of his authority to execute the same, and to attach to it the corporate seal. The authority to execute the bond cannot be questioned on a mere motion. The existing presumption cannot be disproved by this method. If the appellee seeks to question this authority, it must do so by affidavit, showing that reasonable grounds exist for believing that Becker had no authority to sign for the company or attach the corporate seal. Upon such a showing, the authority to execute such a bond would have to be shown. Nothing of that kind appearing here, the motion to dismiss will be denied.

Motion denied.

EYSTER v. GAFF et al.

PRESUMPTIONS — *of performance of official duty.* A trustee held certain lands, whereon was situate a town site; for the use of the occupants; and, by the terms of the statute creating the trust, the execution thereof was directed to be according to certain prescribed regulations: *Semble*, that a conveyance by the trustee, reciting that the grantee is entitled to the premises, under the provisions of the statute creating the trust, referring to such act by its title, raises a presumption of compliance with the regulations.

EVIDENCE — *original record of a conveyance.* *Semble*: It is admissible to receive the original record of a conveyance of lands; production of a certified copy is not essential.

MORTGAGE — *evidence of subsisting debt.* *Semble*: Production of the mortgage, where this recites an indebtedness, is sufficient *prima facie* to establish

the continued existence of such indebtedness; the accompanying note or bond need not be produced.

BANKRUPTCY OF MORTGAGOR—*effect on mortgagee's estate.* The bankruptcy of the mortgagor is no bar to an ejectment by mortgagee against a third person not connected with the assignee in bankruptcy, even though such ejectment be without permission of the bankruptcy court, the assignee never having assumed possession of, or intermeddled with, the estate.

The assignee in bankruptcy is not bound, in all cases, to assume possession of mortgaged lands pertaining to the estate, and no legal presumption exists of such possession, either actual or constructive.

Appeal from District Court, Arapahoe County.

AN act of congress, passed on the 23d of May, 1844 (5 Stat. at Large, 657), authorized the entry of lands of the public domain whereon should be situated any town, by certain officials named, "in trust for several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or territory in which the same is situated." The act contained a proviso that any act of the trustees, not in conformity to the rules and regulations prescribed, should be null and void.

The act of May 28, 1864 (13 Stat. at Large, 94), extended the above act, so as to authorize the probate judge of Arapahoe county to enter certain lands named, whereon was situated the city of Denver, and provided the execution of its provisions should be controlled in all things by the provisions of the former act.

The legislature of the territory, by an act passed May 11, 1864, prescribed rules and regulations for the execution of the trusts arising under an entry made in pursuance of the first-mentioned act and any amendments thereto. This act directed that the official making the entry should, within thirty days thereafter, give notice thereof in a manner prescribed, and that every person claiming to be an occupant, or entitled under the trust, should, within ninety days after

the first publication of notice of the entry, deliver into the office of the official charged with the trust, a statement in writing, containing an accurate description of the particular parcels or lots wherein he or she claimed an interest, and the specific right or interest or estate which he or she claimed to be entitled to receive. Those failing to observe this requisition were declared forever barred, etc.; provision was made for the settlement of adverse claims; the apportionment of the cost and expenses of the entry, and directing conveyance to be made to the claimant after ninety days from the first publication of notice of the entry.

Thomas and James W. Gaff brought ejectment for certain lots, part of the Denver town site; the declaration counting for the premises as the plaintiff's estate in fee.

Upon the trial, which was had before the court without a jury, it was shown that one George W. McClure had resided upon the premises, and was the owner of certain improvements thereon, from 1862 to 1868.

It was also shown that one Hall, probate judge of Arapahoe county, had entered the lands described in the act of congress, on the 6th day of May, A. D. 1865, in pursuance of the provisions of that act.

The plaintiffs also gave in evidence, from the files of the probate judge's office, a statement, subscribed by McClure, and filed in that office on May 25, 1865, by which McClure applied for a conveyance of the lots in question, under the provisions of the latter act of congress, stating that he "claimed the same as the owner thereof," but not otherwise particularizing the estate or interest claimed. It was shown, against the defendants' objection, that this paper accorded in form with those generally used by claimants of lots in this town site.

Plaintiffs also produced a book, admitted to be one of the books of records of the office of the recorder of the county, and offered to read therefrom the record of a conveyance of the premises in controversy, purporting to have been executed by Hall, probate judge, to McClure, on the 11th of August, A. D. 1865, and which recited the act of con-

gress, the entry by the probate judge, and that McClure was entitled to the premises, under the provisions of the act, but not otherwise showing compliance with the provisions of the territorial legislation. The defendant objected to this record: 1. Because the original record, and not a certified copy, was produced. 2. Because the deed did not, upon its face, show a compliance with the regulations prescribed by the territorial legislature; but the evidence was received, and this was assigned for error.

Plaintiffs also gave in evidence, over the defendant's objection, a mortgage of these and other premises, executed by McClure to themselves, and expressed to be for securing the payment of certain moneys, payable in installments, and evidenced by sundry promissory notes; the mortgage bore date February 2d, A. D. 1867, and the last installment of the mortgage debt matured in nine months thereafter. No evidence was given of the non-payment or continued existence of the mortgage debt; and this was the ground of the defendant's objection. The reception of this evidence was also assigned for error.

It was also shown, that on the 11th December, 1868, these plaintiffs exhibited in Arapahoe district court their bill for the foreclosure of this and another mortgage, of which they were the assignees; that a decree of foreclosure and sale was entered on the 1st July, 1870; that a sale of the premises had been had under this decree on the 27th August, 1870, and confirmed October 27 following, at which the plaintiffs were the purchasers, and that the premises were conveyed to the plaintiffs, in pursuance of this sale, on the 29th of May, 1871.

It was also shown on the part of the defendant, by an exemplification out of the supreme court of the territory, which then exercised jurisdiction in bankruptcy, that McClure, on the 10th day of May, 1870, filed his petition to be declared a bankrupt (the accompanying schedules setting forth the property in controversy, as part of the bankrupt's estate, incumbered by the mortgage given in evidence in this cause, and the plaintiffs, as secured cred-

itors, for the mortgage debt); that he was adjudged bankrupt, May 11, 1870; that a warrant issued to the marshal, by which he was required to summon the creditors therein named, including the present plaintiffs, among others, to attend the first meeting of creditors; that said warrant was returned by the marshal, duly served; that publication of notice of the first meeting of creditors was also made; and that at this meeting, John Meechling, Esq., was elected assignee of the bankrupt's estate; that he accepted the appointment on the 4th June, 1870; and received the assignment of the bankrupt's estate on the 9th of June; that on the 30th of June, 1870, he had filed in the foreclosure cause of *Gaff et al. v. Eyster*, a certificate of his appointment as assignee, but, so far as appeared, he had never appeared therein, or sought to become party thereto; nor had he in any way sought to intermeddle with any of the mortgaged premises, except that, upon the 2d day of August, 1870, after final decree in the foreclosure suit, he had filed in the supreme court, sitting in bankruptcy, a petition for an order directing certain tenants, including the defendant below, to pay the rents which might be due to the estate of McClure; no action was ever taken upon this petition, nor, so far as appeared, was the attention of the court in bankruptcy called to it.

The plaintiffs below, so far as appeared, had never proved their claim, in the bankruptcy court, nor was the consent of that court obtained to the proceedings in the foreclosure suit, subsequent to the bankruptcy, nor to the ejectment suit.

The district court found the defendant guilty, and the plaintiffs entitled in fee, and gave judgment accordingly; the defendant below excepted to this judgment, and assigned it for error.

The record did not show that, in the court below, any evidence had been given of the defendant's possession of the premises. It was orally admitted, however, that such evidence had been given, and plaintiff in error stipulated not to object upon the ground of this omission.

Mr. C. S. EYSTER, *pro se*.

Mr. J. Q. CHARLES, for appellees.

Mr. Justice BELFORD dissented.

WELLS, J. Passing by all questions as to whether the assignee of McClure was or was not a necessary party to the bill to foreclose, and as to whether the decree given therein, after the bankruptcy, and without joining him, is or is not void, it appears to us that the appellees were properly permitted to recover in the court below, upon their mortgage alone. This results necessarily, as we think, from the nature of the mortgagee's estate, and the relation of the assignee thereto. The lien and estate of the mortgagee is preserved, notwithstanding the bankruptcy, and the assignee succeeds to the right which the mortgagor had before bankruptcy. If the assignee has, in person, or by another, taken actual possession of the estate, the mortgagee cannot disturb that possession by an action brought after the initiation of the bankruptcy proceedings; in such case the possession of the assignee is the possession of the court in bankruptcy, and if the mortgagee would enter, he must first obtain the permission of that court. But in many cases he is not entitled to such possession; *e. g.*, when the estate assigned consists of realty, subject to mortgage, and the mortgagee has entered before the bankruptcy. In such case the mortgagee unquestionably may retain the possession which he has lawfully acquired. So there are other cases - where, though technically entitled to the possession, he is not only not bound to assume it, but his duty is to leave it where the bankruptcy finds it, *e. g.*, where the estate assigned is subject to incumbrance exceeding its value. *Lambert's case*, 2 B. R. 138. Therefore, where the estate is assigned subject to mortgage, it ought not to be said, that as matter of law, nothing being shown as to the fact, the assignee had either the actual or constructive possession. And in the present case the appellant had not in any way connected himself with the assignee, nor shown

even that the assignee had ever assumed or attempted to assume the possession of the premises. If, as for aught we know is the case, the assignee disclaims the estate, the plaintiffs certainly are entitled thereto, and they ought to be permitted to proceed against the defendant, who appears to be a mere stranger in the ordinary courts, notwithstanding the bankruptcy.

The judgment of the district court is

Affirmed.

BELFORD, J., dissenting. When I have the misfortune to differ from this court, I would, under ordinary circumstances, silently acquiesce in its opinion. It is well known to the profession that this court unanimously voted to reverse this judgment at the last term. Since that time I find that my associates have changed ground. My convictions have, however, undergone no modification. They may be mistaken and unwarranted, but still they are sincerely entertained, and should not be abandoned simply because others have received a degree of judicial illumination, which thus far has failed to enlighten my path. And inasmuch as I think this cause cannot be maintained, I think it not improper to review at length the whole case. The first error assigned is the action of the court in admitting the filing made by McClure on the lots in controversy. The second error goes to the introduction of the deed from Hall to McClure. I will consider these two assignments together. It appears from the bill of exceptions that McClure, the mortgagor, was in the possession of these lots from 1862 until 1868. The mortgage was executed while he was in such possession. It is a well-settled principle of law that a mortgagor will not be permitted to dispute a title derived under his mortgage, nor allege any thing in opposition to a claim founded on it. By the mortgage he professes to convey, and thereby avers, that he held an estate in fee simple. An ancient rule of the common law, founded on clear and immutable principles of justice, forbids a party from alleging in contradiction of his own deed or in opposi

tion to a claim founded on such deed, that he was guilty of falsehood and had no estate or interests in the premises at the execution of the deed. Granting that the filing was defective, and the deed not in conformity with the law, nothing is clearer than that McClure is estopped from availing himself of any defects which may exist in the instruments under and through which he derived his title. And while this is true of the mortgagor, it is equally so of a person who enters as his tenant subsequent to the execution of the mortgage. *Addison v. Crow*, 5 Dana, 282; *Den v. Vanness*, 5 Halst. 102.

It is equally well settled that in an action of ejectment for the recovery of mortgaged premises against the mortgagor, or one entering under him, subsequent to the date of the mortgage, the plaintiff need not trace his title back of the mortgage. *Pollock v. Maison*, 41 Ill. 516. On the trial below, the plaintiffs, after introducing the mortgage, rested their case, and the defendant, with a view to show that the mortgage was ineffectual, offered in evidence the decree of foreclosure, and resisted the recovery on the mortgage, on the ground that it was merged and extinguished by the decree. In the courts where this question has arisen, considerable conflict prevails. In the case of *The People v. Bebee*, decided in 1847, and reported in 1 Barb. 379, it is held that a decree of a court of equity for the foreclosure of a mortgage extinguishes the lien of the mortgage, and it is further held that after a sale of the mortgaged premises under the decree of foreclosure, neither the mortgage nor the decree is any longer a lien upon the premises. In the case of *Butler v. Miller*, 1 Denio, 407, it was held that, when a party having a note secured by a mortgage takes judgment on the note, the judgment operates as a merger and extinguishment of the debt and mortgage. This same case coming before the court of appeals again (1 Comst. 500), the court alludes to the previous decision, and questions its soundness. They say that, although it is clear that the notes were merged in the judgment by operation of law, it does not certainly follow that the mortgage would be extinguished; the debt is not

yet satisfied ; the notes may have been canceled, but the debt was not ; until that is done, the mortgage, whether upon real or personal property, should be allowed to stand. The rule that securities of a higher nature extinguish inferior securities will be found to apply to the state or condition of the debt itself, and means no more than this, that when an account is settled by a note, a note changed to a bond or a judgment taken upon either, the debt, as to its original or inferior condition, is extinguished or swallowed up in the higher security, and that all securities by which such inferior condition was evidenced lose their vitality. The court states : "It has never been applied, and never should be, to the extinguishment of distinct securities, whether superior or inferior in degree ; these are to be canceled by satisfaction of the debt or voluntary surrender alone." In Pennsylvania, it has been repeatedly held that when a judgment is taken on a bond or note secured by a mortgage, and the land sold under the judgment, the lien of the mortgage is destroyed *West Branch Bank v. Chester*, 11 Penn. St. 282 ; *Welliard v. Norris*, 2 Rawle, 56 ; *McCall v. Lennox*, 9 S. & R. 303 ; *Cronister v. Weise*, 8 Walls, 215 ; *Douley v. Hays*, 17 S. & R. ; *Clark v. Stonley*, 10 Barr, 497. The decisions in Pennsylvania are made to rest on the ground that, when a sale is on a judgment on the bond for which the mortgage was given, the entire estate of inheritance was the subject of sale. The mortgage is regarded as a mere charge on the land. The estate in the land is the same thing as the money due upon it. A mortgage, though in form a conveyance of the land, is, in substance, but a security for the payment of the money, and the debt being paid, or in any other manner extinguished, the lien of the mortgage is gone. The transaction is regarded as nothing else in substance but a debt to which all securities are merely accidental adjuncts, and which have no existence but by their union with the subject to which they are attached. The equity of redemption is, therefore, not a mere trust, but in equity is the veritable estate, and when sold to satisfy the debt secured by the mortgage, the purchaser

takes the blended estates of the mortgagor and mortgagee. In Kentucky it has been repeatedly decided that an execution on a judgment at law for a mortgage debt cannot be levied on the equity of redemption of the mortgaged property, and that a sale of the equity under such an execution possesses nothing to the purchaser; this, of course, does not apply to sales when made under judgments in favor of general creditors. *Goring v. Streve*, 7 Dana, 65; *Swigert v. Thomas*, id. 220; *Bronston v. Robinson*, 4 B. Monroe, 142; *Waller v. Tate*, id. 531.

It is not a matter of question that a creditor who takes a mortgage to secure a debt by bond, or otherwise, has three remedies, either of which he is at liberty to pursue until his debt is satisfied. He may bring an action of debt upon the bond, or he may put himself in possession of the rents and profits of the land mortgaged by means of ejectment, or he may foreclose the equity of redemption and sell the land to satisfy the debt. I am clearly of the opinion, however, that a mere judgment on the bond in an action of debt is not a discharge of the lien of the mortgage, nor has a simple decree of foreclosure that effect; but where the mortgaged property has been sold under the decree to satisfy the debt, then, if the decree is a valid one, the mortgage has ceased to be available. By the sale of the mortgaged property, that is accomplished, which the mortgagor and mortgagee, at the time of the execution of the mortgage, intended; that the property should stand as security for the debt, and if necessary be resorted to, as a fixed security, out of which to obtain payment. By such sale the land is converted into money and applied to the mortgaged debt, and the purchaser takes the title. If the proceeds amount to more than the debt, the surplus goes to the mortgagor; and if they are insufficient to pay the debt, the balance unpaid may be recovered from the mortgagor. And this is consistent with the contract, the rights and interests of the parties, where the mortgagor becomes the purchaser at such sale, two titles in the land become united in the same person, in the same right, and at the same time as

mortgagor and mortgagee. The owner of the decree and mortgage is alike the owner of the land. The mortgage has served its purpose when the sale takes place, and can no longer be used as a foundation on which an action of ejectment can be permitted. While the lien of the mortgage is thus defeated by the sale, it has been uniformly held that the title acquired by the sale is carried back, by relation, to the date of the execution of the mortgage. It has also been repeatedly decided, where mortgaged property is sold under decree of foreclosure, and has failed to satisfy the debt, that the property in the hands of a purchaser under such sale is not liable to another exposure. *Ex parte Stevens*, 4 Can. 133; *Henson v. Drygert*, 8 Johns. 257; *Ridgeway v. Longaker*, 18 Penn. St. 219. It now becomes necessary to inquire whether the decree rendered in the foreclosure suit is a valid one. The proceedings to foreclose the mortgage were begun some eighteen months prior to McClure's discharge as a bankrupt; the decree, however, was not entered until a considerable time afterward. It is manifest, from the provisions of the bankrupt act, that when a voluntary petitioner in bankruptcy files his petition in due form, he becomes *eo instanti* a bankrupt, so far as any interference with the property named in his inventory is concerned, and such property is brought into the bankruptcy court, and placed in its custody and under its protection. When the property rests in the hands of the assignee, there is an impassable chasm between the bankrupt and his estate; he has no further interest in or control over it. It is in the custody of the law for the benefit of his creditors. He is as absolutely dead to the estate as he would be if buried out of sight. At the time the decree was entered, the equity of redemption was out of McClure and in the hands of the assignee. Ordinarily speaking, when the interest of a defendant in the subject of the litigation becomes vested in others *pendente lite*, without an actual abatement of the suit, a distinction is very properly made between the transfer of that interest by the mere voluntary act of the defend-

ant, as in the case of a sale or assignment in the ordinary course of business, and a transfer of that interest by operation of law, as upon an assignment in bankruptcy or under insolvent laws. In the first case the complainant is not bound to make the assignee a party, but in the last case the assignee, who has become such by operation of law, has a right to be heard, and must be made a party before the suit can be further prosecuted. *Cleveland v. Sedgwick*, 7 Paige, 200; *Dens v. Thorne et al.*, 3 Johns. 544; *Springer v. Vanderpool*, 4 Edw. Ch. 362; *Lowry v. Morrison*, 11 Paige, 520; Story's Eq. Pl., § 136; *In re Frezelle*, 5 N.B.R. 122. It could not be contended that a complainant, after the death of the respondent, could proceed to enter a decree affecting his property without making those parties on whom the estate was cast. Before another step could be taken, it would be necessary to revive the suit in the name of the administrator or heirs, and this principle is equally applicable to the case at bar, inasmuch as the assignee stands in the same relation to the bankrupt that the administrators or heirs sustain to a decedent. *Herndon v. Howard*, 9 Wall. 664; *Lacy v. Rickett*, 11 Ala. 1002; *Swepson v. Rouse*, 6 Am. Rep. 736. It is the constant rule of courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented; and hence, also, it is a general rule in equity that all persons materially interested, either legally or beneficially, in the subject-matter of the suit are to be made parties to it, either as plaintiffs or defendants, so that there may be a complete decree which shall bind all. In this case the very property, to wit, the equity of redemption which the complainants were seeking to foreclose, was, at the date of the decree, in the hands of the assignee. He was not made a party, was not bound by the decree, and lost no interest by virtue of the same.

It is strenuously insisted on by the counsel for the appel-

less, that every act of a court of competent jurisdiction shall be presumed to be rightly done until the contrary appears, and that this court must presume that the assignee was made a party to the foreclosure proceedings. It is only necessary to say, in reply, that such a presumption would be in the face of the whole record. Not an order, interlocutory or otherwise, made in the case refers in any manner to the assignee. Violent and extraordinary would be the conduct of a court that would have the temerity to announce that the rights of an individual were swept away or barred by a decree which did not purport in any manner to affect them. It is further contended that the foreclosure suit was a proceeding *in rem*, and not *in personam*; that no personal decree was or could have been rendered against McClure. All this may be conceded, and the difficulty will still remain. Whatever rights McClure had at the commencement of the bankruptcy proceedings passed to his assignee. The bankruptcy proceedings antedate the decree. When that was made, Meechling was the owner of the equity of redemption. This suit was brought to foreclose that. McClure then had no interest which could be affected, and the assignee was not before the court. Speaking on this subject, CLIFFORD, J., in the case of *Buchanan et al. v. Smith*, 16 Wall., remarks: "Until the debtor commits an act of bankruptcy it is doubtless true that any creditor may lawfully sue out any proper process to enforce payments of debts overdue, and may proceed to judgment, execution, seizure and sale of his property, but it is equally true that the appointment of an assignee, under a decree in bankruptcy, relates back to the commencement of the bankruptcy proceedings, and that the instrument required to be executed, under the bond of the judge or register, assigns and conveys to the assignee all the *estate*, real and personal, of this bankrupt, including equitable as well as legal rights and interests and things in action as well as those in possession which belonged to the debtor at the time the petition in bankruptcy was filed." In the case of *Winslow v. Clarke*, 47 N. Y. 263, RAPALLO, J., says:

"At the time of the commencement of the foreclosure suit, the equity of redemption was vested by operation of law in the plaintiff (the assignee), and he was not made a party to the proceedings. The foreclosure, therefore, was of no effect as to him, and his equity of redemption remained in full force." That the assignee must be made a party, I think is clear from the following decisions: *Fisher on Mortgages*, 191; *Randall v. Mumford*, 18 Vesey, 424; *Ex parte Berry*, 1 Dickens, 81; *Montieth v. Taylor*, 9 Vesey, 615. In the case of *Russell v. Clark, executor*, 7 Cranch, 69; 2 Curtis, 459, MARSHALL, C. J., holds that assignees in bankruptcy are indispensable parties to a bill against the bankrupt and persons to whom he conveyed property in trust before he was decreed a bankrupt." If assignees could be dispensed with, new opportunities for the practice of frauds would be opened up. It would be an easy matter for one desirous of defrauding certain unsecured creditors, to place on his estate mortgages in favor of some associate in his villainy, exceeding in amount the value of his property, with the understanding that, when the property was sold, there should be a division of the proceeds. In the furtherance of such a transaction, the mortgagor would not be inclined to interpose obstacles when a suit looking to the sale of the property was instituted in court. The assignee stands as the representative of all the creditors, and he should be made a party, in order that, if desirable, he may contest the validity of all deeds executed by the debtor, and assert in himself, for the benefit of the creditors generally, a right to the whole fund. And so believing, I find no difficulty in holding, both on principle and authority, that the decree in the foreclosure suit is simply a nullity.

It then becomes important to inquire whether the appellees can maintain an action of ejectment on the mortgage, or to state it more precisely, can a creditor, during the pendency of bankruptcy proceedings, enforce a lien against the estate of the bankrupt in a State or territorial court. In the case of *Den v. Stockton*, 7 Halst. 322; *Williams v. Brownston*, 3 Gilm. 611, and *Kruse v. Kripp*, 12 Ill. 104, it is laid down

that a mortgagee does not divest himself of the right to maintain an action of ejectment by filing a bill to foreclose, procuring an order of sale, and accepting the sheriff's deed for the premises. If the sheriff's sale is valid, the mortgagee, having become the purchaser, has a right to recover by virtue of the purchase and conveyance. If the sale is not valid, his mortgage still remains, and this rule must be applied to this case, unless some controverting exception, growing out of the peculiar situation of this property, intervenes to arrest this action. Is there such an exception? Of the power of congress to pass laws on the subject of bankruptcy there is, and can be, no question, and when such a law is enacted it is paramount, binding alike on Federal and State tribunals. The commencement of proceedings in voluntary bankruptcy transfers to the national courts the jurisdiction over the bankrupt's estate and all parties and questions connected therewith. The manifest object of the act of 1867 was to provide speedy proceedings, and the ascertainment and adjustment of all claims and rights in favor of or against the bankrupt's estate in the most expeditious manner consistent with justice and equity. Cases pending in State courts at the date of the bankruptcy, where there is nothing in them which requires the equitable interference of the bankruptcy court to prevent any mischief or wrong to other creditors under the bankruptcy, or any waste or misapplication of the assets, are not infrequently allowed to proceed and be consummated by proper decrees and judgments, especially when there is no suggestion of any fraud or injustice. Suits instituted subsequently are seldom, if ever, entertained by State tribunals. Jealous of their own jurisdiction, they have exhibited a commendable zeal in avoiding all occasion for conflict with federal tribunals. In a late case the supreme court of Michigan declined to entertain a cause affecting bankrupt's estate, on the ground that it was instituted subsequently to the bankruptcy, and that the jurisdiction of the national courts is exclusive. Speaking to the same point, the supreme court of Massachusetts, in *Clifton v. Foster*, 103 Mass. 233, say: "Upon

the institution of proceedings in bankruptcy and the appointment of an assignee, all the property of the bankrupt passes into the custody of the courts of the United States, and cannot, while such proceedings are pending, be taken out of their custody upon any subsequent suit in a State court, pending the bankruptcy proceedings, therefore no order could be made on this petition for the sale of the real estate to satisfy the lien of the petitioners." The same doctrine is announced in California. *Wilson v. Capuro*, 41 Cal. 551. In the case of *Whitridge v. Taylor*, 66 N. C. 275, it is held that the jurisdiction of the courts of bankruptcy is superior and exclusive for the purposes contemplated, except as is otherwise provided for in the statute. In this case the mortgagee was allowed to foreclose his mortgage, for the reasons that the adjudication in bankruptcy had taken place in the district court of Maryland, and because that court had no extra-territorial jurisdiction. It also appears that the assignee accepted service, and was willing that the case should proceed. The late Chief Justice CHASE, *In re Winna*, 4 N. B. R. 5, says: "By the bankrupt act all the rights and all the duties of the bankrupt, in respect to whatever property not expressly excluded from the operation of the act, he may hold under whatever title, whether legal or equitable, and however incumbered, pass to and devolve upon the assignee at the date of the filing of the petition in bankruptcy, and all rights thus acquired are to be enforced by process, and all duties thus imposed are to be performed under the superintendence of the national courts. No lien can be acquired or enforced by any proceeding in a State court after petition is filed, though, in case where jurisdiction had been previously acquired by State courts, of a suit brought in good faith to enforce a valid lien upon property, such jurisdiction will not be divested." It would seem clear, from the foregoing authorities and numerous others which might be cited, that a territorial court is without jurisdiction in cases arising subsequent to the bankruptcy.

It seems to me that the true theory of the bankrupt act is, to stop all things at the date of the bankruptcy and to divide

the wreck of the man's property as it stood at that time, and that this division and distribution is to take place under the directions, not of thirty different State courts, but of the district court of the United States. It is claimed by the appellees, "that nothing in the bankrupt act shall be construed to annul, destroy or impair any lien, mortgage, or other securities on property, real or personal, which may be valid by the laws of the States respectively, and which may not be inconsistent with the provisions of this act," and that thereby such liens and mortgages and other securities are saved from the operation of the bankrupt's act, and, by inference, from the jurisdiction of the national courts. I will answer this in the language of Judge STORY in *Ex parte Christy*, 3 How. 316: "There is no doubt that the liens, mortgages and other securities within the provision of this act, so far as they are valid by State laws, are not annulled, destroyed or impaired under the proceedings in bankruptcy; but they are to be held of equal obligation and validity in the courts of the United States as they would be in the State courts. The district court sitting in bankruptcy is bound to respect and protect them. But this does not and cannot interfere with the right of the district court to inquire into their validity, extent," etc. Again, he says, p. 319: "It would be easy to put cases in which the exercise of this authority may be indispensable on the part of the district court, to prevent irreparable injury, or loss, or waste of the assets, without adverting to the case at bar. * * Let us put the case of numerous suits pending or to be brought into the State courts, upon different mortgages by the mortgagees upon various tracts of land or other property, some of the mortgages being upon the whole of the tracts of land, some upon a part only, some of them involving a conflict of independent titles, some of them involving questions as to the extinguishment, or satisfaction, or validity of the debts, and some of them involving very doubtful questions as to the construction of the terms and extent of the conveyances. If all such suits may be brought by the separate mortgagees in the different State tribunals, it is most obvious that as

each of the State tribunals may or must proceed upon the single case only before it, the most conflicting decisions may be made, and gross and irreparable injustice may be done to the other mortgagees as well as to the general creditors under the bankruptcy. All this, however, is completely avoided by bringing the whole matters in controversy between all the mortgagees before the district court, making them all parties, and thus enabling the court to marshal the rights and priorities and claims of all parties, and by a sale and other proceedings, after satisfying the just claims of all the mortgagees, applying the residue of the assets, if any, for the benefit of the general creditors." It is claimed, however, that the rights of the mortgagee are impaired when you compel him to go to the district court for relief, and that the act must be unconstitutional. In reply, I refer the counsel to the able and lucid opinion of BALDWIN, J., appended to *Ex parte Christy's* case, where he fully concedes the power of congress over the whole subject. The act has not left the party without a remedy, quite as broad and efficacious as that afforded by State laws.

In bankruptcy, the mortgagee may come to the court either as legal or as equitable mortgagee, and have his security sold and turned into money, or, if the court shall be satisfied that the property pledged is not of greater value than the debt, the mortgagee can have it turned over to him, and under the order of the court be placed in immediate possession. What better or more speedy remedy can be furnished by any other tribunal. There is another view of this case equally fatal to the claim of appellees. If this property is in the custody of the bankruptcy court, then no other court can interfere with it. *Westvall v. Sampson*, 14 How. 66; *Ex parte Fisher*, 2 Story, 160; *In re Vogel*, 2 B. R. 138; *Angell v. Smith*, 9 Vesey, 335; *Russell v. East Anglian R. R. Co.*, 3 Mc. & G. 104. It is claimed, however, that the appellant is a stranger to this bankruptcy proceeding, and is in no position to question the rights of the appellees. One thing is true; he is in possession of this property, and whatever rights he has will be affected by the judgment

rendered. Ejectment is not only a suit where questions of title may be tried, but also where rights of possession may be involved, and if the appellant has no rights of property he has one right common to all citizens, that of remaining in possession until ousted by a court of competent jurisdiction.

It is conceded, however, by my associates that if Eyster was the tenant of the assignee, the suit could not be prosecuted, for the reason that the possession of Eyster would be the possession of the bankruptcy court. The fallacy of the whole argument upon which their opinion rests, consists in the fact that it overlooks the vesting of this estate in the bankruptcy court by operation of law. When McClure was adjudged a bankrupt, the law itself carried the estate into that court. And being there, who has the right to interfere with it in any form except the assignee? The position of the assignee is analogous to that of a receiver. He is an officer of the court, created by the law for the purpose of managing an estate, to which the judge, on account of the pressure of judicial duties, is not supposed to be able to give his personal attention. The proper course to be pursued in reference to property in that condition, by any one who claims title, is to come into the court and ask that his title be inquired into and settled. And if he holds a judgment or mortgage which is a prior lien, and is desirous of enforcing it against the estate after it has been taken into the care and custody of the court, he must obtain leave for this purpose.

It seems to me that where the law has carried the estate in the court, and we find a party in possession since the event, we are at liberty to presume that he is the agent and custodian of the court. The law presumes that every man in possession of property is there rightfully. It does not treat him as a trespasser or intermeddler of its own motion, and without proof.

It is said that no hardship can result from the admitting of the mortgagee into the possession, that he may be turned out at any time by the court. Why put him in, if the next day you may turn him out? "It has been argued," says

NELSON, J., "that a sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and that the sale, therefore, in such a case should be upheld. But conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court to abide the event of the litigation and to be applied to the payment of the judgment creditor. And in order to effect this, the court must administer it independently of any rights acquired by third persons, otherwise, the whole fund may have passed away out of its hands before the final decree."

Wiswall v. Sampson, supra. It seems to me, that the idea of a mortgagee prosecuting an action of ejectment against property in the custody of the court, after it has been placed there by the bankrupt law, is at war with the whole spirit of that system. If he gets possession, in what attitude does he stand? He becomes accountable for the rents and profits. Shall he be permitted to stay there until they satisfy his claim? And shall the closing up of the estate await that event? Such a proceeding is anomalous and exceptional. I regret, then, that this court has committed itself to such a position. I believe, with C. J. MARSHALL, that the assignee was an indispensable party. I believed, with C. J. CHASE, that after the bankruptcy, no lien can be acquired or enforced against the bankrupt's estate. And I believe, with that distinguished and venerable jurist, NELSON, who for so many years has shed light upon the law, that interference with property in the custody of the court, without its leave, is a contempt of the court.

With these men I am willing to err, if error it be called. I therefore vote to reverse this judgment, with directions to the court below to dismiss the proceedings. *Affirmed.*

MORTGAGE — EFFECT OF BANKRUPTCY. — The bankruptcy of the mortgagor is no bar to an ejectment by the mortgagee against a third person not connected with the assignee in bankruptcy, even though such ejectment be without permission of the bankruptcy court, the assignee never having assumed possession of or intermeddled with the estate. If there be any reason for interfering, the assignee should have himself substituted for the bankrupt, or made a party defendant on petition: *Eyster v. Gaff*, 91 U. S. 521, affirming the judgment in the principal case.

BANKRUPTCY — EFFECT OF — JUDICIAL NOTICE OF. — One court cannot take judicial notice of bankruptcy proceedings in another court. Its duty is to proceed until properly notified. The jurisdiction of federal courts for the benefit of bankrupts does not divest that of State courts, but is concurrent in suits of which they have full cognizance: *Eyster v. Gaff*, 91 U. S. 521, affirming the decision in the principal case.

UNION GOLD MINING COMPANY v. ROCKY MOUNTAIN NATIONAL BANK.

BANKS — *An overdraft* by an agent, of his principal's account, with the knowledge of the cashier of the bank, the credit being extended to the principal, amounts to a simple loan of money, and does not involve moral turpitude, whether the cashier had authority to extend such accommodation or not. The authority of the cashier cannot be questioned in an action by the bank to recover the money.

The case of *Union Bank v. Mott*, 89 Barb. 180, distinguished.

NATIONAL BANKS — *security for loans*. The omission of the officer of a national bank to exact security for moneys lent, cannot be made a ground of defense to an action brought by the bank to recover such loan.

CORPORATIONS — *power to borrow money*. A corporation, unless prohibited, has authority to borrow money to accomplish the purpose for which it was organized.

Estoppel. A corporation which has, through its agents, borrowed money and applies it to its own purposes, is estopped to deny its own power in the premises.

CONTRACTS — *illegal*. The omission of a national bank to take security for a loan of money is not available as a defense to an action to recover the money.

ESTOPPEL — *authority of agent*. One who borrows money from another, assuming to act as the agent of a third person, is estopped to deny the authority of the agent to lend, in an action by the principal to recover the loan.

A corporation whose agent has obtained money by overdraft, at a bank, and applied it to the purposes of the company, is estopped to deny its power to borrow money, in an action by the bank to recover the loan.

ERROR — *what may be assigned*. Matters not objected to in the court below cannot be assigned for error.

PRINCIPAL AND AGENT — *authority of agent*. One who obtains the money of another by way of loan from a third person, assuming to act as the agent of him to whom the money belongs, is estopped to question the authority of the agent to lend, in an action by the principal to recover the loan.

Agency implied from conduct. If an officer of a corporation is suffered to exercise general authority, in respect to the corporate business, or in respect to a particular branch of it, for a considerable time, the corporation is bound by his acts, within the scope of the powers so assumed, in the same manner as if authority had been expressly granted.

Same. To establish that S. was the agent of the corporation defendant, the plaintiff offered letters written by the president of the corporation to S., in which he was addressed as superintendent of the company, and the affairs and prospects of the company were discussed. It was shown that the president, for a considerable time before this and afterward, had assumed general authority in the affairs of the corporation, the control of its prop-

erty, payment of its debts, and the management of its lawsuits. *Held*, that the letters were admissible without direct evidence of authority to write them, the presumption being indulged that the president was acting the part of a faithful executive, and with the knowledge and assent of the corporation.

Ratification — evidence. S., assuming to be the mining superintendent of defendant, obtained money in its name. In an action to recover the loan, the plaintiff relied upon an alleged ratification of the acts of S. *Held*, that upon the question of ratification the fact that S. was the agent of the company for some purpose, and the nature and extent of his agency (even though not extending to the act in question), was material and competent.

So of letters addressed by the president of the corporation to S., recognizing him as the superintendent of the company, though such letters were not expressly shown to have been expressly authorized.

So of the fact that the corporation had discharged other debts contracted about the same time by S. in its name.

So that the money was appropriated by S. to the uses of the defendant, and that the result was beneficial. The resolution upon this point in the same case, 1 Col. Rep. 581, reconsidered.

S., assuming to be superintendent of a foreign corporation, organized for the purpose of working gold mines in this territory, the functions of which office did not extend to borrowing money, obtained money upon the credit of the company; the lender suing the corporation relied upon the silence of the company after notice, as a ratification of the loan. It appeared in evidence, that during his operation S. had arranged with B., the president of the company, to use a mill, which was the individual property of B., and to develop a mining claim, also the individual property of B., in compensation for the use of the mill, and a considerable part of the moneys sued for were expended in this work; no officer or member of the company except B. was informed of this until after action brought.

Some part of the money was also used in mining upon a claim belonging to S. himself; B. was informed of this after the expenditure of the money, but so far as appeared did not communicate his knowledge to the corporation.

Held, that these facts did not affect the question of ratification.

Where the unauthorized transaction is complete before knowledge thereof comes to the alleged principal, and no change in the position of the parties can occur from his delay to approve or disapprove it, mere silence on his part affords an inference of ratification, and is evidence for the jury, but no estoppel is created thereby.

When the transaction is still in progress, or the person dealing with the alleged agent has opportunity to regain what he has parted with, or otherwise improve his position, the alleged principal is bound to approve or disapprove within a reasonable time after notice, and in such case, silence is conclusive evidence of assent.

Notice to officer of corporation. Notice to the president of a mining corporation of the acts of one who, without authority, has assumed to act for it is

notice to the corporation itself, and when sought to be made liable through a ratification by silence, it will not be heard to say that the president in receiving the notice was acting in his individual capacity, and not officially.

Appeal from District Court, Jefferson County.

THIS cause was determined in this court at the term of 1872, upon appeal from a former judgment of the district court, and is reported in 1 Col. 533, where the pleadings are set forth. The judgment being there reversed, the cause was remanded and tried again at the November term, 1872, of the district court; judgment being given for the plaintiff, the defendant prosecuted this appeal.

Evidence was given tending to show that the defendant was incorporated under the law of the State of New York; its principal office and place of meeting was in the city of New York; all its officers and members except the president, one Becker, resided there during the accruing of plaintiff's demand; the mines were located in Gilpin county. The defendant commenced mining in 1864, and continued until the fall of 1865, when its operations were suspended and the mine closed. One Sabin was the superintendent of the mine from the spring of 1865 until the close of operations in the fall of that year; after that he remained in charge of the company's property until the spring of 1866.

In March, 1866, Sabin went east, and at his suggestion, another person was appointed as keeper of the property, and was paid by the company until November, 1866, when Sabin returned and resumed mining operations. There was testimony tending to show that, in the spring of 1866, Sabin resigned his position as superintendent, and that, in resuming work, he was acting under an agreement with the defendant to work the mine upon his own account, and with his own means, retaining the ores of lower grade to his own use, and rendering the first-class ore to the company as rent or compensation for the use of the mine. There was, also, testimony tending to show that at the time of re-opening the mine in the fall of 1866, he professed to be operating upon his own account; that he borrowed money and

employed men upon his individual credit for this purpose, and none of the officers of the company, save the president, Mr. Becker, were informed, until December, 1868, that Sabin was assuming to act for the corporation.

During all the time, however, Sabin occupied the office which had been previously occupied by the corporation; the sign of the company was upon the building, and Sabin always represented to the plaintiff, that he was the superintendent of the defendant. In 1867 he opened an account in the name of the defendant at the plaintiff's bank, and from that time until the fall of 1868, was accustomed to sell at the bank the gold, which was the product of his mining, placing the proceeds to the credit of defendant, and from time to time drew checks against it. The labor of the men at the mine, and other liabilities incurred in his operations, were discharged by these checks. Previous to April, 1868, there was sometimes money to the credit of this account; after that, the account was always overdrawn until the fall of 1868, when his operations were suspended, and the company resumed possession of the mine. The money obtained by this overdraft was used in operating and improving the mine and in milling the ore.

Plaintiff was permitted to show, against defendant's objection, that Sabin had accumulated, and had on hand about 400 tons of the selected ore, at the time when he ceased operations in the fall of 1868. During the time of his operations, subsequent to 1866, Sabin corresponded solely with Mr. Becker. The latter visited Gilpin county in the spring or summer of 1867, and remained at and in vicinity of the mine for several weeks; he returned again in January and again in October of the same year. Whether Mr. Becker was informed, prior to December, 1868, that Sabin had assumed to contract an indebtedness at the bank in the name of the company, was in dispute; but during 1867 and 1868, Mr. Becker had repeatedly addressed letters to him as superintendent of the company, giving directions for the defense of an action brought against the company, and advising as to the manner of conducting the

mine. After the operations ceased he paid other debts contracted by Sabin for the mine, and in the spring of 1869 he made a settlement with Sabin, and paid him for his services, computing his salary at the same rate as during 1865, 1866.

In the fall of 1868 Sabin became the owner of mining premises adjoining these of the defendant, on the west, and there was evidence tending to show that some part of the money obtained from the plaintiff was expended in mining upon this claim. Mr. Becker swore that he was first informed of this in December, 1868.

There was also evidence that in 1867 Sabin had obtained from Becker permission to use a mill which was the individual property of Becker, agreeing to develop a claim of Becker's adjoining the premises of the company, in compensation therefor, and that a considerable part of the moneys were expended in this work.

There was also evidence tending to show that in October, 1868, Sabin had executed two promissory notes, in the name of the company, for the amount of the overdraft at that time, \$10,000, and that this was without the knowledge of any officer of the company, until, during the trial, these notes were produced and canceled in open court.

There was evidence tending to show that in November and December, 1868, Mr. Becker was repeatedly informed by the officers of the bank of the fact of the overdraft and its amount, and promised to pay it.

In January, 1869, he addressed to the president of the bank a letter, in which he spoke of "the overdraft of our company," protested that he had no knowledge of it until about the middle of December previous; stated that it was the only indebtedness of the company of which he had any knowledge, and that if not paid off from the mine, he proposed to call a meeting of the directors, and make an assessment at the February meeting, to pay off this and any other claim that the company might owe. The full text of this letter may be found in 1 Colorado, 535.

Mr. Becker, however, testified that this letter was written at the urgent solicitation of Kountze, one of the officers of

the bank ; that he refused to sign it in his official capacity, or to speak for the corporation, and that he, at the time, expressly disclaimed all authority for the company in the premises.

There was also evidence, tending to show that, immediately upon being informed of the overdraft, Becker had addressed the vice-president of the company in New York, stating the facts, and inquiring whether any new arrangement had been made with Sabin, authorizing such an assumption of authority ; that the vice-president had replied in the negative ; that this was transmitted to Becker, who communicated it to the officers of the bank — upon the point of such communication the evidence was conflicting ; that in April, 1869, the stockholders met and repudiated the claim of the bank, and that this action was communicated to the officers of the bank, at some time afterward. The officers of the bank denied that such communication was made until shortly prior to the former trial.

The statute of the State of New York, under which defendant was organized by certificate of association, was put in evidence, and contained no authority to the corporations formed thereunder to borrow money ; nor was there any express prohibition upon the exercise of such a power. The act, however, contained a provision for the increase of the capital stock of the corporation, by consent of those holding two-thirds of the shares, upon notice. The by laws of the company were also given in evidence, and the letter of instructions and authority under which Sabin was originally appointed superintendent, in which there was no express authority to borrow money on the credit of the company.

The court instructed the jury that if Sabin was the agent of the defendant, and while so acting, borrowed the money sued for in the name of the defendant and Sabin's dealings with the bank were fully explained to Becker, and Becker informed the company thereof, these circumstances called

for an answer from the company, and if through its board of directors it failed to disavow the acts of Sabin within a reasonable time, they should find for the plaintiff.

MR. HUGH BUTLER and Mr. G. B. REED, for the appellant.

MR. W. R. GORSLINE, Mr. H. M. TELLER and Mr. JNO. Q. CHARLES, for the appellee.

HALLETT, C. J. This cause was before this court at the last term, and several questions, now again presented, were then considered and definitely determined, so far as this court may do so. Of this number is the sufficiency of appellant's pleas, by which the competency of appellee to maintain an action for a sum exceeding ten per cent of its capital, was denied, and that question is not now open to examination in this court. The legality of appellee's demand is now however further challenged, upon the additional ground that an overdraft upon a bank, of which the account in suit is an example, is fraudulent *per se* and cannot be made the basis of an action of assumpsit. For this we are cited to the case of an agent, who, by collusion with the book-keeper of a bank, obtained money in the name of his principal, for which it was said the latter was not liable for several reasons; although the agent had authority to draw upon the funds of his principal in the bank, his authority did not extend beyond that point to enable him to borrow money; credit was not given to the principal, the bank being misled by fraudulent entries of its own book-keeper. *Union Bank v. Mott*, 39 Barb. 180. That this has no application to a case in which a depositor is allowed to overdraw his account, either by the express permission or inadvertence of the officers of the bank, is apparent at a glance, and the court say, in their opinion, that the doctrine cannot be applied to a case where money, drawn by an agent, is received by the principal, or the act of the agent is ratified by him. If it be true that one who, without notice, draws upon a bank in which he has no funds, commits a fraud

upon the payee of the check, and upon the bank, it will hardly be claimed that the latter is without remedy against him for the money paid. Although, in such case, the bank may have a remedy against the officer who pays the check, for the perversion of its funds, it may, nevertheless, ratify the proceedings and treat the money paid as a loan. *U. S. Bank v. Macalister*, 9 Penn. St. 478. But, if this were not true, the case of an agreement between the parties, by which the depositor is allowed to overdraw his account, does not involve turpitude on the part of any one. The transaction is then a loan simply, which is not obnoxious to any law. *Morse on Banks*, 318. A national bank is, by the act of its incorporation, required to take security for its loans, but this does not relate to the form of the loan or the evidence by which it is manifested. Security may be taken for a loan to which the parties have orally assented and which has been made by payment of an overdraft as well as any other. If such security is omitted, that circumstance is not available to the borrower, who can never be heard to say, that he obtained the money upon terms more favorable to himself than the law would sanction. In this instance the money was obtained from the cashier, who appears to have had charge of the business of the bank, and it was charged to appellant upon the books of appellee. If this is not sufficient to show the authority of the cashier to make the loan, I doubt whether appellant can rely upon the want of authority in him; for appellant is to be charged, if at all, upon the hypothesis, that the act of Sabin in borrowing the money was its own, and one who has obtained money from an agent who assumed to act for his principal cannot question the power of the agent. By the act of borrowing, the borrower concedes the authority of the agent to lend, or if this be incorrect, it is not material that the money has passed through unauthorized hands. Shall A, who has obtained money from B, allege in his defense, that C, who gave it to him, was without authority from B, in that behalf? As the money came from the bank, and the negotiation was conducted in its name, it appears to me that the authority

of the cashier is not to be drawn in question in this suit, and aside from the matter of Sabin's authority to bind appellant, the case is one of money obtained by overdraft in pursuance of the arrangement of the parties. Whether the cashier is liable to appellee for the amount is a question which does not arise in this suit, nor is it connected with the question of appellant's liability, which alone we are now considering.

Upon the latter question, the objection that the indebtedness was created by overdrafts is regarded as untenable. It is urged, for the first time in this court, that appellant is incapable of borrowing money, there being no provision, in the act under which it was organized, which confers authority to that end. Although it was at one time thought that express authority was necessary to enable a corporation to borrow money, the weight of authority is now opposed to that view. If not forbidden to do so, a corporation may borrow money as a means of carrying out the purposes for which it was created. *Mills v. Gleason*, 11 Wis. 470; *Angell & Ames on Corp.*, § 257.

In this instance, the money was expended in the mine, and it would seem that the company ought to be bound for its payment in the same manner as for debts contracted in the prosecution of its enterprises. In addition to this, it has been said, that as to a contract executed and fully enjoyed, a corporation is estopped to deny its capacity. *Bradley v. Ballard*, 55 Ill. 413; *Underwood v. The Newport Lyceum*, 5 B. Monr. 129. The reasons upon which this rule is founded apply with great force to a contract for borrowed money, whatever may be said of them when applied to other contracts.

But it was not shown that the company was prohibited from borrowing, and as it might have incurred debts in carrying on its mining business, so it could borrow money for the same purpose. At the trial and before any evidence was produced, two promissory notes, executed by Sabin in the name of appellant, were brought into court, and at the request of appellee, they were canceled by the court.

It does not appear that any objection to this proceeding was made by appellant, and, therefore, it is in no position to question its regularity here. Upon the trial below, as upon the former trial, it was made a question whether Sabin was an agent of appellant at the time of the transaction with the bank.

This question, comprehending also the nature and extent of the agency, was important for the purpose of ascertaining whether those transactions were within the powers conferred upon Sabin; and, if it should be found that Sabin had no authority to contract indebtedness, it was also material to the question of the ratification of his acts by appellant.

To establish an agency in the absence of better evidence, it is the common practice to resort to facts, which tend to show recognition by the principal of the alleged agent's authority. Of this nature are communications between the principal and agent, in which the authority of the latter is expressly or impliedly admitted, of which the letters from the president of appellant to Sabin afford an example. Nor, under the circumstances of this case, is it essential that these letters should be supported by evidence of express authority from the company, to its president, to write them. Of all the officers of the company, the president alone visited the territory and assumed personal control of its property; he paid the company's debts; gave directions respecting its lawsuits, and conducted its correspondence, in all of which we must presume that he was discharging the duties of a faithful executive, with the knowledge and approval of his company. If an officer of a corporation is allowed to exercise general authority in respect to the business of the corporation, or a particular branch of it for a considerable time; in other words, if he is held out to the world as having authority in the premises, the corporation is bound by his acts in the same manner as if the authority were expressly granted. *Commercial Mutual Marine Insurance Co. v. Union Mutual Insurance Co.*, 19 How. 322; *Peyton v. The Governor of St. Thomas Hospital*, 3 C. & P. 363; *Chi-*

cago, Burlington & Quincy R. R. Co. v. Coleman, 18 Ill. 298; *Daugherty v. Hunter*, 54 Penn. St. 382; *Alleghany City v. McClurkin*, 14 id. 81; *St. Louis, Alton & Chicago R. R. Co. v. Dalby*, 19 Ill. 375; *Ardesco Oil Co. v. Gilson*, 63 Penn. St. 150.

The case presented is that of a foreign corporation owning property in this territory and its president, who has at all times largely managed its business in communication by mail with a person in possession of its property and alleged to be its agent. In such case, to require proof that the draft of every letter had been submitted to the board of directors and approved by them, or that the president was appointed to conduct the correspondence, would be unreasonable as well as unjust to those who have dealings with the corporation. These remarks apply with equal force to the negotiations between the officer of the bank and the president of the company in respect to the demand in suit. The company could not be approached except through its officers, and of these the president alone was in the territory; and he, in virtue of his position as the chief officer of the company, his familiarity with its affairs and the control of its business that he enjoyed, was the fittest person to represent its interests. If, under such circumstances, the bank could not present its demand to the company through the president of the latter, it would be impossible to obtain a hearing at all.

Hence, at the last term, we affirmed the right of the bank to present their demand to the president of the company, and the power and duty of the president to bring the matter to the attention of the latter. In this we did not assert that the president had power to pledge the company to the payment of any debt, but merely that he must hold open the door of approach to creditors and give audience to all demands. And we also declared that the company could not avoid responsibility in this respect by claiming that he acted for himself solely, and not as president of the company, and thus divest his acts of all legal significance. This proposition is quite as applicable to the testimony before

us, as to that adduced upon the former trial, and therefore it is here again repeated. The payment of debts contracted by Sabin in the name of the company affords some evidence that they were regularly incurred, and therefore it had a tendency to establish the fact of the agency. I do not see that it was otherwise pertinent to the issue, for certainly the payment of one debt is no evidence that the company was liable for another. *Forsyth v. Day*, 41 Me. 382. But the agency of Sabin was in issue, and, upon this point, I think that the evidence had a bearing sufficiently direct to entitle it to admission. At the last term it was said that Sabin's authority as superintendent of appellant's mine did not enable him to borrow money in the name of his principal, and that the liability of appellant for money obtained in its name, must be determined upon evidence showing its acquiescence in, and approval of, the transaction with the bank. Upon the evidence then presented, it appeared that the president of the company was informed of the loan about the middle of December, and that he then communicated the fact to his company; following this, on the 1st of January, he entered into an agreement with the president of the bank, by which, if the claim should not be paid at an earlier date, it was to be submitted to the board of directors of the company in New York city, at a meeting to be held in February, in order that they might provide for its payment. It did not appear that the company, at any time before the commencement of the suit, replied to the demand of the bank or disapproved of Sabin's act in borrowing the money, and this was regarded as evidence of satisfaction sufficient to warrant the finding of the fact. The general propositions here stated have been vigorously assailed, but not at all shaken. It is certainly true, that ratification of the acts of an agent, done in excess of his authority, may be manifested by the silence of the principal. *Law v. Cross*, 1 Black, 533. And the rule is applicable to corporations as well as to natural persons. *Hoyt v. Thompson's Ex'rs*, 19 N. Y. 218; *T. W. & W. R. R. Co. v. Prince*, 50 Ill. 27. A distinction has been made between the acts of an agent who

has gone beyond his authority, and those of a mere stranger intermeddling in affairs with which he is in no way concerned. In the case of a stranger, it has been said that the act will not be binding upon the principal unless expressly ratified by him. *Ward v. Williams*, 26 Ill. 451. But the better opinion appears to be, that in this, as in the case where an agency exists, the approval of the principal may be inferred from his silence and acquiescence when informed of what has been done in his name. *Philadelphia, Wilmington & Baltimore R. R. Co. v. Cowell*, 28 Penn. St. 329; *Ladd v. Heilderbrant*, 27 Wis. 135. But all agree that the relations of the parties are of great consequence in determining the question of ratification, the presumption arising from acquiescence being very much stronger where the agency exists than in the case of a mere stranger. Story on Agency, § 256. Hence the agency of Sabin is an important question in this cause, although the dealings with the bank were not within the powers conferred upon him. So, also, it seems that the appropriations of the money, and the fact that the use of it was advantageous to the party to be charged, are circumstances of some weight respecting the question of ratification. *Harris v. School District*, 28 N. H. 58; *Wilson v. School District*, 32 id. 118; *Philadelphia, Wilmington & Baltimore R. R. Co. v. Cowell*, 28 Penn. St. 329. It is fair to presume that a party will more readily repay money which has come to his use, although without his knowledge, than he would if it had been wholly appropriated by the person assuming to act in his behalf. And where the money has been of advantage to the party to be charged, his willingness to repay it may depend largely upon that circumstance. It is true that no legal obligation arises out of these circumstances, for no one can make himself the creditor of another by doing an act beneficial to him, without his consent. But much less evidence of the assent of the principal to the act of the agent may be required in a case where the money has come to his use, and has been expended in a manner advantageous to him, than would otherwise be necessary. Referring only to the consideration

that use of the money gave rise to no legal obligation to repay it, and to the instructions to the jury then before the court, in our former opinion, we were led into the broad declaration that the use of money was not material to the question of ratification. The statement then made must be modified or revoked to give place to the true principle here announced. It is urged that appellant was not informed at or before the time of the alleged ratification that Sabin had extended his mining operations into the property of the president of the company and into his own property, all of which adjoined that of the company. It seems, however, that the president of the company was fully informed of the extent to which such mining was carried, and indeed upon his own claim it was done by his express permission. As the president was directing the operations at the mine, I do not see that there was any very wide departure from duty in following his directions. But if this were not so, the failure of the president to communicate the facts to his company cannot affect the rights of appellee; and again, the business of appellant was that of mining ore for the purpose of obtaining gold therefrom, and all the ore taken out by Sabin was crushed by him or left in the possession of the president of the company. If the company obtained the ore or the proceeds thereof, there would appear to be no one who could complain of the taking except the parties who were deprived of it. Whether the agent has a remedy for a trespass committed by himself, or the president of the company may have redress for an entry made under his direction, we are not now required to consider or determine. Under the circumstances disclosed by the evidence, it is obvious that the mining done upon the property of the president and agent of the company was quite as much the act of the company as that which was done upon its property, and the circumstance that a portion of the money obtained from the bank was there expended, does not affect the question of ratification. Further comment upon the testimony is believed to be unnecessary, and we pass to the instruc-

tions to the jury, which will be considered with reference to one question only.

Numerous cases are found in the books which illustrate the distinction between the cases in which the principal must repudiate the acts of his agent who has overstepped his authority, within a reasonable time after notice thereof, and those in which his failure to do so will be regarded as evidence of acquiescence, for the consideration of the jury. Of the first class, the case of *Law v. Cross*, 1 Black, 533, is an example. Under instructions to purchase coal at Valparaiso, an agent made the purchase at Coquimbo, a day's sail from the former place, and the coal was subsequently shipped to San Francisco. The principal being informed of this transaction, failed to notify the agent of his disapproval. The court say: "As the coal was purchased for the principal, it belonged to him if he chose to accept it. If the price had risen and Cross had sold it, Law might justly have claimed the profits; and when informed by his agent of what he had done, if the principal did not choose to affirm the act, it was his duty to give immediate information of his repudiation. He cannot, by holding his peace and apparent acquiescence, have the benefit of the contract if it should afterward turn out to be profitable, and retain a right to repudiate, if otherwise." It will be observed, that the reason here assigned for requiring the principal to disavow the agency promptly after notice, operates as an estoppel upon him; that is to say, he cannot repudiate the transaction without wrong to the agent, and therefore, he shall not be permitted to repudiate it at all. The principle is believed to be applicable to all cases in which the parties acting in the belief that the agency is valid, have suffered a change of circumstances, and cannot be restored to the position in which they would have been, if the agency had been repudiated immediately upon notice of the unauthorized act. But it cannot be extended to cases in which no such change of circumstances has taken place, no injury having resulted to any one from the neglect of the principal, and where he could have gained nothing by delay. Note to *Culver v.*

Ashley, 1 Am. L. C. (5th ed.) 719. For example, one who had no authority whatever from the defendant, subscribed in his name to the stock of a railroad company, and immediately notified him of the fact. After some time, suit was brought by the company to recover the amount of the subscription, and the circumstances were submitted to the jury as evidence of ratification, but it was not contended that the defendant was in any manner estopped from denying the validity of the subscription. *Philadelphia, Wilmington & Baltimore R. R. Co. v. Cowell*, 28 Penn. St. 329. No change had taken place in the position of the parties from the date of the subscription until the suit was brought; nor was there any thing unconscionable in the defendant's refusal to pay the demand. Therefore, the case was not one in which the defendant was estopped to deny the authority of the agent; but the question was, whether by his silence when informed of what had been done in his name, he had shown a purpose to adopt the act. In this class of cases, the evidence of silence, and acquiescence on the part of the principal, is valuable only as indicating the intention of the principal with reference to the act of his agent; while in the first-mentioned cases, the facts being proved, the conclusion follows as matter of law. In cases where the principal is estopped to deny the agency, the jury are told that if he has failed to repudiate the agency within a reasonable time after receiving notice of the unauthorized act, they should find the fact of ratification, and such was the instruction in *Law v. Cross*. This would not, however, be a proper instruction in a case where the silence of the principal is merely evidence of his assent, for the obvious reason that the effect of such evidence is to be determined by the jury. *Bates' Ex'rs, v. Best's Ex'rs*, 13 B. Monr. 215.

At the last term we ascertained that the case at bar is of the class in which the principle of estoppel cannot be applied, inasmuch as the position of the parties remains unchanged, and the failure to disavow the agency has not worked injury to the appellee or influenced its conduct, nor has appellant derived any advantage therefrom. Hence the charge that

appellant must have repudiated the debt within a reasonable time after notice thereof, was not warranted by the circumstances of the case, the failure to disavow the agency, if there was such failure, being evidence of acquiescence and assent, for the consideration of the jury, and the effect of it to be determined by them. The most important features of this case have been twice considered by this court, and so far as we are concerned, definitely determined. Numerous points urged upon our attention have not been discussed, for the reason that they are not regarded as affecting materially the rights of the parties.

The judgment of the district court is reversed, and the cause is remanded for a new trial.

WELLS, J. I agree, that for the errors in the charge of the court, the judgment of the district court must be reversed, but upon two questions which are considered in the opinion of the chief-justice, I do not assent to all that is there said.

1. I agree that the letters of the president of the corporation, Mr. Becker, to Sabin, in some of which Sabin is addressed as superintendent of the company, and in others of which he is directed touching its business, were properly received. It is fair to presume, that the president of the corporation knew who was in immediate charge of its affairs at the scene of its operations, and the fact that the president of the corporation addresses Mr. Sabin as its superintendent affords, at least, some evidence of the existence of this relation. But it is said, that if an officer of a corporation is allowed to exercise general authority for a considerable time, and so held out to the world as having authority in the premises, the corporation will be thereafter bound by his acts, in the same manner as if authority had been expressly granted. It cannot be doubted, that acquiescence by a corporation, for a considerable time, in the acts of one, who, without original authority, assumes to act for it, will, as to third persons, having knowledge of the previous assumptions of authority and the acquiescence therein, and dealing with the pretended agent on the faith thereof, create

an agency by an implication of law. In the present case, however, this is asserted of a non-resident corporation whose principal office was in a foreign state, in respect to the acts of their officer done here. So far as shown by the evidence, no officer of the corporation, except Becker, and no stockholder ever resided here or ever was here, even temporarily during the time of Becker's transactions in question, and no officer or stockholder is shown to have ever had any intimation of these transactions. How, then, can the corporation be said to have acquiesced in them, or to have held Becker out to the world as having the authority which he assumed? I grant, that if by the exercise of such attention to its affairs as a man of ordinary prudence in the like case would have exercised, the corporation might have informed itself of Becker's doings; it is the same as if they had actual knowledge. The corporation ought not to be heard to say that it did not know that which, by the ordinary diligence which the law exacts of them, they might have known, and it may be that, as to the particular matter in question, this corporation is shown to have been derelict. The opinion of the chief-justice, however, proceeds upon the ground, that under all circumstances the long exercise of authority on behalf of a corporation raises the presumption of an original appointment which I am not prepared to admit.

2. While I doubt whether it appears by the evidence that any portion of the money for which the action is brought, was expended in the improvements made upon the property of Mr. Becker, I incline to the opinion that if such be the fact, it is *prima facie* a circumstance material to be communicated to the mining company, in order to warrant the inference of ratification.

The burden of proving such communication or the existence of attending circumstances, rendering the omission of such communication immaterial, rested upon the plaintiff, and there being no proof on either point, ratification could not be inferred from the company's silence.

The judgment must, therefore, if we concede that some

part of the money was expended as here supposed, be reversed on this ground also.

BELFORD, J., dissenting. The rule is pretty well established among respectable courts, that an appellate tribunal will never reverse itself in the same cause. The reason for the rule is that the court below is bound to respect the views of the supervisory court, and if this latter court were allowed to change its views with every trial of the cause, there could be no end to litigation. The district judge would be liable to have his action reversed simply because he obeyed a direction made by his superiors, and for whose ideas he unfortunately entertained some little respect. It is quite as important that there should be some stability attendant upon judicial decisions as it is that they should be right. A regard for this principle has induced me to enter my protest against the manner in which this case has been treated in this court. When it was brought here first, I did not participate in the discussion or decision of it, and I feel that I am in no way responsible for the principles announced in the opinion delivered by the chief-justice. When I first read it, I realized that it was in some respects ill-digested, and in others manifestly wrong. It was evidently calculated to mislead the district judge and the counsel engaged in the trial of the cause, and that such was its result will be made apparent before I conclude. On the first trial evidence was admitted to show that the money borrowed by Sabin was used by him in working and developing the mining property of the defendant, and that the profits arising from the extraction of the ore and the working of the mine went to the defendant. The court instructed the jury that they should consider these facts in determining the liability of the defendant. The learned chief-justice in his first opinion treated the admission of this evidence and the instruction of the court with manifest disfavor, for he says: "The circumstance that the company retained the ore taken from the mine is not material to the question of ratification." In other words, he announced the startling

proposition that the jury was not at liberty to consider any advantage the principal might derive from the acts of his agent. An agent might borrow money from a bank or individual, expend it in working the property of his principal, and the principal might become enriched by the expenditure thus made, and when called upon to pay the money through whose use he derived his profits, it is error to instruct the jury that in determining the question of ratification they are at liberty to take note of these circumstances. A more careful review of the authorities led the judge below to disregard the opinion pronounced by this court, and to admit the evidence a second time, and the learned chief-justice in the present opinion states: "So also it seems that the appropriation of the money, and the fact that the use of it was advantageous to the party, to be charged, are circumstances of some weight respecting the question of ratification. *Harris v. School District*, 28 N. H. 58; *Wilson v. School District*, 32 id. 118." To which authorities might be added *Cowell v. R. R. Co.*, 28 Penn. St. 329; *Alleghany City v. McClarbin*, 14 id. 81; *Bank v. Comb*, 7 Barr. 543. The reversal of the judgment at this time is based upon alleged error in the instructions, and I desire to set them out so that they be compared not only with principles announced in the first opinion, but also with the language of the court. The instructions are as follows: "If you find from the evidence that Becker was president of the Union Gold Mining Company on the 16th day of December, 1868, and that he had full knowledge of this indebtedness to the bank at that time, and that he agreed to lay the claim of the bank before the board of directors at the February meeting of the board, then the court instructs you that, although you may find from the evidence that Becker had no authority to pledge the company to the payment of the debt, still he, as president, had authority to convene the board of directors to consider the claim at that time, and to take some action in reference thereto, and if you find from the evidence that the board of directors failed or refused to consider said claim,

or failed to disavow or repudiate the debt within a reasonable time thereafter, and to notify the officers of the bank of such disavowal, then you will be warranted in finding that the company ratified Sabin's dealings with the bank, for when an agency exists, and the agent exceeds his authority, the silence of the principal, when he has full information on which he can and ought to act, gives rise to the presumption of an intentional ratification of the unauthorized act. In determining whether the company ratified the act of Sabin, you will consider the negotiations with Becker, the notice to the company of the indebtedness, the agreement to lay the claim before the February meeting of the board of directors, and the conduct of the company in reference thereto. If, at any time, the company assented to the acts of its agent, it is as much bound by those acts as it would have been if the agent had been clothed with authority to perform them. When the relation of principal and agent does, in fact, exist, although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter informing him what has been done on his account." From the foregoing instructions, it will be observed that, in the opinion of the judge who tried the case, it was incumbent on the defendant to take some action in reference to the claim of the bank, and if at the February meeting of the board of directors it failed to take such action and disavow the conduct of its agent in borrowing this money, then the jury would be warranted in finding that the agent's acts had been ratified. In giving these instructions the judge was fully warranted by the language and spirit of the opinion pronounced by this court when the cause was first here. Upon page 547, 1 Col. Rep., the chief-justice says: "The matter of Sabin's dealings with the bank appears to have been fully explained to Becker, and by his statement the company was equally well informed. *The circumstances called for an answer from the company.* Money had been obtained by its agent, and upon its credit, and the bank

was demanding payment. The president of the company acknowledged the justice of the demand, and if the company had any objection to it, it was reasonable to believe that such objections would be made known." Again, he says, page 546: "Upon this rule it appears to me that Becker's undertaking to bring the claim of the bank before the board of directors of his company at the *February meeting bound the company to consider the claim at that time.* The undertaking was an exercise of the executive function, and we are at liberty to presume that it was performed. Upon the evidence, it seems that notice of the indebtedness was given to the company December 16, 1868. Fifteen days later Becker undertook to present the claim to the board of directors at the February meeting in New York. If the matter was acted on by the company, it does not appear that any notice of the result was given to the bank. Upon these facts, the jury would have been warranted in finding that the company had ratified Sabin's dealings with the bank, *for, when an agency exists, and the agent exceeds his authority, the silence of the principal may give rise to a presumption of an intentional ratification of the unauthorized act.*"

Again, he says: "If, however, Becker had no authority to pledge the company to the payment of any indebtedness, he certainly had authority to convene the board of directors, and lay before them the claim of the bank, and this he agreed to do. In the usual course of business, the corporation is addressed through its president; and it is an important duty of the executive officer to bring to the knowledge of the board of directors any matter affecting the interest of the corporation." Again, he says: "The question is as to the intention of the company respecting Sabin's dealings with the bank, to be determined upon evidence of its conduct, and the declarations of its authorized agents, within the scope of their authority. If at any time the company assented to the acts of its agent, it is as much bound by these acts as it would have been if the agent had been clothed with authority to perform them. The negotiations

with Becker, the notice to the company of the indebtedness, the agreement to consider the matter at the February meeting of the board of directors, and the delay of the company to disavow Sabin's acts, are facts to be considered by the jury, whose province it is to determine the question of ratification." Is it not clear from the above, that this court held that the action of Sabin with the bank, "called for an answer from the company?" Is it not equally clear "that Becker's undertaking to bring the claim of the bank before the board of directors of his company at the February meeting, bound the company to consider the claim at that time?" Is it not clear, also, that with the knowledge of the indebtedness, and the failure to take action on the same by the company at the February meeting, "the jury would have been warranted in finding that the company had ratified Sabin's dealings with the bank, for when an agency exists, and the agent exceeds his authority, the silence of the principal may give rise to a presumption of an intentional ratification of the unauthorized act." How can it be said that the conduct of Sabin called for an answer from the company, if no legal obligation existed on the part of the company to make any. How can it be said that the failure to consider the claim at the February meeting, and take some action in reference thereto, would have warranted the jury in finding a ratification, if it be true as is said now, that the company was not required to take any action at all. To any fair mind, the conclusion must be irresistible, that the instructions given, and on account of which this cause is now reversed, embrace not only the principles announced by this court, but embody its very language.

The case of *Horton v. Twines* is quoted with approval and put forth as an authority entitled to great consideration in connection with this case. The facts of the two cases have nothing in common; they are as widely apart as the poles. In *Horton v. Twines*, the agent had authority to negotiate and discount notes at a specified bank, not to exceed in amount the sum of \$3,000. The principal, however, was to derive no benefit from this transaction.

The advantages were to inure to the agent. It further appears that the agent, standing in need of provisions for himself and family, bought groceries to the amount of \$500, and executed to the vendor a note in the name of his principal. Suit was afterward brought against the principal, and it was sought to charge him on the ground that, after the note was executed, he had full information of the act of his agent and maintained silence in reference thereto. The court held, and very properly too, that the plaintiff could not recover. TUCKER, J., says: "The transaction was one from which the defendants could derive no profits." Why repudiate a transaction with which one has no possible connection. If Sabin had used the money he borrowed of the bank, in buying provisions for his family, the two cases would be alike. But this he did not do. The money was used in an enterprise in which he was legitimately engaged. It went to the benefit of the principal; the ore extracted by the use of it went into the hands of the corporation for which he was working. When the facts change, the rule changes with them. There is another phase of this case which is proper at this time to consider. Already, there have been two trials of this cause. Some points have been definitely settled by this court. Some questions have been twice solved by the jury. Two juries have found that Sabin was agent and not lessee. Shall the verdict be set aside wholly or in part? Shall the cause be sent back and the plaintiff be compelled to fight this old battle of agency over again, or shall the next trial be confined to the simple point in which this court has found error? Upon general principles, the plaintiff in this case has as clear a right to the verdict upon the questions that were rightly tried as the defendant has to a new trial of the questions that were wrongly tried. And when the defendant asks the court to deprive the plaintiff of the ground fairly and legally won, and to put the plaintiff to another expensive, laborious and vexatious campaign to recover the same ground a second time, it is for the defendant to show how such an extraordinary, unjust and unconscionable demand can be

sustained. On the face of it, such a demand is an appeal to despotic force. A power that would indulge itself in the needless and indiscriminate destruction of those parts of a costly verdict in which there is no error, can be paralleled only by a power that would destroy an entire verdict without cause. The general principle of the correction of errors which occur in judicial proceedings, preserves, as far as possible, what is good and destroys only what is erroneous when the latter can be severed from the former, and destroys no more of the good than is necessary in the process of ratification. But it may be that the defendant is entitled to a new trial as a matter of right. A new trial of what? Of those questions which have been rightly resolved against him? Of those questions in the trial and settlement of which no error was committed? Upon what principle of right, justice, logic or common sense can this immodest pretension rest? The whole claim is placed upon the false assumption that where there has been a mistrial of one issue, there must be a new trial as to all. The very object of a new trial is to correct the error which has been committed, and to this point it should be limited. The right of the plaintiff to preserve that which he has legitimately gained is as absolute and unassailable as the right of the defendant to recover that of which he has been wrongly deprived. The rights of the one should be no broader than those of the other. And in securing rights to one, those of the other should not be destroyed. But the counsel for the defendant will say this is the voice of innovation and revolution. No; it is the attuned note of the common law which has been sounded by great judges and courts for five hundred years. King's Bench and House of Lords have echoed and practiced it, and Lord C. J. DENMAN has declared that it is a matter of surprise that any one should ever (*Queen v. Willis*, 10 Cl. & Fin. 534) question it. Massachusetts, New Hampshire, South Carolina, Iowa and other States have recognized and applied its doctrines; and indeed the cases in its support far exceed in number the volumes in the library of this court. Why then not apply it to this case? One reason alone is assigned.

It would be a surprise to the profession. This is indeed a poor tribute to their intelligence, for the rule is as well established as that in *Shelley's case*. See *Lisbon v. Lyman*, 49 N. H. 582, and the innumerable cases there cited.

Believing that the trial was had in conformity with the opinion first pronounced by this court, and that the court should not reverse itself in the same cause, I vote to affirm this judgment.

Reversed.

RATIFICATION OF AGENT'S ACT may be presumed from his principal's silence, after full knowledge of the facts: *Breed v. First Nat. Bank*, 4 Colo. 506, 507; 8, C. 6 Colo. 240.
RES ADJUDICATA AND STARE DECISIS. — On a re-trial, the decision of the appellate court is more than *stare decisis*; it is *res adjudicata*: *Lee v. Stahl*, 13 Colo. 177.

HAYES et al. v. NEW YORK GOLD MINING COMPANY OF COLORADO.

PLEADING — *non damnificatus*. Is an action on a bond with condition to perform certain specific acts as, *e. g.*, to surrender a mill at the expiration of a lease, *non damnificatus* is not a good plea.

LANDLORD AND TENANT — *right to remove fixtures*. A tenant has a right to remove trade fixtures, such as boilers and an engine in a quartz mill, during his tenancy.

And if he sells such fixtures to his landlord, and covenants to deliver them together with the premises occupied by him, at the expiration of his term, it is no defense to an action on his bond to say that prior to the sale the fixtures were attached to the freehold, and that the landlord was not, at the date of the bond or subsequently, the owner of the freehold.

SALE ON EXECUTION — *title to realty*. The title to land sold on execution remains in the debtor until, by the sheriff's deed, it is conveyed to the purchaser.

FIXTURES — *conveyed with land*. Fixtures erected upon land by the debtor after a sale under execution and before the sheriff's deed is made, pass, with the land, to the purchaser upon the execution of such deed, and the same is true as to fixtures purchased by the debtor from a tenant holding under him.

COVENANTS: REAL — *what are*. A bond executed by a tenant in possession to his landlord, the latter being the owner of the premises demised, setting forth a sale by the tenant to the landlord of certain fixtures then upon the demised premises, and covenanting to surrender the fixtures and the premises in good repair at the expiration of the lease, and to perfect the title to the fixtures, and to pay taxes, runs with the land, and passes to grantees in a sheriff's deed made after the execution of such bond.

BOND — *construction of*. To an action on a bond conditioned to surrender certain premises and perform other specific acts on a day named, it is no defense to say that the plaintiff was not the owner of the premises at the commencement of the suit, and had never been evicted from the premises

Error to District Court, Gilpin County.

THE plaintiff below, present defendant in error, declared in debt upon a bond, dated November 28, 1870, executed by Martin B. Hayes, Samuel Mishler, B. C. Waterman, with condition as follows :

WHEREAS, The said above bounden, Martin B. Hayes, is now in the possession of the Enterprise mill, under a lease from the said New York Gold Mining Company of Colorado ; and,

WHEREAS, The said Hayes has this day sold to said company, two boilers and one engine now in said mill and in good order, at an agreed price ; and,

WHEREAS, Said engine and boilers are to be left in said mill, to be used by the said Hayes in said mill until the expiration of said lease, to wit : on the 20th day of April, A. D. 1871 ; and,

WHEREAS, By the terms of said lease, said Hayes is bound to pay the taxes assessed upon said mill for years 1869 and 1870.

Now, if the said Hayes shall, upon the expiration of his said lease, to wit : on the 20th day of April, A. D. 1871, quit and surrender the possession of said Enterprise mill and its appurtenances to said New York Gold Mining Company of Colorado, its successors or assigns, and shall, at said time, leave said mill, engine and boilers in as good repair as they now are, ordinary wear and tear excepted, and shall perfect the title to said engine, so that the same shall be complete and without any lien or claim of any other person on said engine, and shall pay or cause to be paid said taxes upon said mill and appurtenances, for the said years 1869 and 1870, as by said lease he is bound to do, then this obligation to be void and of no effect, otherwise to remain in full power and effect.

The defendants filed six pleas, the first of which was *non damnificatus*. In the second, after craving oyer of the bond and setting it out in full, the defendants averred, that

on the 24th of May, 1870, the engine and boilers in the bond mentioned were attached to, and became part of, the premises leased to the said Hayes, and that the plaintiff was not, at the time of the making of the bond, nor at any time since that time, the owner of the premises demised to said Hayes, concluding with verification.

The fourth and fifth pleas were substantially the same as the second. In the third plea, after craving oyer of the bond and setting it out in full, the defendants averred that the engine and boilers in the bond mentioned were, on the 24th day of May, 1870, attached to and became part of the realty of the premises leased to said Hayes.

The defendants then averred that, at the May term, A. D. 1869, of the district court of Gilpin county, four several judgments were recovered against the said plaintiff, by parties and for sums named and set forth in the plea, which judgments became a lien upon the said Enterprise mill, which was then and there owned by the said plaintiff. That the plaintiffs in said judgments sued out executions thereon, and that, upon the 24th August, 1869, the property demised to said Hayes was sold to Charles Morgan et al., to satisfy said executions, and certificates of sale were thereupon made to the said Charles Morgan et al., which were afterward duly assigned to Rosswell G. Ralston and John W. Burke, that the premises not having been redeemed, the sheriff of the county afterward, and on the 20th day of March, A. D. 1871, made, executed and delivered, a deed, in due form of law, of the said premises to the said Ralston and Burke, concluding with verification.

In the sixth plea, after craving oyer of the bond, and setting it out, the defendants averred that the engine and boilers in the bond mentioned were, on the 24th May, 1870, attached to, and became part of, the realty let to the said Hayes, and that, at the commencement of the suit, plaintiff was not the owner of said Enterprise mill, engines, boilers, etc., and that it had never been evicted therefrom.

A demurrer to these pleas was sustained, and the defendant sued out this writ of error.

Mr. Justice WELLS took no part in the decision.

Mr. G. B. REED, for plaintiffs in error.

Mr. H. M. TELLER and Mr. WILLARD TELLER, for defendant in error.

HALLETT, C. J. The bond upon which this action is founded shows that Hayes, the principal obligor, was in possession of the Enterprise mill, under a lease from defendant in error, and that he had sold to the latter, two boilers and one engine, then in the mill, to be delivered at the expiration of his term. The conditions of the bond require Hayes to surrender the mill, and the engine and boilers, in as good repair as they then were, at the expiration of the lease; to perfect the title to the engine, and to pay the taxes assessed against the property for the years 1869 and 1870. In the declaration, breaches were assigned upon each of these conditions, and as we had occasion to say in another cause, each of the breaches so assigned, in connection with the body of the declaration, is to be regarded as a separate count. *Sopris v. Lilly et al.*, 1 Col. 266. Six pleas were interposed by plaintiffs in error, to which a demurrer was sustained, and we are asked to review the action of the court in respect to them. The first plea was *non damnificatus*, which may be pleaded in an action upon a bond to indemnify and save harmless, but not when the bond is conditioned for the performance of such acts as were specified in this instrument. *McClure v. Erwin*, 3 Cow. 332; *The State v. Gresham*, 1 Ind. 190.

In the second, fourth and fifth pleas, it is alleged that the boilers and engine were attached to, and became part of, the realty, on the 24th day of May, 1870, and that defendant in error was not the owner of the estate at the time the bond was made, or subsequently. Considered with reference to the undertaking to sell and deliver the engine and boilers, the defense set up in these pleas is, in substance, that, at the time of sale, these articles were attached to the freehold of some one not a party to the contract. If from this we

are to understand that the subject of sale was the property of a stranger, the action stands confessed, for one of the breaches of the condition of the bond assigned in the declaration is, that Hayes was not the owner of the engine at the time of the sale to defendant in error. If, on the other hand, the purpose of these pleas was to show a right of action on the bond in the owner of the freehold, it is plain that they have not that effect. According to the pleas, defendant in error was not the owner of the land at the time the bond was given, and, therefore, the right of action upon the bond could not pass to an assignee of the land. *Spencer's case*, 1 Smith's L. C. (5th Am. ed.) 125. Hayes was a tenant in possession of the property, and the boilers and engine, if owned by him, were trade fixtures which he had a right to remove during the tenancy. Taylor's L. & T. (5th ed.), § 545. If he owned them, he could sell them as personal property; and, if he did not own them, he is liable in damages for his failure to perform his contract.

The third plea presents a different question. It is there alleged that the Enterprise mill was, on the 24th day of August, 1869, sold under several executions, issued upon judgments previously obtained against defendant in error; and that in pursuance of such sale, on the 20th day of March, 1871, Ralston & Burke obtained a sheriff's deed for the property. It is also alleged that the boilers and engine were attached to, and became part of, the realty on the 24th day of May, 1870, which, it will be remembered, was prior to the making of the bond and the sheriff's deed. It is also alleged that defendant in error was owner of the mill at the time the judgments were obtained, and that the property was sold to satisfy the judgments. Upon this plea, it appears that defendant in error was the owner of the legal estate in the mill property at the time the engine and boilers were attached to it, and at the date of the bond, for the title was not divested by the sale under execution. *Cutlin v. Jackson*, 8 Johns. 406; *Gorham v. Wing*, 10 Mich. 486. Afterward, however, and on the 20th day of March,

1871, the mill was conveyed to Ralston & Burke by the sheriff's deed, and this was prior to the forfeiture of the bond.

It is true that the purchasers at the sheriff's sale acquired no right to the boilers and engine at the time of the sale, as those articles were not then in the mill. But they were subsequently attached to the freehold by Hayes, and thus became part of the realty, subject to the tenant's right of removal. Note to *Elwer v. Mawe*, 2 Smith's L. C. By the sale to defendant in error, the right of removal was extinguished, and the title to the fixtures united with the fee of the land. Buildings erected by a tenant, under a covenant to surrender them at the end of the term, cannot be removed by the tenant, and the same rule must obtain in regard to all fixtures placed upon land by a tenant, under an agreement to surrender them with the land at the end of the term. Taylor's L. & T. (5th ed.), § 549.

A condition of the bond in suit is, that the mill and its appurtenances, and the boilers and engine, shall be surrendered at the end of the term in good repair, which is similar to the covenant referred to in Mr. Taylor's text. After the sale by Hayes, the relation of the fixtures to the land was the same as if they had been erected under an agreement to surrender them at the end of the term, which would make them part of the realty, for all purposes. This being true, they would pass with the land by any conveyance effectual to transfer it. *Preston v. Briggs*, 16 Vt. 124; *Kittridge v. Woods*, 3 N. H. 503. It is considered that fixtures erected upon land by a mortgagor, after the lien of the mortgage has attached, are subject to it, and the same rule appears to be applicable to land sold upon execution. *Roberts v. The Dauphin*, 19 Penn. St. 71. It is said that crops sown after a sale upon execution, and which have not been harvested at the date of conveyance, pass to the vendee (*Parker v. Storts*, 15 Ohio St. 351), and upon the same principle, all fixtures annexed to the land at the time of the conveyance must pass with the freehold.

This brings us to the principal question in this case, which is, whether the covenants in the bond are such as run with the land and passed to the grantees in the sheriff's deed. As we have seen, the obligee in the bond on the 28th November, 1870, the date of the instrument, was the owner of the mill, which was essential in order that the covenants might take effect upon the land. But the assignable quality of the covenants did not depend on the interest of the obligors in the land, since a covenant by a stranger to the estate may pass with it. *Spencer's case*, 1 Smith's Lead. Cases, 125. The form of the obligation is not material, for a covenant may be contained in an exception or proviso, or any words which evince the intention of the parties. Taylor's L. & T., § 248, *et seq.* What, then, is the legal effect of the bond in suit, considered with reference to the mill property therein described, which, at the time the bond was given, was in possession of Hayes as tenant to defendant in error? That it was intended to secure the due performance of certain acts respecting the estate demised to Hayes is expressly declared in the condition of the bond, and since the boilers and engine had become part of the realty, all the acts there specified refer to the realty alone. They were acts affecting the quality and value of the premises demised, and therefore within the definition of real covenants which run with the land. Taylor's L. & T., § 261; Rawle on Covenants for Title, 334.

Express authorities are not wanting to show that the conditions to surrender the premises in good repair, and to pay taxes, are covenants real, and as the engine was annexed to the land, the condition to perfect the title to it was equally so. Taylor's L. & T., § 262.

Respecting the covenants to perfect the title to the engine, as well as the other conditions in the bond, it is to be observed that they were not to be performed until the 20th day of April, 1871, and, therefore, it cannot be said that they were broken as soon as made, and that thereby defendant in error became invested with an immediate right of action.

At the time designated for performing the conditions, the estate had passed to Ralston and Burke under the sheriff's deed, and therefore there was then no right of action in defendant in error. It is well settled that covenants real pass with the land to which they are annexed, to a purchaser at a sale under execution. Rawle on Covenants for Title, 352. I have not found any case in which the rule has been applied to a covenant which attached to the land after the sale, and before conveyance by the sheriff, as in this case. But it is believed that the principle is applicable to such covenants, and to whatever estate is acquired by the judgment debtor prior to the conveyance by the sheriff. Any other rule would divorce the covenant from the land for the benefit of which it was intended, and practically annul its obligation. The judgment debtor, not having the estate in the land, can suffer no injury from the breach, and if the grantee in the sheriff's deed cannot sustain an action upon the covenant, it would appear that no one would have such right. It is very certain that the judgment debtor is divested of the right of action, and if it is not extinguished, it must pass to the assignee of the land. Our conclusion is, that the facts set forth in the third plea are sufficient to bar the action, and it remains to consider the sufficiency of the sixth plea, concerning which very little need be said. In this plea it is alleged that defendant in error was not the owner of the Enterprise mill and appurtenances at the commencement of the suit, and had never been evicted or ousted therefrom. If the corporation was the owner of the premises at the time the condition of the bond is alleged to have been broken, the right of action then accrued, and the ownership at the commencement of the suit is of no importance. As to the averment that defendant in error had not been evicted, I do not discover any thing in the declaration to which it can be applied. There is no covenant in the bond for quiet enjoyment, nor did defendant in error complain of a disturbance of the possession. The plea is clearly insufficient, and the demurrer was very properly sustained to it.

The third plea is, however, good, and therefore the judgment of the district court is reversed and the cause remanded, with directions to that court to enter judgment for plaintiffs in error on the demurrer to that plea. *Reversed.*

EXECUTION SALE DOES NOT PASS TITLE to realty until by the sheriff's deed it is conveyed to the purchaser: *Manning v. Strehlow*, 11 Colo. 457.

ROGERS v. NUCKOLLS.

PLEADING — *denying partnership.* In assumpsit against two persons as partners to recover damages for failure to deliver stock pursuant to a contract which was not in writing, the general issue by one of the defendants, without oath, operates to deny the partnership.

PRESUMPTION — *as to pendency of suit from conduct of parties.* Where an order was entered of record dismissing the cause, and subsequently the cause was brought to issue and trial, no notice being taken of the order of dismissal, the court will presume that the cause was reinstated by agreement of parties.

Error to District Court, Arapahoe County.

THE declaration was in assumpsit against Henry J. Rogers and Gurdan H. Wilcox, late partners under the firm name of Rogers & Wilcox, to recover the sum of \$1,833.33, paid the defendants in consideration that they would transfer to plaintiff certain shares of stock. December 11, 1867, on motion of plaintiff's attorney, the cause was dismissed. May 8, 1868, Rogers, the present plaintiff in error, appeared and filed the general issue. January 9, 1872, cause was brought to trial, resulting in a verdict and judgment for plaintiff for \$1,833.33.

Testimony was given at the trial, tending to show a purchase of stock by plaintiff from the defendant Wilcox, and payment to Wilcox. Evidence was offered and received to show that a certain memorandum of sale signed by Wilcox, plaintiff, et al., was indorsed by Rogers, in the firm name of Rogers & Wilcox, but it was not claimed that the action was upon this instrument. The question to be determined was, the liability of Rogers for the transaction of Wilcox, his co-defendant, and upon this the court charged:

"The pleadings in this case admit the joint liability of both the defendants for all that either of them is liable for; if the jury believe that the defendant Wilcox made the agreement contained in the paper marked 'A,' which was read to the jury, then the defendant Rogers is, for the purposes of this action, bound thereby."

The plaintiff had judgment.

Mr. E. L. SMITH, for plaintiff in error.

Messrs. BROWNE & PUTNAM, for defendant in error.

BELFORD, J. Rogers & Wilcox were sued as partners. The declaration charges that on the 31st of March, 1864, the plaintiff, Nuckolls, paid the defendants the sum of \$1,833, in consideration that they would thereafter transfer to him one and one-third shares of the Denver Tunnel and Mining Company. It is further averred that the defendants refused to deliver such stock, whereby the plaintiff became damaged, etc. There was no service had on Wilcox, and Rogers filed the general issue, and went to trial. The court instructed the jury that the general issue admitted the partnership, and this is assigned for error. Section 6 of the R. S., p. 310, provides that "in actions upon contracts, express or implied, against two or more defendants, alleged to have been made or executed by such defendants as partners or joint obligors or payers, proof of the joint liability or partnership of the defendants, or their Christian or surnames, shall not be required in the first instance, to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by the filing of pleas denying the execution of such writing, verified by affidavit, as required by law." Before the revision the words by "pleading in abatement or" followed the word "necessary." We held, in the case of *Litchfield v. Daniels*, 1 Col. 271, that where the action was on an instrument in writing, the plaintiff was not required to introduce any evidence to show that the defendants were partners or joint

obligors, unless the defendant put the partnership or joint obligation in issue by denying the execution of the written instrument. The language of the court cannot be extended beyond the case then in hand. It is hard to conceive that the legislature intended to impose on a defendant, when sued as a partner, the duty of denying under oath the execution of a written instrument, where none was sued on. Under the old statute it was held, in *Warren v. Chambers*, 12 Ill. 125, that where the action was founded on a written instrument, the plea of general denial verified was necessary to put in issue the question of partnership. When the action was on a contract not in writing, the existence of the partnership must be denied by plea of abatement. And this construction commends itself to one who carefully reads the section as it stood before the revision took place. It seems to us that the word "implied" was inadvertently left in, and that a true construction requires us to read the section as though that word were omitted. By this method alone can we get rid of the too palpable incongruity which exists between the first and last line of this section. Thus read, we harmonize the various parts, and execute the intention of the legislature, which unquestionably was to place the proof of partnership, when arising on written contracts, on the same footing with the proof of the execution of written instruments, and by dispensing with the plea of abatement, it was evidently designed that the issues of partnership or joint obligation could be raised by the general denial or non-assumpsit, because that plea not only traverses the contract, but the manner and form in which it is alleged to be made. If this view is correct, and such we think it to be, the instruction is clearly erroneous. The record shows that on the 17th day of December, 1867, the plaintiff, by his attorneys, appeared in open court and dismissed the action, and it is claimed by plaintiff in error that all proceedings subsequent to that day were void. No notice seems to have been taken of this order of dismissal. The record shows that on the 8th of May following, the defendants appeared and filed their plea. The cause must have been continued on the docket,

at least the order above mentioned attracted no attention until years after it was made, and was only discovered when this record was being prepared for this court. The appearance of the defendants after the order of dismissal was entered, the filing of their plea, and their proceeding to trial without objection must be regarded as tantamount to a re-instatement of the cause. To allow such an objection to be raised for the first time in this court would be to give sanction to a system of practice at war with all principles of justice.

The judgment is reversed, and the cause remanded for further proceedings.

Reversed.

McCRAW v. WELCH.

PLEADING IN REPLEVIN — *officer justifying under attachment writ.* In replevin against a constable who held the goods in controversy as the property of a third person under a writ of attachment, the defendant justified under that writ, and after verdict it was objected that it was not alleged in the plea that a debt was due from the attachment defendant to the plaintiff; *held,*

1. That if such averment was necessary, an allegation in the plea, that the attachment was for \$250, that the writ was at the time of the levy in full force and effect, and that the amount claimed was unpaid, was sufficient after verdict.
2. That the defendant having also pleaded property in the attachment defendant, he was at liberty to put in the same defense under that plea.

And in such action it is not necessary that the defendant should aver in his plea of justification or prove at the trial that the writ of attachment was duly returned, or that there was cause for suing out the attachment.

ATTACHMENT — *statement of grounds for, in affidavit.* A charge in an affidavit for attachment that the defendant "is converting or is about to convert his property into money, or is otherwise about to dispose of his property with the intent of placing it beyond the reach" of his creditor, is a statement of but one cause of attachment under the act (R. S. 58), and not of several causes in the alternative.

The charge that the defendant would otherwise dispose of his property with the intent named is too general, and cannot be regarded as a ground for attachment.

ATTACHMENT — amendment of bond — effect. If, upon issuing an attachment, a defective bond be filed and approved, and subsequently a good bond is filed and approved by way of amendment, pursuant to section 8 of the act (R. S. 55), the proceeding thereby becomes valid from the beginning.

EVIDENCE — original and amended bonds in attachment. And in a collateral suit, both the original and amended bonds may be received in evidence, to show the regularity of the attachment proceedings.

PRACTICE — ground of objection to testimony should be stated. An objection to testimony which may be obviated by the production of further testimony should be distinctly stated at the time the objection is made.

Therefore, an objection that the official character of a J. P., who issued a writ of attachment, and of the constable who executed it, was not shown before offering the writ, and other papers in the attachment suit, is not presented by a general objection in the court below to such papers.

EVIDENCE as to official character of J. P. and constable. And when received, the writ of attachment and return thereto, afforded some evidence of the official character of the justice and constable, sufficient, *prima facie*, to warrant the finding of the fact.

STATUTE OF FRAUDS — sale void for non-delivery. A sale of goods which is not accompanied by immediate delivery, and followed by actual and continued change of possession, as required by section 14 of the Statute of Frauds (R. S. 839), is void as against the creditors of the vendor.

EVIDENCE — as to matters occurring after suit brought. In replevin against a constable who holds the goods in controversy, as the property of a third person, under a writ of attachment, evidence is not admissible, on behalf of the plaintiff, to show that the attachment was dissolved after the replevin was brought.

Error to District Court, Gilpin County.

CHARLES O. WELCH brought replevin in the district court of Gilpin county against Hugh McCraw, for certain goods and chattels alleged to be of the value of \$200. The writ was issued August 20, 1870, and the declaration was in the *cepi* and *detinet*. The defendant pleaded:

1. *Non-detinet*.
2. Property in Frank O. Sawin.
3. That at the said time when, etc., he, the defendant, was a constable of Gilpin county; that on the 13th day of August, 1870, a writ of attachment, issued by Mather, a justice of the peace, at the suit of John W. Hickman and against Frank O. Sawin, came to his hands; that the writ was issued upon affidavit, bond and security as required by law; that it was for the sum of \$250, and was "then

and there in full force and effect, and the amount claimed by said plaintiff, Hickman, was unpaid ;" that on the 15th day of August, 1870, he levied the writ upon the goods and chattels in the declaration mentioned as the property of the said Frank O. Sawin ; that the said goods and chattels were the property of said Sawin, and were subject to levy, and not the property of the plaintiff, etc.

Issue was joined upon these pleas, and the trial was had before a jury.

At the trial the plaintiff testified in his own behalf, that he bought the goods of Sawin on the 16th of July, 1870, and took a bill of sale for them ; that Sawin was his tenant and he took the goods for rent ; upon cross-examination he stated that the goods were not removed from the building occupied by Sawin, and that after the sale they were used by the latter in the same manner as before.

Defendant gave in evidence that the goods were in possession of Sawin at the time they were taken by McCraw. The defendant also offered an affidavit, original and amended bond, writ of attachment and return thereto, which appeared to be of the files in the case of John W. Hickman against Frank O. Sawin, before Charles W. Mather, a justice of the peace. The only evidence of this, however, was the file mark, the approval of the bonds by the justice, the signature to the writ of attachment, and to the return of the constable indorsed thereon. The original attachment bond which appeared to be filed August 13, 1870, had not the condition to pay damages caused by an excessive levy as required by the statute. R. S. 55. The amended bond was, apparently, given to cure this defect, and appeared to be filed and approved August 31, 1870. The plaintiff objected to the bond of August 13, 1870, because not conditioned as the law provides, and to all the papers for incompetency. The objection was overruled and papers were read in evidence. The return to the writ of attachment was of a levy on goods, such as those described in the declaration as the property of F. O. Sawin, it was signed Hugh McCraw, constable. The defendant also gave in evidence that at

the time the attachment suit was begun, Sawin was indebted to Hickman in the sum of \$250. The plaintiff, in rebuttal, produced the docket of Charles W. Mather, justice of the peace, and proposed to read therefrom a judgment dissolving the attachment in the suit of Hickman against Sawin, which appeared to be dated August 31, 1870. The defendant objected that this was after the commencement of the replevin suit, the writ in this cause having been issued on the 20th of August, but the court overruled the objection, and the docket entry was read. The judgment was for the plaintiff, and the defendant sued out this writ of error.

Mr. Justice WELLS took no part in the decision.

Mr. I. N. WILCOXEN, for plaintiff in error.

Mr. WILLARD TELLER, for defendant in error.

HALLETT, C. J. This was an action of replevin in which plaintiff in error justified the seizure of the goods replevied under a writ of attachment issued by a justice of the peace, at the suit of John W. Hickman against Frank O. Sawin. Defendant in error claimed by purchase from Sawin made before the levy of the attachment. The goods were in the possession of Sawin at the time the attachment was levied, and it is urged that the sale to defendant in error was void as against creditors of Sawin, under the 14th section of the statute of frauds. That there was no change of possession at the time of the sale as required by that statute is clear upon the evidence, and the controversy turns upon the sufficiency of the plea of justification, and the regularity of the proceedings in the attachment suit. It is claimed that it was necessary to aver and prove a debt due from Sawin to Hickman, in order to show that plaintiff in error was acting for a creditor of the former, and that the plea of justification contains no sufficient averment of that nature. Of this, however, there may be some doubt, for in an action of trespass by the vendee of a defendant in attachment against the officer who levied the writ of attachment, and the creditor

who prosecuted it, the supreme court of the United States recently decided that such an averment was unnecessary. *Deitsch v. Wiggins*, 15 Wall. 539.

The principle upon which that case was decided is equally applicable to this form of action, and since we must accept the rule as of the highest authority, I can see no reason why it should not be adopted here. But it is not necessary to decide the point in this case, since the averment of indebtedness from Sawin to Hickman, although somewhat ambiguous and inaccurate, is probably sufficient upon issue of fact joined. The allegation in the plea is that the writ of attachment was for \$250, and the amount claimed by Hickman was unpaid, which would hardly stand the test of a demurrer, but may be sufficient after verdict. It may be observed also that under the plea of property in Sawin the evidence offered by plaintiff in error was admissible whether the plea of justification was good or bad. *Quincy v. Hall*, 1 Pick. 357.

Upon the trial the evidence was full upon the point of the indebtedness, so that it is correct to say that the fact was averred and proved, if that was necessary to the defense. There is no averment in the plea that the writ of attachment had been returned by plaintiff in error, but this, according to the case above cited, was altogether unnecessary. Upon this point a different view has been entertained, and expressed in this court, but the authority of the case cited is controlling—so also upon the same authority it was unnecessary that plaintiff in error should aver in his plea, or prove at the trial, the ground upon which the attachment was issued, and so we held in *Berry v. Hart*, 1 Col. 246. It would be manifestly unjust to require an officer who must execute process regular on its face, to prove that the matters alleged by the plaintiff as a ground for issuing the writ were truly stated. Of the truth of those matters the officer usually has no knowledge, nor can he, upon receiving the writ, refuse obedience, until the truth of them can be ascertained.

The language of the affidavit as to the ground of the at

tachment is slightly variant from that of the writ, but the variance has not been noticed in argument, and is not apparently relied upon. But it is urged that several causes of attachment are distinctly alleged, and that both the affidavit and writ are therein substantially defective. It is true that the statement of two or more distinct grounds of attachment in such manner that it is impossible to determine which one of them is relied upon, will not be allowed, but this proceeding does not present a case of that character. The allegation is "that said Frank O. Sawin is converting, or is about to convert his property into money, or is otherwise about to dispose of his property with the intent of placing it beyond the reach of said John W. Hickman & Co.," and this, according to the authorities, is not a statement of several distinct facts of different natures, but of several phases of the same fact. Drake on Attachment, § 102; *Kluck v. Schwohn*, 19 Wis. 112. The difficulty of ascertaining whether a creditor is converting or is about to convert his property into money, or is about to dispose of his property in some other manner, with the intent named, is regarded as sufficient to excuse the creditor from making a more specific statement. The substantial fact is that the debtor is about to place his property beyond the reach of the creditor, and the manner in which this will be accomplished cannot always be certainly known. Probably the averment that the debtor would otherwise dispose of his property is too general to be of service to the party making it, and should not be regarded as a ground of attachment. If the debtor is concealing his property, or conveying it beyond the jurisdiction, or dissipating it in any other manner, with the required intent, the creditor should state the fact. But whether we regard this as a substantial averment, or confine our observations to the other allegations in the affidavit, under the rule referred to, the objection to the affidavit and writ is untenable. Whether an officer may justify under a writ of attachment issued by a justice of the peace, which is in due form, but without showing that the writ was founded upon the affidavit, and bond required by

the statute, is, upon authority, a question of some difficulty. If a writ is issued without affidavit, and there is no service or appearance in the action, it appears to be settled that the court has no jurisdiction of person or property. Drake on Attachment, § 86, *et seq.* And where the court exceeds its jurisdiction, it has been said that regular process will not protect the officer who executes it. *Wise v. Withers*, 3 Cranch, 331; *Dynes v. Hoover*, 20 How. 65. In the late case of *Erskine v. Hohnback*, 14 Wall. 613, the same point was not presented, but the language of the court would seem to support the doctrine that process fair on its face, and showing no departure from the law, or defect of jurisdiction over the person or property affected by it, will protect the officer executing it, and justify the seizure and detention of property under it. This I understand to be the doctrine of the cases cited by Mr. Justice FIELD, and of *Barnes v. Barber*, 1 Gil. 401. In the case at bar it does not appear to be necessary to enter into this distinction, for both the affidavit and bond in attachment were given in evidence upon the trial in the court below. The bond first taken by the justice of the peace was, in some respects, defective, but the defects were cured by amendment, which, by relation to the commencement of the suit, would validate the proceedings throughout. The first bond filed with the justice was properly received, notwithstanding the defect in the condition, in order that it might appear that there was an attempt to comply with the statute at the commencement of the suit, and the amended bond, designed to supply defects in the first, was receivable to show that the statute had been obeyed.

A settled rule of practice requires that objections to the admission of testimony which may be obviated by the production of further testimony, shall be distinctly presented at the time the objectionable testimony is offered. *Cody v. Butterfield*, 1 Col. 377. Of this nature is the objection that the official character of the justice and constable was not in evidence when the writ of attachment and the return thereto, the bond and affidavit in attachment were received in

evidence. The general objection made to the papers in the court below cannot be regarded as presenting that point in this court, and when those papers were received, they furnished evidence of the official character of the justice and constable, sufficient, *prima facie*, for the consideration of the jury. The writ tested in the name of Mather, as justice of the peace, and the return thereto, signed by plaintiff in error as constable, may be regarded as the declarations of those parties put in evidence without objection from defendant in error, and as such they were entitled to consideration. A witness also testified, that plaintiff in error had been acting as constable, but as he did not state when he so acted, the evidence was of little value. Defendant in error put in evidence the record of the trial before the justice, which was attested in Mather's name, thus contributing to the evidence of his official character. Upon the whole, we think that there was evidence of the official character of the justice and constable, which, in the absence of opposing evidence, should have been accepted by the jury as sufficient to establish the fact, and that the other points in the case for plaintiff in error were clearly made out. That the sale by Sawin to defendant in error was not followed by actual and continual change of possession, as required by the 14th section of the Statute of Frauds, is very clear, and there is little room for doubt upon any essential point in the case. No question was made in the argument as to whether plaintiff in error was required to prove that he was an officer, *de jure*, at the time of levying the writ of attachment, and at the commencement of this suit, probably because the opposite view appears to have been sanctioned in *Deutsch v. Wiggins, supra*. The evidence to show that the attachment was dissolved after the property was replevied could not have been material to the issue, as the right of the parties at the commencement of the replevin suit, and not afterward, was the question to be tried. This evidence should have been excluded.

The judgment of the district court is reversed with costs, and the cause is remanded for a new trial. *Reversed.*

SHERIFF JUSTIFYING UNDER EXECUTION and seeking to attack the title of the plaintiff in replevin for fraud must show that the judgment is unsatisfied: See *Covell v. Colorado Springs Co.* 3 Colo. 87; *Tracy v. People*, 3 Colo. 87; *Wyatt v. Freeman*, 4 Colo. 18.

GOOD v. MARTIN.

JUDGMENT—*what is final.* A decision of a district court upon a motion to quash an execution is not a final judgment which may be removed into this court for review by writ of error.

Error to District Court, Arapahoe County.

THIS cause was before the court at the last term upon appeal, and the judgment being affirmed, defendant in error sued out an execution from the district court. The present plaintiff in error thereupon moved the district court to quash the execution, upon the ground that the cause had been removed into the supreme court of the United States by writ of error, which writ had become a supersedeas. The district court denied the motion, and plaintiff in error took a bill of exceptions and sued out this writ.

MR. N. HARRISON, of counsel for defendant in error, now moved the court to quash the writ, upon the ground that the decision of the district court upon that motion was not a final judgment.

MR. E. L. SMITH, *contra.*

BELFORD, J. Good filed his motion in the court below to quash an execution which had been issued on a judgment obtained by the defendant in error against him. The motion was denied, and thereupon Good sued out this writ of error, to review the action of the court below. It is claimed by the defendant that the order denying the suppression of the execution was in no sense a final judgment, nor an award in the nature of a judgment, and that neither an appeal nor writ of error will lie therefrom. It has been repeatedly held that no appeal nor writ of error will lie from an order to show cause why any particular thing should not be done; or from an order for an attachment to bring a party before the court; or an *ex parte* order refusing an injunction; or an order granting an injunction until the coming in of an

answer ; or when on motion dissolving or continuing it until the final hearing or further order ; or when property was likely to be lost or materially injured, appointing a receiver to take care of it for the benefit of all concerned ; or from an order upon a defendant to bring a sum of money into court, which he had admitted in his answer did not belong to him, for the purpose of having it invested so as to be made productive pending the litigation, or from a mere discretionary decree or order. The principle upon which the denial rests is, that if appeals or writs of error from such orders were allowed, the court of last resort would draw into it the whole business of the inferior courts before they had become ripe for discussion and decision there ; and not only render the voice of those courts mute, and their process nugatory, but it would destroy the appellate court itself by rendering it wholly incompetent to dispatch the immensity of business which would thus accumulate. *Ringgold's case*, 1 Bland. Ch. 13. Considerable conflict is found in the books as to the exact nature of the order herein complained of. In Illinois, Mississippi, Indiana and Alabama, it is regarded as final in such sense as that a writ of error will lie. *Sloo v. State Bank*, 1 Scam. 428 ; *Lawdsford v. Richardson*, 5 Ala. 618 ; *Bank, etc., v. Patten*, 5 How. 200 ; *Cline v. Green*, 1 Blackf. 58. In North Carolina, New York, and in the Federal courts, a different rule prevails. *Bowen v. Lavin*, 2 Tayl. 241 ; *Brooks v. Hunt*, 17 Johns. 484 ; *Hohn v. Cargo*, 1 Mason, 435 ; *Barton v. Forsythe*, 5 Wall. 190 ; *Boyle v. Zacherie*, 6 Pet. 648. In the case last cited, motions of this character are regarded as being addressed to the sound discretion of the court, and their refusal is not a ground for a writ of error. A distinction is also taken in the case of an order refusing to quash an execution, and an erroneous award of execution not warranted by the judgment. In the latter case it is stated that a writ of error will lie. Amid this conflict of authority, we are forced to range ourselves on the side of the Federal courts, and dismiss this writ, and it is accordingly so ordered.

Motion allowed.

BARNES et al. v. DE FRANCE.

MARRIED WOMAN — liability on promissory note. A promissory note given by a married woman and her husband, for property purchased by her as a sole trader, is valid in law, and the amount of such note may be recovered against the husband and wife in an action of assumpsit.

Error to Probate Court, Jefferson County.

THE suit was commenced before a justice of the peace on a promissory note in ordinary form, for the sum of \$250, against David Barnes and Sarah L. Barnes, his wife, the present plaintiffs in error, and thence removed to the probate court by appeal. At the trial in the latter court there was evidence to show that Sarah L. Barnes owned and operated a flouring mill at Golden City, and that in the course of such business the defendant in error sold to her a quantity of wheat, and that this note was given to secure the price thereof. Objection was made to the note upon the ground that the said Sarah being a married woman was not capable of making the same. The plaintiff had judgment.

The statute referred to in the opinion (R. S. 455) is as follows:

“Any married woman may carry on any trade or business and perform any labor or services, on her sole and separate account, and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property and may be used and invested by her in her own name; and she may sue and be sued as if sole, in regard to her trade, business, labor, services and earnings, and her property acquired by trade, business and services and the proceeds thereof may be taken on any execution against her.

MR. GEORGE W. PURKINS, for plaintiffs in error,

MR. ALLISON H. DE FRANCE, *pro se*.

BELFORD, J. The only error assigned goes to the admission of the note in evidence. It is claimed that Sarah

Barnes at the date of the execution of the instrument was a married woman and therefore incapable of making the same. The evidence clearly shows that she was carrying on business as a trader through her agent David Barnes, and that the consideration of the note went to the benefit of her separate estate. Under the sixth section of an act concerning "Married Women" (Rev. Stat. 455), she could make contracts affecting her business or trade to the same extent as though she were a *femme sole*. To hold otherwise would be to deprive her of the very rights which this statute was designed to confer.

We see no error in this record, and affirm the judgment.
Affirmed.

BUTLER v. THE PEOPLE.

CONTEMPT OF COURT—*abuse of process*. To sue out an attachment for a witness in a civil cause who has not been regularly served with subpoena, is a contempt of court in the attorney applying therefor.

WRIT OF ERROR—*in case of contempt*. Whether a writ of error lies to a judgment for contempt, the court was not agreed, but as no error was found in the record, the writ was dismissed.

Error to District Court, Gilpin County.

THE record showed that on the 9th day of August, 1867, in the district court of Gilpin county, the civil cause, *Snyder v. Grimes*, was called for trial. Thereupon, Mr. Butler, an attorney of the court and of the plaintiff, Snyder, suggested to the court that a subpoena had been issued for Martin Johnson et al., which had been served, and moved the court for a writ of attachment against said witnesses as for a contempt of court in not obeying the said subpoena, which writ was accordingly issued.

The other material portions of the record are set forth in the opinion of Mr. Justice BELFORD.

The chief-justice did not participate in the decision.

Mr. HUGH BUTLER, plaintiff in error, in person.

Mr. E. WAKELY, *contra*.

BELFORD, J. The plaintiff in error was fined in the court below for an alleged contempt in causing a writ of attachment to be sued out for an absent witness. It appears that the witness was subpoenaed to be in attendance on the 9th day of August. On that day the cause coming on to be heard, and the witness not appearing, the record recites that Mr. Butler moved for an attachment for the body of said witness, which was accordingly issued. The record further recites that "afterward and upon the same day it appears to the court that the said writ of attachment was improperly issued, for that the subpoena aforesaid is made returnable upon the 9th day of August, and it further appearing to the court that the said subpoena, and the time at which the same is made returnable, was filled in and written by the said Butler, it is considered and adjudged by the court that the said Butler, in causing the said writ of attachment to be issued improperly and wrongfully as aforesaid, is guilty of a contempt of this court, and it is ordered and adjudged by the court that the said Butler pay to the clerk of this court a fine of \$2.50, and until he purge himself of such contempt by paying such fine, he shall not be permitted to appear in this court as an attorney," etc.

The attachment was evidently sued out on the theory that it was the duty of the witness to be in attendance on court at the opening of the same on the morning of the 9th. The offense is rather technical than intentional or real. To sue out process when one is not entitled to it has been held by able courts to be a contempt. Every counsel, in asking for an attachment, pledges his personal and professional honor to the court that the papers which are on file are sufficient to entitle him to the order. *Brown v. Keller*, 40 Ill. 81.

We are of the opinion that the witness had all of the day to which the subpoena was made returnable to appear, and that no attachment could properly issue. No hour was fixed in the subpoena. The witness was simply required to be at

court on that day. The chief question for our determination is, will a writ of error lie in a case of contempt in the face of a court of justice? In Illinois the question has been resolved in the affirmative. *Winkelman v. The People*, 50 Ill. 449. A different answer has been given by a higher court, and one which I am obliged to accept. In *Ex parte Bradley*, 7 Wall. 376, Mr. Justice NELSON says: "The order disbarring attorneys or subjecting them to fine or imprisonment is not reviewable by writ of error, it not being a judgment in the sense of the law for which this writ will lie."

The doctrine announced in this case is reaffirmed in *Ex parte Robinson*, Chicago Legal News, Jan. 24, 1874. See also *Ex parte Martin*, 5 Yerger, 457.

It may be asked is an attorney, when disbarred or imprisoned, without remedy? If an individual was unlawfully imprisoned by any court of justice, relief could be afforded by the constitutional writ of *habeas corpus*, but against a sentence imposing a fine, I know of no relief. If disbarred, the writ of mandamus may be invoked. In the view I take, this writ of error must be dismissed.

WELLS, J. If the writ of error lies here, the judgment must be affirmed. The witness whom Mr. Butler caused to be attached in the district court was clearly entitled to the whole of the day named in the subpoena in which to make his appearance; to take out an attachment against him in the meantime was to occasion an abuse of the process of the court, which, though inadvertently done, was a contempt; for such slips and omissions of counsel tend to bring disgrace upon the courts themselves, as not taking due care to prevent them. Bac. Abr., Attachment, A; Com. Dig., Attorney, B; 13 Hawkins' P. C., b. 2, c. 22, s. 2.

As to so much of the sentence as suspended Mr. Butler from practice until payment of a fine imposed, I do not appreciate what was said in argument against the existence of the power thereby assumed. If the courts may not in such cases as this record presents suspend the attorney, they

are equally powerless where the contempt is of such an aggravated and scandalous character as to render it unseemly that the offender should be received within the bar. And if the inferior courts may not directly exercise the power of suspension, they may not reach the same end indirectly. And this will take away the power of imprisonment; for to imprison the attorney is practically to suspend him during the period of the detention, and this will give to those of the profession and, as I should think, all those who exercise any office whatever, a practical immunity to condemn the inferior courts. As to *Winkleman's case* (50 Ill. 450) which is relied upon by the plaintiff in error, it is to be observed that the order complained of here goes no further than to suspend Mr. Butler from practice until he should pay the trifling fine imposed; whereas in the case referred to, the suspension was perpetual. In that case, too, the order extended itself to all the courts of the circuit, in which respect, inasmuch as the attorney was not admitted in that court, the order was too extensive. *Stephens v. Hill*, 10 M. & W. 33. Here the suspension was only in the particular court wherein the contempt was committed, and for the exercise of the power in this extent the case last cited is authority, and *Winkleman's case* does not, as I think, conflict with it.

I am not prepared to concede that we may not, upon writ of error, review the sentences of the inferior courts in proceedings for contempts; nevertheless, as we are agreed that no error intervened, and the result, so far as the plaintiff is concerned, is the same, I unite with Mr. Justice BELFORD in the order to discontinue the writ of error.

Writ dismissed.

TALPEY v. DOANE et al.

SECURITY FOR COSTS — upon suing out a writ of error from this court to a district court, a non-resident of the territory must give security for costs, as required by the statute. R. S. 153.

Error to District Court, Arapahoe County.

Mr. CHARLES, of counsel for defendants in error, now moved to dismiss the writ because the plaintiff, being a non-resident, had not filed a bond for costs, as required by chapter 19, R. S. An affidavit was filed in support of the motion.

Mr. L. B. FRANCE, *contra*.

BELFORD, J. The motion to dismiss is founded on an affidavit, wherein it is averred that at the date of suing out the writ the plaintiff in error was a non-resident of the territory of Colorado, and that no cost bond had been filed, as provided by law. There is another statement in the affidavit "That Talpey left said territory in the month of November, A. D. 1872, as this affiant, on diligent inquiry, has been informed and believes to be true, and has never since returned." It is objected that this averment is not sufficient to put the plaintiff to the proof of his residence. Conceding that it is so, still the first averment is clear and unequivocal, and the effect is not impaired by what follows. The last may be treated as mere surplusage. The suing out of a writ of error is the commencement of a new suit, and the plaintiff, if a non-resident, must file a cost bond before he can acquire a standing in court. *Ripley v. Morris*, 2 Gilm. 381. The plaintiff has filed no counter affidavits, disputing the allegation of non-residence, but rests his defense to the motion on the insufficiency of the affidavit. In this case he has leaned on a broken reed. It was suggested that inasmuch as the record was filed in the supreme court on the 28th of March, 1872, the commencement of the suit must be held to date from that day, and that this affidavit does not show the non-residence of the plaintiff at that time. In answer to this suggestion it is sufficient to say that it is the suing out of the writ, and not the filing of the record, that is regarded as the commencement of the suit. It is the writ that puts the machinery of the court in motion. The writ sustains a rela-

tion to the record somewhat similar to that of a summons to a bill in chancery, or a declaration at law. The issuing out of either is the first process of the court, the first step taken in the cause. *Motion allowed.*

SECURITY FOR COSTS MUST BE GIVEN ON COMMENCING AN ACTION OR SUING OUT A WRIT OF ERROR. The statute is mandatory and allows the court no discretion: *Puley v. Cody*, 3 Colo. 321; *Edgar & S. M. Co. v. Taylor*, 10 Colo. 112.

MURLEY v. ENNIS.

EVIDENCE — effect of admissions. A defendant's admission of a fact is not conclusive upon him, but it is to be weighed by the jury in connection with all other evidence in the case.

PLEADING AND EVIDENCE — must correspond. If the plaintiff has not declared for money paid to the use of defendant he cannot have judgment therefor.

STATUTE OF FRAUDS — agreement to locate lode claims. An agreement between two or more persons to explore the public domain and discover and locate lodes for the joint benefit of all is not within the statute of frauds (R. S. 837), and it is not necessary that it should be written.

LODE CLAIMS — may be located by an agent. Any citizen who is entitled to locate a lode on the public domain may perform all necessary acts of appropriation and development through the agency of others.

Lode claims — time allowed to perfect location. Upon discovering a lode the locator is entitled to a reasonable length of time in which to perfect the development which the local law requires of him.*

Nature of inchoate right pending development of claim. While holding possession for the purpose of making the development required by law, the locator's right to the lode is complete and it cannot be conveyed except by deed.

It may nevertheless be lost by abandonment or by voluntarily yielding the possession to another, which is the same thing.

And so if the locator admit another to the possession with him, this will amount to an abandonment *pro tanto* and a retaking by the party admitted upon which they will become interested in the lode, jointly or otherwise, according to the terms of their agreement.

In these particulars the rule is the same when applied to the relocation of an abandoned claim.

ASSUMPSIT — for money received on sale of lode. If one who is in possession of a lode holding for himself and another make sale of the property, the latter may bring ejectment against the purchaser for his part or he may affirm the sale and sue his associate in assumpsit for his part of the purchase-money.

* By the act of 1874 (10 Sess. 187), the discoverer is allowed sixty days in which to sink a discovery shaft.

CONTRACT — may be abandoned because of failure to perform condition. If two persons agree with a third to furnish necessary supplies to the latter as the same shall be required, for discovering and locating lodes for the joint benefit of all, the latter may treat this as a condition precedent, and upon failure to furnish the supplies, he may abandon the enterprise, or he may proceed to discover and locate lodes in his own right, without regard to the contract.

*Error to Probate Court, Clear Creek County.**

THE declaration contained the common counts for goods sold and delivered ; for work done and materials furnished ; for money loaned ; for money received by defendant for use of plaintiff ; for interest ; for money found to be due upon an account stated. There was no count for money paid to the use of defendant. At the trial, Ennis, the present defendant in error, who was then plaintiff, gave evidence tending to prove an agreement between Murley, the plaintiff in error, one Thompson and himself, by which Murley was to prospect for lodes, and the others were to furnish provisions and other supplies to him ; that, under this arrangement, Murley took possession of the St. Joe lode, which had been previously located and abandoned by other parties ; that, by the terms of their agreement, each was to have one-third of all locations made by Murley ; that Ennis and Thompson furnished to Murley about \$200 worth of provisions under this arrangement ; that Murley afterward sold and conveyed the St. Joe lode to one McAfee and received therefor about \$960 ; that Murley afterward promised to pay plaintiff one-third of the money so received from McAfee, and gave to plaintiff an order on McAfee for \$310, being a portion of the said purchase-money ; that this order was returned to Murley with the request that he would collect the same. The plaintiff gave further evidence to show that in the year 1868, at Murley's request, he paid to one Morgan the sum of \$70. The defendant gave evidence controverting that offered by the plaintiff, which it is unnecessary to repeat. The court charged the jury as follows :

* *Murley v. Thompson*, presenting the like facts and rulings of the court, was reversed for the same reasons.

1. If the jury believe, from the evidence, that Murley did have an accounting with Ennis, and give him an order for the amount as due on the sale of the St. Joe lode, and such order not paid, he is now estopped from denying his liability to Ennis, unless by subsequent payment.

2. This is a civil suit ; therefore, the jury will be governed by the weight or preponderance of evidence in determining whether or not the defendant is indebted to the plaintiff.

3. "If the jury believe, from the evidence, that, at the time the alleged contract for prospecting was made, Murley was in possession of St. Joe lode, and that this St. Joe lode was not included in that arrangement, then the jury should find for the defendant. But admissions of the defendant, as to any portion of the sale money belonging to the plaintiff, is good evidence to prove that the lode was included in the alleged contract."

4. "The court instructs the jury that a contract broken, releases the other party from its terms ; and if they believe that the plaintiff and defendant did enter into some kind of a contract or arrangement for prospecting or working any mining property, and that the plaintiff did not carry out his portion of said contract, then the defendant is released from the operations of any such contract, but if afterward there was a settlement and accounting between the parties, and settlement made as to the matters relating to such contract, and the defendant acknowledged his indebtedness to the plaintiff, then the defendant is bound by such accounting and such agreement.

5. "The court instructs the jury that a contract between the plaintiff and defendant to prospect in partnership, for mines, gives the plaintiff no right to or interest in mines previously discovered and owned by defendant, unless afterward, or at the time the contract was made, such mines were included in such contract."

6. "If the jury believe, from the evidence, that in the spring of 1867 the defendant and plaintiff entered into an arrangement for prospecting, and were to share in the proceeds, this gives the plaintiff no right to or interest in prop-

erty subsequently found by defendant, unless he, the plaintiff, carried out his part of the agreement."

7. "If the jury believe, from the evidence, that the defendant is indebted to the plaintiff for money on account of sale of St. Joe lode, then the plaintiff is entitled to interest at ten per cent per annum from the date of settlement about the matter with plaintiff to the present date."

8. "If the jury believe, from the evidence, that Murley is indebted to Ennis for money paid to Morgan, as attorney, then Ennis is entitled to interest on the same from the time the money was paid, to this date, at ten per cent per annum."

To the giving of which said instructions (except the 6th), by the court, and to the giving of each of them, the defendant then and there excepted.

The jury found for the plaintiff, and judgment was given on the verdict.

Mr. HUGH BUTLER, for plaintiff in error.

Messrs. POST & COULTER, for defendant in error.

WELLS, J. We are of opinion that the supposed accounting and promise to pay referred to in the first instruction, which was given, amounted to no more than an admission of liability, and was entitled to only such consideration as the jury might see fit to accord to it in view of the other testimony. If, in truth, Ennis had no interest in the proceeds of the lode in question, then the alleged promise was without consideration and void, but by this instruction the jury are required to give it conclusive effect; the fourth asserts substantially the same proposition. The eighth authorizes the jury to allow, in the computation of plaintiff's damages, interest upon a sum of money said to have been paid plaintiff to defendant's use; the declaration contained no allegation under which even the principal sum so paid could be recovered. Other points in the charge of the court are perhaps liable to exception, but for the error mentioned the judgment must be reversed.

Inasmuch as the cause must be tried again, it will be best that, for the guidance of the lower court, we express ourselves upon the substantial questions which were agitated upon the former trial.

If two or more go into the public domain together to search and explore for mines, with the agreement to occupy and develop such discoveries as may be made for the joint benefit, and such discovery, development and joint occupation follow, it is clear that while each explorer becomes invested with his due share and estate in the premises, no provision of the statute of frauds is violated. The 8th section, which was relied upon in argument, applies strictly to contracts of sale. But, in the case supposed, neither of the parties has, at the date of the association, any interest or estate which can be the subject of sale, and the contract of association does not contemplate that either shall part with any. Nor does the interest or estate which is afterward acquired, vest or inure by virtue of the agreement, but by the occupation and appropriation alone. The terms of the association may, it is true, be referred to, to ascertain the respective rights and interests of the occupants when controversy arises as to these, but this does not at all impair the force of the last proposition. Each associate is the agent of all the others, and every act done by either about the joint adventure is the act of all. In such case, as in the case of partnership transactions, the effect of the contract of association is simply to fix the terms of the agency and to determine how far each may be said to act for himself, and how far for his co-adventurers. Such contract of association is merely the creation of an agency in each of those contracting, and is no more a violation of law than a contract of partnership or association in any lawful calling. The contract of association is equally valid, although, by the terms thereof, one of the associates is to conduct the exploration and perform the work of development, while the others provide and furnish the supplies necessary. Any citizen entitled to avail himself of the privileges conferred by the acts of congress in this behalf may well

appoint an agent to do for him all that he might do in his own person. The act of appropriating and developing the mineral deposits of the public domain may as well be performed by another as by the appropriator in his own person. *Gove v. McBrayer*, 18 Cal. 583.

But if one acting for himself alone discovers in the public domain a mineral deposit, such as mentioned in the acts of congress, he, by virtue of his discovery, merely becomes entitled to a reasonable length of time in which to perfect the development which the local law requires of him ; and in the meantime he must be permitted to retain the possession of the premises without interference. His right while he proceeds with the work of development is as absolute as after the development is completed.

The same is true where one enters upon a mine previously discovered, and to which the discoverer has lost his right by failing to make the development required by the law ; from the moment of commencing the labor of development with the *bona fide* purpose to complete it, and so appropriate the mine, the party has a possession in fact, and for the time being a right to retain that possession. And this right is, perhaps, such an interest in land as cannot be contracted for or disposed of without writing. Brown on Stat. of Frauds, § 231. Nevertheless, it may be lost by an abandonment, as all must agree ; for the right, while absolute in the present, exists as to the future only upon condition that the occupant shall perfect the improvement which the law requires, proceeding with reasonable diligence therein ; so that if he desert the premises, though but for a moment, with intent not to resume his labors, his right is gone. So if without writing he yield up the possession to another, the right, which before was in him, passes to his successor in possession ; or rather the right of the first occupant is gone by abandonment ; and by virtue of his occupancy a new right has arisen in him who succeeds. And so, if the first occupant, while his right is still incipient, admit another into possession with him, upon the agreement that the labor of development shall be performed by the two for their common ben-

effit, this amounts to an abandonment *pro tanto*, and if the development be afterward perfected by their joint labors, the better right, which is thereby acquired, inures to the two jointly. The case is not different where the first occupant, pending the labor of development, agrees for a consideration to proceed therewith for himself and another jointly, for such undertaking amounts to an abandonment as to such interest in the premises as he agrees shall inure to that other, and creates an agency, also, whereby every blow thereafter stricken is the act both of him and of his associate. The law will not permit him to put off the agency which, for a valuable consideration, he has assumed. From the moment of entering into such an agreement his occupancy is not only his but another's also; and the right given thereby is given to both. And if one so occupying for himself and another afterward avail himself of his sole possession to turn the estate into money, his associate may either bring ejectment against the purchaser for his interest and share in the realty, or may at his election affirm what has been done, and treat the money, or so much thereof as may be proportionate to his interest in the premises, as money received to his use, in which case, even without any express promise, assumpsit will lie therefor. But here there was evidence of an express promise, which certainly rests upon sufficient consideration. The defendant below gave evidence tending to show an omission by plaintiff and Thompson to provide the supplies for which, by the terms of the contract, they had become bound. As to this phase of the case, the rights of the parties would seem to depend upon the following considerations: If, by the understanding of the parties, Ennis and Thompson were to provide all supplies necessary to the prosecution of the work of development upon the lode, as the same might from time to time be required, then performance upon their part was a condition precedent to the obligation of Murley to perform; and their failure would, it would seem, authorize him to treat the whole adventure as abandoned. He might then lawfully desert

the work and proceed about his other affairs; or, inasmuch as the default of Ennis and Thompson could not have the effect to compel him to abandon his right in the premises, he might, with equal propriety, proceed with and perfect the development of the lode upon his own account. And if he did so, plaintiff cannot be heard to insist upon any benefit under the contract, which he himself had voluntarily abandoned. Whether plaintiff might lawfully claim in such case to be remunerated for what supplies were furnished under the contract, it will probably not be necessary to inquire, inasmuch as all the evidence tending to show a default on the part of the plaintiff, tends also to show that the defendant, before this action, had repaid all advances made, and the jury will probably accept or reject it in whole. What has been said seems to be a sufficient expression of the views of this court upon all the questions likely to arise in the second trial.

The judgment is reversed, and the cause remanded. *Reversed.*

LODE CLAIMS—AGREEMENT TO LOCATE.—An agreement between several to engage in the business of prospecting for and developing lode mining property for the joint use and benefit of all is like a partnership, making each the agent of the others in the prosecution of the joint adventure: *Lawrence v. Robinson*, 4 Colo. 577; *Meagher v. Reed*, 14 Colo. 356.

ROOP v. DELAHAYE et al.

PLEADING—*Illegality of note made in foreign State.* To a declaration on a promissory note, a defense that the note was made in a foreign State, upon a consideration which was void under a law of that State, should be specially pleaded, and it cannot be received under the general issue.

PRACTICE—*when objection should be made.* That an issue of fact was determined by the jury against the evidence, if not relied on as a ground for new trial in the court below, cannot be urged in this court.

PLEADING—*immaterial issue.* To a plea that a promissory note was given for intoxicating liquors, sold in contravention of a statute of the State of Iowa, the plaintiff replied that by a certain other statute of that State certain persons who should give bonds and obtain from the county judge a permit were allowed to sell intoxicating liquors for purposes therein named, and that the plaintiffs procured from the circuit court a license to buy and sell, under and by virtue of which the intoxicating liquors, which were the consideration of said note, were sold to the defendant. The defendant rejoined that the said liquors were not sold by virtue of the said permit, nor for the purposes for which the same was granted. *Held*, that the issue was immaterial.

PRACTICE—*when replender may be awarded.* If, of several issues, one is immaterial and others are good, a replender will not be awarded.

Error to Probate Court, Arapahoe County.

IN the first and second counts of the declaration the plaintiffs declared upon a promissory note for \$451.69, dated January 5, 1871, payable sixty days after date. The declaration also contained the common counts ; to this the defendant, the present plaintiff in error, pleaded, first, the general issue ; second, that on the 23d of December, 1870, at Burlington, in the State of Iowa, against the form of the statute of the said State of Iowa, it was corruptly agreed between plaintiffs and defendant that plaintiff should sell to defendant a quantity of spirituous liquors, and that defendant then bought such liquors and gave the promissory note in suit therefor ; that the said sale was in violation of an act of the general assembly of the State of Iowa, which was set forth in the plea, and certain exceptions in the statute were negatived in the plea. To the second plea the plaintiff replied, first, that the said statute in the said plea set forth was not at the time of the giving of the note in the declaration mentioned, and when the said goods described in said plea were sold, in force, and concluded to the country ; second, that said statute in said plea mentioned had been amended, which amendments were set forth in the replication, and thereby authority was conferred upon the county judge to grant permits to persons who were not engaged in certain kinds of business and who should comply with the law in respect to the giving of bonds and other formalities to buy and sell intoxicating liquors for mechanical, medicinal, culinary and sacramental purposes. And the plaintiffs averred that in pursuance of said acts they obtained and procured a permit to sell intoxicating liquors from the circuit court of the county of Des Moines in the State of Iowa, which permit was set out in the replication and appeared to be from the circuit court, attested by the seal of that court. And the said plaintiffs averred that the said liquors in the said second plea mentioned, and for which the note described in the declaration was executed, were sold by the plaintiffs to the defendant under and by virtue of the said permit.

The defendant rejoined that said liquors and goods mentioned in the said second plea were not sold by the plaintiffs to him under and by virtue of the said permit in said replication mentioned, and for the purposes for which said permit purports to have been granted, and concluded to the country. Upon this rejoinder and the first replication and upon the general issue, issue was joined and the cause was brought to trial before a jury.

At the trial much evidence was given relating to the sale of liquors, upon which it was alleged that the note was given, and the statutes referred to in the pleadings were put in evidence.

In a motion for new trial the defendant relied upon matters relating to the charge of the court to the jury, but no objection was made to the finding upon the ground that it was opposed to evidence. The plaintiffs had judgment and the defendant sued out this writ of error.

Messrs. BELDEN & POWERS, for plaintiffs in error.

Messrs. HORNER & HARMON, for defendant in error.

WELLS, J. The conclusions to which we have arrived in respect to the pleadings upon which the other issues in this case were found seem to render it necessary to consider whether the circumstance upon which the defense was based, to wit, the alleged invalidity of the promissory note declared upon, may be shown under the general issue. In general, the defense of illegality may be made under this plea, but here the alleged illegality consists in a violation of a statute of a foreign jurisdiction, which presents a somewhat different question, and one upon which the authorities are not numerous. In *Smith v. Whittaker*, 23 Ill. 368, where, under the plea of *non assumpsit*, the defendant to an action upon a promissory note attempted to show that the instrument was made in a foreign State, and that the rate of interest reserved therein was greater than that allowed by the statute of the foreign State, it was held

inadmissible. "The provisions of a foreign law," say the court, "is a fact which must be pleaded." The same rule was applied in *Mason v. Dousay*, 35 Ill. 425, where, in an action upon a parol acceptance of a bill of exchange, the defendant, under the plea of *non assumpsit*, attempted to show that the question of his liability was governed by the law of another State, and that under the statute of that State a parol acceptance was invalid. These are the only reported cases which have come to our notice, wherein the precise question now under consideration was presented. Decisions upon a somewhat analogous question are not, however, wanting. In *Faut v. Miller*, 17 Gratt. 67, which was an action of debt upon a Maryland contract, the supreme court of Virginia held that a special plea of usury was defective in not setting forth what the law of Maryland was. In *Chumaseo v. Gilbert*, 24 Ill. 294, the plaintiff, who declared upon a promissory note, payable in New York city, attempted to recover interest according to the law of New York; but this was held inadmissible, the declaration not having set forth the law. In *Holmes v. Boughton*, 10 Wend. 75, the defendant plead former recovery for the same cause of action in the county court of Rutland county, Vermont, and certain proceedings in execution thereon which were averred to be "according to the laws of the State of Vermont, and fully authorized thereby." On demurrer it was held that the proceedings under the execution upon the Vermont judgment not being according to the common law, the plea was defective for not setting forth the law of that State by which it was authorized. The decision in this case is based upon the authority of *Colleth v. Keith*, 2 East, 261, and *Walker v. Maxwell*, 1 Mass. 103. To the same effect are the cases of *Peck v. Hibbard*, 26 Vt. 268, and *Bingham v. Earl Wormington*, 3 M. G. & S. 153. Upon principle it would seem that where, as in this case, the plaintiff declares specially upon a contract which the defendant would avoid as in contravention of the law of another State, he ought to plead specially the fact that the contract was made abroad, and show the law of the foreign jurisdiction.

The declaration in such case sufficiently advises him of the particular contract which is the foundation of the action. He is enabled, therefore, to set forth the foreign law, tender an issue thereon, and prepare himself to maintain that issue. The rule, therefore, works no hardship upon him, whereas, to receive such a defense under *non assumpsit*, may possibly entrap the plaintiff into the trial of an issue for which he is in no way prepared. We conclude, therefore, that the plea of the general issue does not present this defense.

The second plea averred that before the said time when, etc., the legislature of the State of Iowa had by a certain statute, which was set forth, prohibited the sale of intoxicating liquors, save imported liquors (which were permitted to be sold in the original package), and that the promissory note mentioned in the declaration was given in consideration of certain intoxicating liquors sold by the plaintiff to the defendant, at the State of Iowa, the same not being imported liquors, contrary to the form of the statute, etc. To this plea the plaintiff replied, first, that the said supposed statute was not, at the said time when, etc., of force within the State of Iowa, and upon this was joined the second issue. The defendant upon the trial gave testimony sufficient to maintain this issue, which was not afterward rebutted. As to this issue, therefore, the verdict was against the evidence. But the defendant did not bring this to the attention of the court below, his motion for a new trial going upon other grounds, and he cannot be heard to make this objection for the first time in this court. By his second replication to the same plea, the plaintiff averred that after the enactment of the said supposed statute the legislature of the State of Iowa, by a certain other statute amendatory thereto, had enacted that any person, not of certain specified classes, might buy and sell intoxicating liquors, for mechanical, medicinal, culinary and sacramental purposes, upon first obtaining from the *county judge* a license thereunto; and that before the said time when, etc., they had procured from the *circuit court* a license to buy and sell

for the purposes aforesaid, under and by virtue of which said permit, the goods and chattels which were the consideration of the said promissory note were sold to the said defendant. To this replication defendant rejoined that the said goods and chattels were not sold by virtue of the permit, in the said replication mentioned, nor for the purposes for which the same was granted, concluding to the country ; and hereon was joined the third issue.

By this rejoinder, the defendant passed by the allegations of the replication as to the supposed amendments of the statute (and so admits them), and traverses

1. The plaintiff's allegation that the liquors which were the consideration of the note were sold *by virtue of the said permit* ; and

2. (What was not alleged, except impliedly) that they were sold *for the purposes mentioned in the permit*. Now it is doubtful whether the first point of the traverse going to the *virtute cuius* is not ill (1 Ch. Pl. 612) ; but whether well or ill, inasmuch as the permit emanated from the circuit court, which had no authority in the premises, and was therefore void, the issue presented hereby was entirely immaterial.

The second traverse was also upon an immaterial point ; for, whether the liquors were sold for the purposes mentioned in the statute, or for other purposes, was of no consequence, unless plaintiff had the authority which the law required ; or, unless, possibly, either the plaintiffs or the defendant had such license. An unlicensed person could no more sell for a lawful than for an unlawful purpose ; but that either the plaintiff or defendant were lawfully licensed was nowhere alleged. As to both points, the issue joined upon this replication was, therefore, an immaterial one ; and a verdict thereon, whether for the plaintiffs or for the defendant, could determine nothing. It is all one whether as to this point the jury found in accordance with the evidence or against it, and inasmuch as all the instructions which were given were directed to the controversy upon this issue alone, it is unimportant whether they

correctly express the law or not. The errors, therefore, are not well assigned. Plaintiff in error having failed to present in the record the issue upon which he sought to make his defense, we have debated with some solicitude whether we should not award a repleader. But, inasmuch as one material issue, to wit, that joined upon the plea of the general issue, was found for the plaintiff, it seems from the authorities that the plaintiff is entitled to judgment upon this. *Payne v. Barnet*, 2 A. K. Marsh. 314; *Hartfield v. Patten*, Hemp. 271; *Pegram v. United States*, 1 Brook. 265.

The judgment must be

Affirmed.

MARTIN v. DAVIS.

Pleading — execution of bond. In a declaration on a bond, an averment that the defendant made his certain writing obligatory is sufficient as to the execution of the instrument.

Bond — voluntary. A bond given upon the removal of a cause from a district court into the supreme court by writ of error, not by the plaintiff in such writ, but by a stranger to the suit, although not in the form prescribed by law, is valid as a voluntary obligation.

Error to District Court, Arapahoe County.

THE first count of the declaration alleges that the defendant, together with two certain other persons, namely: Oscar D. Cass and Silas W. Fisher, on the 29th of January, A. D. 1866, at the county of Arapahoe, made a certain writing obligatory, signed with his seal, and here in the court to be produced, and then and there delivered the same to the said plaintiff, etc. After setting forth the penal part of the bond, the condition is given reciting a judgment obtained in the probate court of Arapahoe county, by Davis, the obligee, against Oscar D. Cass, the principal obligor, for \$1,082, and costs of suit, on appeal by Cass to the district court of Arapahoe county, and that the appeal was dismissed in

the district court. The declaration, further reciting the condition of the bond, proceeds as follows: "From which said judgment of the said district court, the said Oscar D. Cass has taken a writ of error to the supreme court of the territory of Colorado (meaning thereby, as the said plaintiff avers, that the said Oscar D. Cass has sued out a writ of error from said supreme court directed to the said probate court)," and following this, the declaration sets out the condition of the bond to prosecute the writ of error and pay the judgment, if the same should be affirmed. It is further alleged that the judgment of the district court was affirmed by the supreme court, and for breach, that the said Oscar D. Cass hath not paid the said judgment, etc.

The second count is similar to the first, except that the words in parentheses quoted from the first count are omitted, and it is alleged that the defendant alone made his writing obligatory, and it does not appear from this count that said Cass in any manner executed the same. There was a demurrer to the declaration, which was overruled, and the defendant sued out this writ of error.

Messrs. BROWNE & PUTNAM, for plaintiff in error.

Mr. ALFRED SAYRE, *contra*.

BELFORD, J. This was an action on a supersedeas bond, brought against the plaintiff in error. The declaration contains two counts. The first charges that the defendant, John H. Martin, together with Oscar D. Cass and Silas W. Fisher, made a certain writing obligatory, signed with his seal, and here in the court to be produced, and then and there delivered the same to the plaintiff, whereby the said defendant, together with the said Cass and Fisher, acknowledged themselves jointly and severally bound unto the plaintiff in the penal sum of \$3,000, etc. The second count charges that the defendant alone made his certain writing obligatory, sealed with his seal, and here to the court

shown, and delivered the same to the plaintiff, etc. A general and special demurrer was filed, and overruled, and this ruling of the court is assigned for error. The special causes assigned were as follows: *First*, the plaintiff avers that the said supposed bond or writing obligatory is signed with the seal of the said defendant, without saying or averring that the said supposed bond or writing obligatory is signed by him in his name. *Second*, that the said plaintiff does not aver that the said defendant ever signed the said supposed writing obligatory.

The objections to the second count are as follows: 1st. Because the said writing obligatory is not said to be signed by the said Oscar D. Cass. 2d. Because the said supposed writing obligatory is wholly without consideration.

In answer to the objections urged to the first count, it is only necessary to say that an averment that the defendant made his writing obligatory is sufficient, for these words import of themselves a complete deed, bond or specialty. 1 Chitty's Pl. 364.

In answering the objections made to the second count a reference to the facts of the case becomes necessary. Davis obtained judgment against Cass in the probate court, from which an appeal was taken to the district court. The appeal was dismissed. A writ of error was thereupon sued out, and the case taken to the supreme court, where the judgment was affirmed. Martin executed the supersedeas bond. Without deciding whether the party appealing or suing out a writ of error must join in the bond (see *Thorn v. Savage*, 1 Blackf. 52; *Keene v. Dearden*, 8 East, 298), we think it was competent for Martin to execute this one. The delay of execution caused by the filing of it was a sufficient consideration to support the undertaking. Conceding that a bond thus executed would not be a compliance with the statute, still it would be good as a common-law obligation.

There are other errors assigned, but we do not deem them worthy of serious attention.

The judgment is

Affirmed.

CRUMP et al. v. THE PEOPLE.

PRACTICE — notice of pleadings. A rule of court which requires that a memorandum of pleadings filed in a cause shall be made in a book kept by the clerk for that purpose, is reasonable and valid, and a demurrer filed without observing such rule may be stricken from the files, and thereupon judgment *nil dicat* may be entered against the defendants.

PLEADING — averment that recognizance was certified and returned. In a declaration in debt on a recognizance of bail after setting forth that the defendants appeared before a justice of peace, on a day named, and acknowledged themselves to be indebted to the people, in the sum of \$300, and in the condition of the recognizance it was averred, that "said recognizance was then and there taken and acknowledged by the said justice of the peace, and afterward, to wit: on the 25th day of January, A. D. 1873, by him, the said justice, filed in the office of the clerk of the said district court, and became a matter of record therein," etc.

Held, that this was sufficient to show that the recognizance was certified by the justice and delivered to the clerk as required by section 234 of the Criminal Code (R. S. 250).

PRACTICE — inquest by a jury, in debt on recognizance. In debt on recognizance of bail, judgment *nil dicat* may be entered for the penalty of the recognizance without impaneling a jury to compute the amount. There is nothing for a jury to determine.

BAIL — when action may be brought against. Upon breach of the condition of a recognizance to keep the peace, an action may be brought against the cognizors prior to the term of court at which such recognizance is returnable.

Error to District Court, Arapahoe County.

ACTION of debt commenced on the 25th day of March, 1873, against Horace Crump, John Crump and R. R. McCormick, to the April term, 1873, of the district court of Arapahoe county. It was averred in the declaration that on the 14th of October, 1872, the defendants appeared before O. H. Whittier, a justice of the peace of the county of Arapahoe, and by their recognizance in writing by them duly signed and sealed, jointly and severally acknowledged themselves to be indebted unto the said plaintiffs in the sum of \$300, and the said defendants did, then and there, in, and by the said recognizance, consent, grant and agree that the said sum of \$300 should be levied of their respective goods and chattels, lands and tenements, to the use of the said

plaintiffs, which said recognizance was and is subject to a certain condition thereunder written ; which condition was, that if the said Horace Crump should personally be and appear at the district court, within and for the county of Arapahoe, aforesaid, on the first day of the then next term thereof, then and there to answer for the offense of having made threats and having committed a breach of the peace, and to do and receive what should be, by the said court, then and there enjoined upon him, and not depart the said court without leave, and should in the meantime keep and preserve the peace toward all of the people of the said territory of Colorado and particularly toward one Ira Thompson, then the said recognizance should become void, otherwise should remain in full force and effect. The allegation as to the certificate and return of the recognizance is set forth in the opinion of the court. For breach of the condition, it was averred that the said Horace Crump had not kept and preserved the peace toward all of the said people and toward the said Ira Thompson, but on the contrary thereof, on the 25th of December, 1872, the said Horace Crump committed another breach of the peace, and then and there made other threats against the said Ira Thompson. The judgment of the court was as follows :

Now, on this day, come the said people of the territory of Colorado by Merrick A. Rogers, Esq., district attorney, and the said defendants by S. E. Browne, Esq., and T. G. Putnam, Esq., their attorneys, also came, and thereupon comes on to be heard the motion of said district attorney for judgment *nil dicti* against the said defendants. And thereupon the said defendants, move the court for leave to enter upon the book kept for that purpose the demurrer by them heretofore interposed to the declaration of the plaintiffs, and the court being fully advised in the premises it is considered by the court that the said motion of the defendants be denied. And it appearing to the court that the said defendants have failed to note in the book kept for that purpose any memorandum of the filing of said demurrer as required by rule number 12 of the rules of this court, it is ordered by

the court that the said demurrer be stricken from the files and that the said motion of the district attorney be sustained.

Therefore, all and singular the premises being seen and by the court here fully understood, it is considered by the court that the said people of the territory of Colorado have and recover of and from the said Norace Crump, John Crump, and R. R. McCormick, the said sum of three hundred dollars (\$300), the penalty of the said recognizance in the said plaintiffs' writ mentioned, and also their costs by them in and about this suit in this behalf laid out and expended, and have execution therefor.

Messrs. BROWNE & PUTNAM, for plaintiffs in error.

Mr. M. A. ROGERS, district attorney, for defendants in error.

BELFORD, J. This was an action of debt on a bail bond. From the record, it appears that Hiram Crump, on the 14th day of October, 1872, was brought before O. H. Whittier, a justice of the peace, on a charge of violating the 230th section of the Criminal Code. Such proceedings were thereupon had that Crump was required to enter into bond for his appearance at the ensuing term of the district court, and one of the conditions of the bond was, as appeared from the declaration, that he should keep the peace toward all the people of the territory of Colorado, and particularly toward one Ira Thompson, who had preferred the charge against him before the justice. The breach assigned in the declaration is, that he did not keep the peace toward the people, and that he resumed his threats, etc., against Thompson, whereby the condition of the bond became forfeited.

It appears from the record that on the 8th day of April, a rule was taken on the defendant to plead by the incoming of the court on the 15th. On the 9th a general demurrer was filed, and on the 16th plaintiffs moved for judgment *nil dicit*, on the ground that no notice of the demurrer was

filed in the motion book, as required by the 12th rule of the court. The defendants filed their counter motion for leave to enter their demurrer on the motion book, which was denied. And thereupon judgment *nil dicit* was awarded. The action of the court is especially complained of. If the plaintiffs in error were in default in complying with the rules of court, they cannot be heard here. These rules are established to facilitate business, and to enable attorneys to ascertain just what steps have been taken by opposing counsel. They are established for the further purpose of relieving the officers of the court from the constant inquiries that would be made as to what had occurred in reference to the case during their absence from the room; and of the power of the court to make such rules there can be no question. It is inherent in all courts of record. *Snyder v. Buchanan*, 8 T. & R. 336; *Fullerton v. The Bank, etc.*, 1 Pet. 604. Objections are taken to the sufficiency of the declaration, and we have carefully considered the same. It is claimed that it contains no averment that the bond taken by Whittier was duly certified by him to the clerk of the district court. The allegation in the declaration is "which said recognizance was then and there taken and acknowledged by the said justice of the peace, and afterward, to wit, on the twenty-fifth of January, in the year of our Lord one thousand eight hundred and seventy-three, by him, the said justice, filed in the office of the clerk of the said district court, and became a matter of record therein," etc. We think the allegation sufficient. *Champlain v. The People*, 2 Comst. 82.

It is further claimed that the court erred in allowing final judgment to be entered in the cause for the penalty of said recognizance without a writ of inquiry, and without evidence and assessment of damages by a jury. It may be said that in legal estimation a penalty is a debt. In this case the amount of the debt is stated. No computation or assessment was required. There could be nothing for a jury to determine.

So, too, we apprehend that a right of action accrued to

the people, on the bond, as soon as there was a breach of the condition, and the district attorney could not be required to wait until after the term of court at which Crump was bound to appear before he could commence suit, for the reason that one of the conditions of the bond was that Crump would deport himself peaceably toward Thompson, from the time he executed the bond until the final order in the district court was had. When he failed to do this, the condition was broken, and the right to bring the action for that breach had accrued.

The judgment is

Affirmed.

ELDRED v. MALLOY.

CONTRACT OF WAGER — *not enforceable*. An action will not lie on a contract to pay a sum of money upon the condition that a railroad should be built to a place named, on or before 20th of February, 1871.

Promissory note must be certain as to day of payment.

A promise to pay a sum of money upon the condition that a railroad should be built to a place named on or before 20th of February, 1871, is not a promissory note, and is not negotiable as such.

Error to Probate Court, Jefferson County.

ASSUMPSIT upon a written instrument in this form:

“GOLDEN CITY, COL. TER., *May* 20, 1870.

“Nine months after date, for value received, I promise to pay J. A. Remington, or order, five hundred dollars, without defalcation or discount, at Golden City, Colorado. The consideration of the above is that if the railroad is completed and cars running to a point inside the Table Mountains, at Golden City, Colorado territory, on or before the 20th of February, A. D. 1871, the above sum will be duly paid to the before-mentioned J. C. Remington; otherwise the obligation to be null and void.

“STEPHEN ELDRED.”

Remington assigned to Gorman and the latter assigned to defendant in error, who was plaintiff below.

At the trial several witnesses testified that the contract was given upon a wager as to when the Colorado Central railroad would be completed to Golden City. There was also evidence to show that the road was completed in September, 1870.

The plaintiff had judgment.

Messrs. MILLER & MARKHAM, for plaintiff in error.

Mr. A. H. DEFRAÑCE, for defendant in error.

BELFORD, J. Notwithstanding the fact that contracts of wager have been regarded as valid at common law, a disposition has been steadily growing in all respectable courts to discountenance and ignore them. It is generally conceded that the principle was engrafted on that system at a time when but little consideration was given to the subject, and the right to recover in such cases quite fully established before any searching inquiries were made into the moral tendencies of the doctrine. While bowing to the authority of Lord MANSFIELD, such able jurists as ELLENBOROUGH and CAMPBELL and LE BLANC have declined to entertain such cases, while other judges have refused to proceed as long as any thing else could be found to do, constantly declaring that were the question a new one, the rule would be different.

The manifest disfavor extended to these contracts by the English judges, and the unremitting efforts that are being made to get rid of a rule established through the inadvertence of their predecessors, convinces me, that in upholding these contracts, the earlier decisions were founded on a misapprehension of the common law.

The courts of this territory have enough to do without devoting their time to the solution of questions arising out of idle bets made on dog and cock fights, horse races, the speed of ox trains, the construction of railroads, the number on a dice or the character of a card that may be turned

up. If we enter upon the work of settling bets made by gamblers in one case, especially on the time when the Colorado Central railroad reaches Golden, or when it will reach Georgetown, we may despair of ever finding time for the dispatch of those weightier matters which affect the personal and property rights of the respectable people in this territory. If the gate is once opened for this kind of litigation, it is more than probable that we may be overrun with questions arising out of bets. The spirit of our laws discountenances gambling. Penalties are prescribed against gaming, and I can see no difference in principle in the bet that the faro dealer will turn up a jack the next turn and the bet that the railroad will be built to Table Mountain in so many days.

It would be an anomaly in law to punish a man for the one bet and reward him for the other. The character of this case seems to be unique throughout. Remington, the original payee of this paper, sold it to Gorman for fifteen dollars, and he assigned it to Malloy for nothing. The document seems to preserve its original character throughout all its stages. It originated in a venture and has had a venturesome career. From five hundred dollars it has degenerated to zero. Appreciating the regrets of English judges over the establishment of a wrong rule in Great Britain, we are in favor of making a correct start here, and accordingly hold that no wagering contract is enforceable.

There is another objection equally fatal. The instrument sued on is not negotiable. To constitute a promissory note the money must be certainly payable, not dependent on any contingency, either as to time or the fund out of which payment is to be made, or the parties by or to whom payment is to be made. If the terms of an instrument leave it uncertain whether the money will ever become payable, it cannot be considered as a promissory note. In this case payment was to be made if the railroad reached a given point at a given time. If the point was not reached within the time, then the instrument was

to be null and void. The contingency might never happen, and therefore the money was not certainly, and at all events, payable. The instrument then lacked an essential ingredient of a promissory note, and consequently was not negotiable under the statute. The fact that the railroad did get there in time makes no difference. It was not a promissory note when made, and it could not become so by matter *ex post facto*. The plaintiff has not the legal title to the instrument, and could not bring the suit, and the defendant's objection to its introduction in evidence should have been sustained.

We will reverse the judgment without remanding the cause, and the plaintiff in error will recover his costs, both here and in the court below. *Reversed.*

WAGERING CONTRACT — BONA FIDE PURCHASER. — An instrument such as that given in the principal case, though void as between the parties as a wagering contract, would be good in the hands of a bona fide purchaser: *Boughner v. Meyer*, 5 Colo. 75.

NEGOTIABILITY OF INSTRUMENT. — To render instrument negotiable, money or property must be payable absolutely and at all events: *Carnahan v. Pell*, 4 Colo. 194; *Jennings v. First Nat. Bank*, 13 Colo. 420.

LOGAN v. CLOUGH.

PLEADING — complainant's title in bill for injunction. In a bill to restrain the probate judge of Arapahoe county from selling a lot in the city of Denver, under the act approved February 8, 1872, to provide for the further execution of the trust relating to the town site of the city of Denver, and to regulate the same (9 Stat. 191), it is not necessary to set forth at length the title of complainant.

As to the title, it is sufficient to allege that a former probate judge held the lot in trust for complainant, under the act of congress of May 28, 1864, "for the relief of the citizens of Denver (13 Stat. at Large, 94); that he conveyed the same to complainant in execution of the trust, and that complainant is the owner of the legal estate.

Appeal from District Court, Arapahoe County.

THE bill which was filed October 5, 1872, alleges that complainant is seized in fee of lot numbered thirty in block numbered forty-nine, in the east division of the city of Denver, the same being within the limits of the west half of section numbered thirty-four, township three, south of range sixty-eight, west, etc. That, on the 28th day of January,

A. D. 1868, Jacob Downing, then probate judge of the county of Arapahoe, held said lot in trust for complainant under authority of the act of congress, approved May 28, A. D. 1864, for the relief of the citizens of Denver. That, in the exercise of the power in him vested by said act of congress, for a valuable consideration, and for other good and sufficient consideration, the said probate judge conveyed to said complainant the title in fee simple, and that said deed was duly acknowledged and recorded. That the said complainant, for a long time prior to the execution and delivery of said deed, was thence, hitherto and now is, in the actual possession and occupation of the said lot. That the said defendant, acting as probate judge of said county and pretending that the trust as to said lot had never been executed, threatens to sell the same at public vendue, and as probate judge aforesaid, to make, execute and deliver to the highest bidder therefor, a deed purporting to convey to such purchaser the title in fee of said lot.

The prayer is for injunction and relief. A demurrer to the bill was sustained and complainant appealed.

The chief-justice did not sit at the hearing.

MESSRS. FRANCE & ROGERS, for appellant.

MR. M. BENEDICT, for appellee.

BELFORD, J. The appellant filed his bill in the court below to enjoin and restrain the appellee, who was probate judge, from selling lot number thirty (30) in block number forty-nine (49) in the east division of the city of Denver.

The bill alleges that the appellant is the owner in fee of said property. It is further alleged that on the 28th day of January, 1868, Jacob Downing, then probate judge of the county of Arapahoe, held said lot in trust for complainant, under authority of the act of congress, approved May 28th, 1864, for the relief of the citizens of Denver. That, in the exercise of the power in him vested by said act of congress,

for a good and valuable consideration the said probate judge conveyed to said complainant the title in fee simple, and that said deed was duly acknowledged and recorded. That the said complainant, for a long time prior to the execution and delivery of said deed, was and now is in the actual possession and occupation of said lot. That the defendant, acting as probate judge of said county, and pretending that the trust as to said lot had never been executed, threatens to sell the same at public vendue, and as probate judge aforesaid, to make, execute and deliver to the highest bidder therefor, a deed purporting to convey to such purchaser the title in fee of said lot. The charging part of the bill contains these distinct averments, that the title in fee is in the complainant, and has been since the 28th day of January, 1868, and that the trust confided by the act of congress as to said lot has been fully and completely executed. The prayer is the usual one for injunction and relief. To this bill a general and special demurrer were filed. The special causes assigned are seven in number. We will simply set out those which appear to be entitled to serious consideration.

1. That the bill does not show compliance with the laws of the territory in the execution of the trust.

2. That it does not show that Downing had any title, or that his predecessors had ever entered the same, or that he became charged with the execution of the trust.

3. That it does not show that complainant was a beneficiary under the trust.

The demurrer was sustained, and the bill dismissed. Does the complaint present a *prima facie* case? If so, the ruling on the demurrer was erroneous. The solution of this problem may be aided by inquiring whether it is necessary to set out the several steps through which a title is perfected.

I know of no rule imposing this burden, and to exact such detail and minuteness would make questions of title exceedingly complicated. It seems to me that a simple averment that the title to the premises is vested in the plaintiff is suf-

ficient. Such an averment is found in this bill. *Nourse v. Allen*, 4 Blatchf. C. C. 378. It can hardly be claimed that the complainant loses the benefit of this positive averment by ambiguously representing the title of Downing, or stating it in a doubtful form. Nor is it perceived how, in pleading, the averment of title is made better by carrying it back a step or two farther. An abstract is no doubt unsatisfactory, if it commence at a date too recent; but an averment in pleading of the title of a party is not made more positive or certain by the statement that his ancestor, or those under whom he claims were also entitled.

When it is averred that one is seized in fee, does the averment gather any strength or weight from an additional allegation that the complainant derived his title from A, who obtained a patent from the government? *Houghton v. Reynolds*, 2 Hare, 267; *Gibb v. Griffing*, 2 Black, 519. See *Wiggins v. The Mayor, etc.*, 9 Paige, 156.

It is conceded that in some cases, such as in actions to restrain the commission of waste, a greater degree of precision is required. The defendant then is in possession, and the party seeking to restrain him must do it on the ground of some privity of estate. It is necessary, therefore, that the complainant should set out his right with accuracy and certainty, that the court may judge of the propriety of interference. And yet, in a case of waste, where the bill alleged that the land had been conveyed to complainant by deed (naming the grantor), which deed he had accepted, it was held that the bill contained the necessary allegations of title. *London v. Warfield*, 5 J. J. Marsh. 197.

So, also, it has been held that in bills of injunction to restrain trespass or nuisance, it is sufficient to allege that the complainant is seized in fee. *Van Winkle v. Curtis*, 2 Greene's Ch. 425; Hilliard on Inj. 46. If a bill for discovery were filed against one in possession to compel him to disclose his title, I apprehend that the greatest strictness would be required in setting out the complainant's rights; but this is not a bill for discovery, nor is the respondent in

possession of the property. If the averment of seizure in fee is sufficient to give the court cognizance of the case, then the allegations as to Downing would be immaterial in the issue presented by the general demurrer, it being well settled that a demurrer cannot be sustained if any proof properly called for, by and founded upon the allegation in the bill can make the case a proper subject for equitable jurisdiction. *Bleeker v. Bingham*, 3 Paige, 84. The allegation as to Downing is not as specific as it might be made, but still it is sufficiently certain to apprise the respondent of the source through which the complainant's title comes.

It is averred that Downing as probate judge held this lot in trust for the complainant, under the act of congress of May 28th, 1864, entitled "An act for the relief of the citizens of Denver," and that Downing, as such probate judge, in execution of such trust so created, conveyed by deed to the complainant the property in question, which deed is attached to the bill and referred to for greater certainty. It seems to me that the statements upon the whole represent distinctly enough that the claim of the plaintiff is founded upon the trust created by the act of congress of May 28th, 1864, and they inform the defendant of the nature of the case against which he is required to defend himself. When it is averred that the property was held in trust for the plaintiff under the act of congress, and that by virtue of such act the deed of conveyance was made, I apprehend that that averment notified the defendant that the plaintiff was claiming as a beneficiary of such trust. *Champlin v. Parish*, 3 Edwards' Ch. 613. Nor am I aware of any rule which requires the pleader to state in his bill every fact which makes up the trust. The trust once alleged, the method of establishing it belongs to the domain of evidence. It is true that a title, apparently good, may be stated in a bill, and yet the plaintiff may not really have the title he states, either because he misrepresents himself or because he suppresses some circumstances respecting his title which, if disclosed, would show either that nothing was

ever vested in him, or that the title which he had has been transferred to another. Where these matters are not apparent in the bill, they must be raised by plea, and cannot be taken advantage of by demurrer.

Whether Logan has a good title or not is not now pertinent; it is sufficient if the bill discloses an apparently good title. I desire to be understood as expressing no opinion as to the right of Logan, if he were not in occupation of the property at the date of the entry, because that is a question which does not properly arise on the demurrer, and for a like reason I decline to express an opinion as to the validity of the act "To provide for the further execution of the trust relating to the town site of the city of Denver, and to regulate the same." The bill charges that Downing held this land in trust for Logan. This is an allegation which must be established by evidence. If he were a beneficiary of the trust, Logan must show that fact. It will be time enough to decide that question when it is properly presented. The demurrer admits that Logan owned this property in fee simple, and it was manifestly wrong for the court, in the face of this admission, to dismiss this bill. *Griffing v. Gibb*, 2 Black, 519.

It is further stated in the demurrer that this is not a case for the jurisdiction of a court of equity. The prayer of the bill is that the defendant be enjoined from selling the property in question, and from executing and delivering any conveyances therefor, in other words, from doing an act which will cast a cloud upon the complainant's title. Whatever doubts may have at one time existed as to the jurisdiction of a court of equity in such cases, they are now put at rest by the modern decisions, and the relief afforded seems to be on the principle of a bill *quia timet*, lest the sale to be made might embarrass the complainant in his rights, or the deed to be executed might cast suspicion on his title. Speaking on this subject, BELLOWS, J., in *Tucker v. Kenniston*, 49 N. H., says: "The application for this species of relief is by a bill *quia timet*, and is addressed to the sound discretion of the chancellor upon

the circumstances of the particular case; and the relief will ordinarily be afforded when injury may reasonably be apprehended." In *Pellett v. Shepard*, 5 Paige's Ch. 493, it was held that upon the same principle that the court would remove a cloud already existing upon the owner's title, it would interfere to prevent a conveyance that would create such a cloud. *Bank v. Schultz*, 2 Ohio, 471; *Burnett v. Cincinnati*, 3 id. 73.

It is further alleged in the bill that for a long time prior to the filing of the same, the plaintiff had been in the actual occupation of this property. In some States mere occupation is regarded as sufficient to entitle one to this kind of relief. *Apperson v. Ford*, 23 Ark. 761; *Moody v. Holcomb*, 26 Texas, 714.

In the view I have taken of this case, the decree of the court below should be reversed, with directions to reinstate the case, and overrule the demurrer.

WELLS, J. In the opinion delivered by Mr. Justice BELFORD, great importance seems to be attributed to the averment of the bill, that the complainant is seized in fee of the premises which are the subject-matter of the controversy. In my judgment this allegation is not entitled to the consideration accorded to it. The complainant may have the legal estate by a conveyance executed in disregard of the conditions and instructions imposed by the statute, which assuredly would give no standing in a court of equity. The bill, however, does contain an averment that Downing, as probate judge, held the premises in trust for the complainant, which may suffice. I concur, therefore, in reversing the decree of the district court.

Reversed.

PLEADING AND PROOF MUST CORRESPOND. — And though the plaintiff make out a good case, if it is not within the allegations of his bill, he cannot recover: *Francis v. Wells*, 3 Colo. 221.

BLACK v. DRAKE et al.

PRINCIPAL AND AGENT — *authority of attorney to collect judgment.* An attorney at law, who is employed to prosecute a suit to judgment, has authority from his client, in virtue of such employment, to receive payment of such judgment.

CONTRACT — *by plaintiff's attorney relating to payment of judgment.* The plaintiff's attorney in a judgment at law contracted with the judgment debtor to receive and sell certain potatoes and apply the proceeds in satisfaction of the judgment : *held,*

1. That the plaintiff in the judgment was not bound by the contract.
2. That ratification by the plaintiff in the judgment would not make the contract his own.
3. That any money actually received by the attorney for potatoes sold under the contract should be credited on the judgment.
4. That the contract was properly received in connection with evidence tending to prove that the potatoes were sold, for the purpose of ascertaining the amount to be credited on the judgment.

NEW TRIAL — *verdict against evidence.* Where it clearly appears that the plaintiff is entitled to greater damages than were awarded, a new trial will be granted.

Error to District Court, Gilpin County.

DEBT on an appeal bond against Lester Drake and Joseph F. Hall, the condition of which was as follows :

"The condition of the above obligation is such, that whereas the said Benjamin A. Black did, on the 11th day of July, 1866, before G. M. Nulett, justice of the peace, recover a judgment against the above bounden, Lester Drake, for the sum of \$269 debt, together with costs of suit, from which judgment the said defendant hath taken an appeal to the district court, in and for the county of Gilpin aforesaid and territory of Colorado. Now, if the said Lester Drake shall prosecute his appeal with effect and shall pay whatever judgment may be rendered by the court, upon dismissal or trial of said appeal, then the above obligation to be void, otherwise to remain in full force and effect."

At the trial, defendants relied upon a contract of which the following is a copy :

"It is hereby agreed by and between Lester Drake of Gil-

pin county, Colorado, of the first part, and Lewis C. Rockwell of the same place, of the second part, witnesseth: That the said Lester Drake, for and in consideration of one dollar cash in hand paid, the receipt whereof is acknowledged, does agree as follows: "Said Drake agrees to deliver 11,000 pounds of good, merchantable potatoes, in the cellar opposite the post-office, in Central city, the same to be, when delivered, as collateral security for the payment of a certain judgment against said Drake, and in favor of Benjamin A. Black, in full force and effect, in the district court, in and for said Gilpin county, and said potatoes are to be in the care and custody of said Rockwell, and are to be kept by said Rockwell until the 20th day of January next, 1868, unless the parties hereto agree to sell before that time, and when any or all of said potatoes are sold, the money received therefor is to be paid to said Rockwell and by him applied to the payment of said judgment, and the said Rockwell is to have and retain one-half of the rise on said potatoes over and above the said four cents per pound, the stipulated price for the same at this time, reasonable storage to be charged by said Rockwell to be taken out of the selling price of said potatoes when sold.

Dated CENTRAL, *October 21, 1867.*

(Signed)

LESTER DRAKE.

LOUIS C. ROCKWELL.

From the record of plaintiff's judgment it appeared that Rockwell was plaintiff's attorney in the suit in which the appeal bond was given. Defendants also gave evidence tending to prove that Black, the plaintiff, was apprised of the making of this contract, and that he assented to it. Drake delivered, at the place named, some nine thousand pounds potatoes, a portion of which was sold by Rockwell, and another portion was lost through his negligence in the care of them. The plaintiff asked the court to instruct the jury that defendants were entitled to a credit of the amount received by Rockwell from the sale of the potatoes and no more, which the court declined to give. The court charged

that Rockwell had no authority, as attorney of the plaintiff, to receive property in satisfaction of the judgment, but if the potatoes received and sold by him were of a value equal to the plaintiff's judgment and costs, they should find for the defendants.

The jury found for the plaintiff. Debt \$500, which was the penalty of the bond. Damages \$88. There was judgment on the verdict.

Mr. L. C. ROCKWELL, for plaintiff in error.

Mr. H. M. TELLER, for defendants in error.

HALLETT, C. J. The action was upon an appeal bond given by defendants in error to plaintiff, to remove a cause from a justice of the peace into the district court. The defense was payment of the judgment rendered in the original suit, and the defendants relied upon a contract between Rockwell, the plaintiff's attorney, and Drake, the judgment defendant, under which a quantity of potatoes was delivered to Rockwell to be sold by him and the proceeds applied to the payment of the judgment. The agreement between Rockwell and Drake was, that the potatoes should be received and sold after a time specified, and the proceeds applied to the payment of the judgment, and no inference can be drawn from it that the potatoes were to be accepted in payment or satisfaction of the judgment. I have not overlooked the last clause of the instrument, in which four cents per pound is mentioned as the stipulated price for the potatoes at the time of making the contract, but this was with reference to the advance in price of which Rockwell was to receive one-half, and it was inserted apparently for the purpose of fixing his compensation. If accepted as evidence of a sale this clause would flatly contradict other portions of the agreement, and therefore such construction cannot be indulged. There is, therefore, no question presented as to the authority of Rockwell to receive payment or satisfaction of the judgment in property, for he did no

attempt to do any thing of that kind, and if the plaintiff approved the transaction, of which there is some evidence in the record, its character was not thereby changed. The approval of the plaintiff might show his willingness to accept the act of his attorney, but it could not change the nature of the act itself.

The question is, therefore, whether the agreement tended to prove payment of the judgment or any part of it in money, a defense which is, of course, effectual in an action of this kind; for the plaintiff can recover no more than is due on his judgment; and whether any and what sum is due is of the very essence of the controversy.

It will not be contended that the undertaking of Rockwell to receive and sell the potatoes was within his authority as attorney of plaintiff, nor did he assume to act as such attorney in that regard. The contract is in his own name, and he, nowhere throughout the instrument, claims to act as the representative of another. The plaintiff's name is not mentioned, except for the purpose of describing the judgment, nor is it signed to the instrument. Again adverting to the question of ratification it may be well to remark, that the contract was not one which the plaintiff could ratify. Not having been made in his name the plaintiff could not, without the consent of the parties to it, make the contract his own by any approval or assent that he might give. Story on Agency (7th ed.), 251, a. If, then, the contract was not performed by Rockwell, he alone was liable for the non-performance, and the plaintiff could not be charged with any default in respect to it. Whether the potatoes were properly cared for, or sold at the proper time, or at all, or for an adequate price, are questions arising between Rockwell and Drake, with which the plaintiff is in no way concerned. But the contract was, nevertheless, properly given to the jury in connection with evidence tending to prove that the potatoes were in fact sold by Rockwell, for thus it appeared that money belonging to the defendant Drake had come to his hands for the purpose of being applied to the payment of plaintiff's judgment. It

is conceded that Rockwell was plaintiff's attorney in the original suit, and as such he was authorized to receive the amount of the judgment for the plaintiff. *State for use, etc., v. Hawkins*, 28 Wis. 366; *Nolan v. Jackson*, 16 Ill. 272.

In virtue of his employment as plaintiff's attorney he was not required to receive or sell defendant Drake's potatoes in order to raise money to pay off the judgment; but if he undertook to do so, the money received must be regarded as paid upon the judgment in the same manner as if it had been delivered to him by the defendant. The substantial fact is, that money, belonging to defendant Drake, passed to plaintiff's attorney in satisfaction of the judgment, and that being shown, it is not necessary to refer to the means by which it was obtained, except for the purpose of ascertaining the amount. For that purpose, however, it was important to refer to the contract, for the reason that the court and jury could never understand how the plaintiff was to be charged with money received by Rockwell from sales of potatoes, unless they knew from whom and upon what terms they were received. As a link in the chain of evidence to show what money had been paid upon the judgment, the contract was competent evidence although the plaintiff was not a party to it or bound by it. There is, however, an error in the assessment of damages, for which the judgment must be reversed. The amount to be credited upon the judgment in the original suit is that actually received by Rockwell, and this, upon the evidence in the record, would leave a balance due the plaintiff of more than \$200. The jury returned but \$88 damages, which is not according to the evidence, and, therefore, the motion for a new trial should have been allowed.

The judgment of the district court is reversed with costs, and the cause is remanded for a new trial.

Reversed.

WESTCOTT v. BOOK.

FORMER RECOVERY — *in replevin*. A judgment of nonsuit in an action of replevin is not a bar to another action for the same goods.

PRACTICE — *assigning error upon the charge of the court*. A general assignment that the court erred in the instructions given to the jury is not according to the 12th rule of this court, which requires that the part of the charge to which objection is made shall be set out in the assignment of errors, and it will not be considered.

Error to District Court, Arapahoe County.

THE declaration contained two counts, the first for taking, and the second for detaining, a wagon, the property of the plaintiff.

The defendant pleaded :

1st. *Non cepit* ; 2. *Non detinet* ; 3. Property in himself ; 4. That in an action of replevin brought by the plaintiff against him in the probate court of Arapahoe county for the same goods and chattels he recovered judgment against the plaintiff for the return of the goods, and for \$50 damages for the detention thereof, and for costs of suit.

To this last plea the plaintiff replied that the judgment of the probate court was not on the merits, but a mere judgment of dismissal for want of prosecution by the plaintiff, in which the merits of the case were not involved or determined. The defendant demurred to the replication, and the demurrer being overruled, he filed a rejoinder, alleging that the judgment of the probate court was upon the merits, and hereupon issue was joined.

Upon the other pleas issue was also joined, and the cause was tried before a jury.

At the trial the plaintiff's evidence tended to prove that he purchased the wagon from one Main, who engaged the defendant to iron it ; that after defendant had completed the work the wagon was removed to another shop to be painted ; that after the paint-work was completed, the plaintiff, having paid for the wagon, was in the act of removing

it when the defendant forcibly took possession of it and removed it to his own shop. The defendant's evidence tended to prove that he was a blacksmith by occupation, and that he ironed the wagon at the request of Main, and that the labor and material by him so furnished was of the value of \$75; that when the wagon was delivered to Klein, the painter, he requested the latter to hold the wagon until he, the defendant, should be paid.

The evidence upon these points was very contradictory, and as the court declined to discuss the motion for new trial it is not necessary to set it out more fully.

The judgment of the probate court, upon which plaintiff in error strongly relied to defeat this action, was for the same wagon, as appeared by the description and by the admission of defendant in error. The record recited that the defendant (the present plaintiff in error) appeared by his counsel, and the plaintiff failing to appear, the cause was dismissed, and the court gave judgment for damages and for return of the goods, etc.

The third specification in the assignment of errors was in these words:

The said court erred in the instructions given to the jury in this cause.

The charge of the court contained several propositions, none of which were set out in the assignment.

Messrs. BROWNE & PUTNAM, for plaintiff in error.

Mr. E. L. SMITH, for defendant.

BELFORD, J. Bock instituted a suit in replevin against Westcott, on the 20th of November, 1871, in the probate court of Arapahoe county, to recover a certain wagon, alleged to be wrongfully in the possession of Westcott. The case being called, and Bock not appearing, a judgment of dismissal was entered for want of prosecution, a writ of *retorno habendo* awarded, and \$50 allowed the defendant for the detention of the property. Bock then brought his

action in replevin against Westcott in the district court, for the property which had been taken in the first suit. The defendant relied on the adjudication had in the probate court, claiming it to be final between the parties.

At common law when the merits of a suit in replevin were decided by a verdict for the defendant, or judgment for him on demurrer, or confession by the plaintiff, the judgment for the defendant awarded him a return of the distress irreplevisable. A different rule obtained in the case of a nonsuit, for, in that case, the defendant was not entitled to this judgment.

To remedy the inconvenience which proceeded from the plaintiff in the case of nonsuits, having several replevins for one and the same cause, the statute of Edw. I, ch. 2, was framed, in which it was provided that after judgment on verdict, or demurrer, or upon a *non pros.* for want of a declaration or plea in bar, or nonsuit at the trial, the judgment for the defendant should be held irreplevisable, and that the plaintiff could have no new writ of replevin, but must sue out of the court where the nonsuit was had, a new writ called the *second deliverance*, and which operated as a supersedeas in law to the sheriff to execute the writ of *retorno habendo*, obtained on the nonsuit of the plaintiff.

If upon the writ of second deliverance the party replevying made default, the statute provided that the distress should remain irreplevisable forever. Wheaton's Selwyn, vol. 2, 1226.

This statute of Edw. I is only applicable to actions of replevin founded on a distress for rent, and is not of general nature, but is local to that kingdom, and inconsistent with the laws, practice and policy of this country. *Dagget v. Robbins*, 2 Blackf. 415.

It seems clear, therefore, that the judgment of nonsuit, and the delivery of the property to the defendant, under the order of *retorno habendo* made in pursuance of such nonsuit, does not make the property irreplevisable. There is no trial on the merits, and the party is not concluded.

We decline to consider the errors assigned to the instruc-

tions of the court, because the plaintiff in error has not complied with rule number 12, which requires that "where the error alleged is to the charge of the court, the part of the charge referred to shall be quoted *totidem verbis*, in the specifications." The instructions given cover two or three pages of the record. The whole charge is set forth in one specification. A charge is made up of a series of propositions, interdependent, in one sense, yet distinct in another. Some may be correct, others wrong. Where a party assigns error to an entire charge, we think that each proposition announced by the court should be regarded as a separate instruction, and should be specifically assigned.

We cannot afford the time to search through a long charge to find a fault concealed under the glittering generality of *quod in omnibus est erratum*. It is the duty of counsel to specially direct the attention of the court to the distinct matter of which they complain. And it is only those matters complained of that it is necessary to set out.

It is well settled that if a series of propositions be embodied in instructions, and the instructions excepted to in a mass, if any one of the propositions be correct, the exception must be overruled. *Johnson v. Jones et al.*, 1 Black, 220.

We think the evidence in the case supports the verdict. The judgment is accordingly *Affirmed.*

ON GENERAL EXCEPTION TO MASS OF INSTRUCTIONS, if one instruction is correct, the exception will be overruled: *Hoyt v. Mueon*, 2 Colo. 509; *Martin v. Hazzard Powder Co.* 2 Colo. 602.

PACKARD et al. v. BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY.

RAILROADS — *authority to issue county bonds to aid in their construction.*

Municipal corporations have the power to make a subscription to the stock of a railroad company, payable in the bonds of the municipality, upon such terms and conditions with reference to the prosecution of work on the railroad as may be deemed desirable, to provide against loss, but the board of county commissioners have no power to make such subscription in behalf of the county without the approval of the legal voters expressed at an election called pursuant to law.

COUNTY COMMISSIONERS—*special meetings of—how called.* A special meeting of the board of county commissioners cannot be legally held without due notice to every member of the board. *Quere*, whether an order for a special meeting should not be entered of record at a regular meeting by which the public at large, as well as the members of the board, may have notice of the time and the nature of the business to be transacted.

Trustee named in a proposition to vote bonds—*agent of both parties.* A trustee to whom, pursuant to the terms of a proposition to vote bonds, submitted to the vote of electors, is delivered the bonds of a county, becomes the agent of both the board of county commissioners and the railway company, and as such agent is charged with the duty of holding the bonds subject to the conditions of the contract of subscription.

Modification of a proposition to vote bonds, after notice of election—*effect of.* A proposition to vote bonds, modified one week before the election in such a manner as to become a new proposition, cannot be legally voted upon at that election, as there is not remaining sufficient time before the election in which to give the notice required by law.

PRACTICE—*injunction against misapplication of public funds.* A bill to restrain the misapplication of public funds cannot be brought by two or more tax-paying complainants on their sole behalf, when they have no other interest in the question to be determined than that which arises from a liability to pay taxes. A bill for this purpose may be maintained if the complainants sue on behalf of themselves and all others in the same situation.

PLEADING. Where a bill in such case is filed by tax-paying complainants on their sole behalf, if the defendants in their answer raise the objection of want of proper parties complainant, the court cannot disregard it.

Appeal from District Court, Jefferson County.

THE bill was filed by George F. Packard, B. F. Woodworth and John Clark against the board of county commissioners of Jefferson county, the Golden City and South Platte Railway and Telegraph Company and Francis E. Everett. The bill alleges that the complainants are resident tax payers of Jefferson county; that the Golden City and South Platte Railway and Telegraph Company was incorporated January 18th, 1872, by Charles C. Welch, W. A. H. Loveland and E. L. Berthoud, that on the sixth day of April thereafter the company filed a supplemental certificate, that the capital stock by the original and supplemental certificates was fixed at \$30,000; that on the 17th day of December, 1872, said company presented to Beasley and

Wannemaker, two of the county commissioners of Jefferson county, a petition duly signed requesting the board of commissioners to order an election to vote upon a proposition to subscribe \$50,000 to the capital stock of the company, payable in the bonds of the county, said petition fixing the time for the delivery of the bonds as follows, to wit: \$16,000 when one-third of the road-bed is graded, extending from Golden City to the South Platte at or near Littleton; \$17,000 when two-thirds are graded, and the balance when the entire road-bed is graded, with bridges and cross-ties provided.

This petition was presented at a special meeting called for the purpose, only two members being present, and the third not notified either directly or indirectly. In pursuance of the petition the two commissioners ordered an election to be held January 17th, A. D. 1873, to vote upon the proposition; and thereupon adjourned to meet December 18th, 1873, on which day the said two commissioners again met, and adjourned without transacting any business, except to order notice to be given to the judges of election. The bill then alleges that the order for the election made by said two commissioners was not in fact made the 17th day of December, 1872, as shown by the records of the board, but was made and entered of record on the 18th of December, 1872, and that the publication of the notice of election was made for the first time on the day last named in the *Colorado Transcript*; that on the 6th day of January, A. D. 1873, a regular meeting of the board was held which was adjourned until the 9th day of January, 1873, on which day they again met, when said company submitted a supplemental proposition in which the company agreed that it would, within nine months from the time of voting said bonds, complete the grading of its road-bed one-third of the entire length of the line, and the balance of grading within twelve months from the time of such vote, and that it would complete the whole of the grading of the road-bed, and bridge and tie the same ready for the laying of rails, within eighteen months from the date of the vote; and, if

the said company should fail to complete the grading of the first third of its road-bed within nine months from the date of said vote, the company should forfeit all the bonds ; but, in case of compliance therewith, the said company to receive \$16,000 of the bonds ; and, if it should fail to complete the grading of the second third of its road-bed as above specified within twelve months from the date of the vote, the said company should forfeit the remaining portion of said bonds, but, if the company shall complete the grading of the second third of its road-bed, it should receive \$17,000 more of said bonds ; and, if having complied with the above, the said company should fail to complete the grading of its road-bed, and bridge and tie the same preparatory to laying the rails within eighteen months from the date of said vote, the company to forfeit the balance of \$17,000. The supplemental proposition provided further that, if the delivery of the bonds should be delayed by the board of commissioners, the trustee or the process of any court, "the time taken up by such delay or hindrance should not in any such event be counted against the company on the computation of the time or times hereby agreed upon for the completion of the different parts of said work, but the said company shall have an extension of the time or times for such completion of the same number of days so taken up or consumed by such delay or hindrance." This agreement was to be taken as part of the original proposition made by the company. That the supplemental proposition was approved by the board of commissioners on the 7th day of January, 1873; that on the 18th of December, 1872, the commissioners caused to be published for the first time a notice of an election to be held in said county, on the 17th day of January, 1873, and the 8th of January, 1873, the said supplemental proposition was added to said notice as part of the original proposition of said company ; but was only published for the space of nine days previous to the election ; that the election was held in pursuance of said notice on the 17th day of January, 1873, at which a majority of the votes cast were in favor of said subscription ; that a special meeting of

the board of commissioners was held on the 18th day of March, 1873, at which the said Beasley and Wannemaker only were present, at which meeting it was ordered that the chairman of the board be authorized to sign the bonds of the county voted in aid of said company, and to affix the seal of the county thereto, and to deliver said bonds when so signed and sealed, and attested by the clerk of said county, to Francis E. Everett, trustee, to hold said bonds and deliver the same to said company, in accordance with the provisions of the contract between the county and said company, and that said bonds should bear date the 18th day of March, A. D. 1873; that at a special meeting of said board held March 18th, 1873, one of the commissioners, viz., Warrington, was not present and had no notice of the meeting; that on the day last mentioned the bonds of said county for \$50,000 were issued by said board of commissioners, and the coupons signed in the absence of said Warrington and placed in the hands of said Everett, as trustee, for the use of said company; that no subscription has ever been made to the capital stock of said company by said board of county commissioners, on behalf of said county, of said \$50,000, or any other sum; that said company has never delivered any of its capital stock to said county; that at the time of voting said bonds, and at the time said bonds were delivered to said trustee, no location or survey of said road had ever been made; that at the time said election was ordered by said commissioners, and when the election was held, the capital stock of said company was only \$30,000.

The bill prays for an injunction restraining said board of county commissioners from making any subscription to the capital stock of said company, and the said Everett from delivering the bonds of said county to said company, or any other person on its behalf, and the said county from levying any tax to pay said bonds or the coupons, and the said company from recovering said bonds or coupons from said Everett, trustee, and from negotiating the same; that the bonds and coupons may be surrendered up to be

canceled, and that the board of county commissioners may be perpetually restrained from making any subscription to the capital stock of said company.

The defendants in their answer deny that the capital stock of said company was only \$30,000 at the time of voting the bonds, and aver that, before the subscription was made, and on the 9th day of November, 1872, the company increased its capital stock to \$400,000, and that a certificate of the increase was filed in the office of the territorial secretary January 21, 1873, and that the \$50,000 of the capital stock of said company has been delivered to and accepted by the board of commissioners in payment for said bonds; aver that the complainants are not the only tax payers in Jefferson county, and that they have no right to maintain the suit; deny that no location or survey of said line of road was ever made; aver that such location and survey was made before the commencement of this suit, and that all the acts of the commissioners and of the company in the premises were in strict conformity to law.

The parties hereto filed stipulations that the following facts exist, and may be considered by the court as duly proved :

First. That the said Golden City and South Platte Railway and Telegraph Company was incorporated, as alleged in the bill of complaint, with the capital of \$30,000.

Second. That by a vote of the voters of the county of Jefferson, on the 17th day of January, A. D. 1873; it was voted to issue \$50,000 of the bonds of said county in exchange for the like amount of the stock of said company.

Third. That the bonds have been issued and placed in the hands of Francis E. Everett, one of the defendants, as trustee selected by the board of county commissioners and the said railway and telegraph company, in accordance with the submission, submitted to the voters of said county. It is also admitted that on the 9th day of November, 1872, the said Golden City and South Platte Railway and Telegraph Company, by its stockholders, increased the capital stock of said company, according to the provisions of the statute,

from \$30,000 to \$400,000, and that on said 9th day of November, A. D. 1872, Charles C. Welch, who was the president of said company, made a certificate of such increase of stock, and swore to the same, but that such certificate was not filed with the secretary of the territory of Colorado until the 21st of January, A. D. 1873.

That at the time the board of county commissioners made such submission to the voters of said county, it was represented to the board of county commissioners that the capital stock of said railway and telegraph company was \$400,000, and such submission was so made on the basis of a capital stock of \$400,000.

That before the commencement of the suit, the board of county commissioners of Jefferson county authorized J. Wannemaker, the chairman of such board, to receive from the said railway and telegraph company the said \$50,000 of the capital stock of said company, and that, after such proceedings, the said railway and telegraph company did deliver to the said board of county commissioners the said \$50,000 of capital stock of said company, and the same was received before the commencement of this suit, and was duly signed and sealed; such stock was delivered without the consent or knowledge of the complainants.

That at the time of the submission by the board of county commissioners to the voters of the county, there had been no stock of the company issued, and none was issued until the time of the issue of the said \$50,000 of the said stock to the said county of Jefferson. At the hearing the district court dismissed the bill at complainant's cost, and they appealed.

Messrs. BROWNE & PUTNAM, for appellants.

Mr. HENRY M. TELLER, for appellees.

HALLETT, C. J. The authority conferred upon counties, cities and towns to subscribe to the capital stock of railroad companies, and to issue bonds in payment therefor, is to be

exercised by and with the approval of the legal voters of the county, city or town so subscribing, expressed at an election, to be called by the proper authority, of which thirty days' notice must be given. Rev. Stat. 134.

No doubt can arise as to the power of any such corporation to make its subscription to the stock of a railway company upon such terms and conditions of payment, with reference to the prosecution of work on the railway and the completion of the same, as may be considered necessary or desirable to provide against loss. *Portland Railroad Co. v. Hartford*, 58 Me. 23. By whom the terms of the subscription are to be settled on behalf of the county, city or town, has, however, become a subject of controversy in this case, and this is a question to be determined upon the language of the act. It will be observed that the board of county commissioners have no power to begin the proceeding, and can only act upon the demand of one hundred voters for an election to be held, after which the election is to be called "to approve and vote the subscription of stock and authorize the issue of bonds." Authority to subscribe to the stock is, by the first section, conferred upon the board of commissioners, to be exercised under the direction of the electors of the county, according to the provisions of the second section, from which it appears that the people are to act directly in the matter, so far as it is possible for them to do so. The board of commissioners are to perform those acts of subscribing to the stock and issuing the bonds, which cannot be done by the people except by and through their proper representatives, and all other matters are left to the electors. It will not be contended that bonds issued without authority from the voters as to rate of interest and time of payment would be valid, and all other essential features of the contract of subscription must be equally within their control. By the express words of the act the electors are to approve and vote the subscription to the stock, and this cannot be done without fixing the amount, the terms of payment and all the substantial parts of the contract. The commissioners, acting on behalf of the

county, must of necessity arrange these details in the first instance, in order that the electors may pass upon them, but there is nothing in the act which requires them to do more. Indeed the act requires express authority from the people as to all material matters, and of course the instructions received by the board must be obeyed. In this view it becomes necessary to inquire whether the matter of subscription to the stock of the railway company was properly submitted to the voters of the county, for if it was not so submitted, the board of commissioners was without authority to subscribe to the stock.

The proposition made by the railway company was submitted to two commissioners of the county convened in special session, and an order was made by them, directing that an election be held on the 17th day of January thereafter, at which the electors of the county should approve or reject it. The third commissioner was not present at the meeting, nor was he notified thereof, and the meeting was for that reason without authority of law. Regular meetings of the board of commissioners in each county are held on the first Monday in January, April, July, and October in each year, and special meetings may be held at such other times as, in the opinion of the board, the public interest may require. Rev. Stat. 168. The act is silent as to the manner of calling special meetings, and there are strong reasons for requiring an order entered of record at a regular meeting, by which the public at large, as well as the members of the board, may have notice of the time and the nature of the business to be transacted. If, however, it should be conceded that the board may meet upon the call of the chairman or otherwise, a sound rule of public policy requires that all members of the board shall have notice of the meeting. *People v. Batchelor*, 22 N. Y. 129.

It would seem, therefore, that the election was not ordered by a duly constituted board of commissioners, but the action of the board at the regular meeting in January may be regarded as curing the irregularity, and it is not necessary to dwell upon this point. The proposition as first made by

the railway company and submitted to the people, was for \$50,000 of the bonds of the county, to be prepared and placed in the hands of a trustee selected by the county and the company, and by him delivered to the company, \$16,000 upon the completion of one-third of the road-bed ; \$17,000 upon the completion of another third of the road-bed, and the remaining \$17,000, upon the completion of the entire road-bed. No time was provided for doing the several parts, or the whole of the work, nor was any thing said as to the consequences of a default in the conditions of the contract. At the January meeting of the board, the railway company put in a supplemental proposition for the avowed purpose of making more definite the terms and conditions of the original proposal and of restricting and limiting the time for finishing the road-bed. The time for building the several sections of the road was declared to be nine, twelve and eighteen months respectively from the date of election, and if, according to the usual intendment of the law, the first proposal was for a reasonable time in which to do the work, we have nothing to indicate that the periods fixed by the last proposal were different from the first. We are not advised by the record as to the length of line, the labor of construction, or any matter upon which an opinion may rest as to the time within which the road must have been built, in order to comply with the first proposal, nor is it alleged in the bill that the times mentioned in the second proposal are variant from the first, and therefore we cannot assume that any change was wrought in this particular. It was further declared in the supplemental proposition that, upon failure to complete any section of the road within the time specified, the bonds payable thereon should be forfeited to the county, but this added nothing to the original proposition, under which the company acquired no right to the bonds, until the section of the road upon which the same were payable was built. It was not necessary to declare that the railway company should forfeit bonds to which no right had been acquired or could be acquired, until the work was finished under the first proposition. It was also provided that if the

delivery of the bonds should be delayed by the board of commissioners, the trustee or the process of any court, "the time taken up by such delay or hindrance should not, in any such event, be counted against the said company on the computation of the time or times hereby agreed upon for the completion of the different parts of said work, but the said company shall have an extension of the time or times for such completion of the same number of days so taken up or consumed by such delay or hindrance."

Without adverting to the effect of delay occasioned by the action of the board of commissioners or of the courts, it will only be necessary to consider the effect of the provision as to delays occasioned by the action of the trustee. As we have seen, there was nothing in the original proposition as to the default of the trustee, who, being the choice of both parties, may be regarded as the agent of each, to hold the bonds subject to the conditions of the contract of subscription. Upon the principle which has been applied to auctioneers in the analogous case of a deposit by a purchaser subject to the condition that a good title to the property purchased shall be made, it seems that the trustee under this proposal would hold the bonds for the use of the county in the first instance and until the completion of the work on that section whereon they are payable, and afterward for the use of the railway company. In *Burrough v. Skinner*, 5 Bur. 2639, which was an action by a purchaser against an auctioneer for a deposit, the court was clear, that the action would lie upon failure of title, for the defendant was a mere depositary and bound to hold the money until it should appear to whom it properly belonged. If the condition were performed, the right of the vendor to the deposit would be equally clear. Upon this principle, one for whom a promissory note had been lodged with a depositary, to be delivered upon the removal of an incumbrance from certain real property, after performance of the condition, was allowed to recover upon the note, notwithstanding the refusal of the bailee to deliver it. *Chase v. Gates*, 33 Me. 363.

If, then, the trustee would hold the bonds for the county until performance of the condition, and after that event for the railway company, the loss or misapplication of the bonds by the trustee would fall upon the county or the company, to be determined by the time when it occurred, as whether before or after the performance of the condition. If for instance, referring to the \$16,000 of bonds to be first delivered, the trustee should lose or misapply them before one-third of the road-bed was completed, the county would bear the loss, but if the same should occur after that event, the company would bear it and so also as to the other installments. According to the decisions of the supreme court, bonds issued to railway companies, under acts such as ours, are negotiable securities, which, if lost, or misapplied by the trustee, would be valid against the county in the hands of an innocent party. *Moran v. Miami Co.*, 2 Black, 722.

If, then, under the original proposition, the status of the parties has been correctly stated, we have no difficulty in saying, that the proposition was materially changed by the amendment thereto. For, by the amendment, a delay or failure of the trustee to deliver bonds according to the terms of the proposition relieved the company from prosecuting the work during the continuance of such delay or failure, and this was not the case before the amendment was made. This modification of the original proposition may be regarded as a withdrawal of that proposition *pro tanto*, and the substitution of another therefor, and of course this must defeat all proceedings pending at the time of the amendment. To require the voters to pass upon a proposition after it has been withdrawn or essentially changed would be useless, because it cannot then become the basis of an agreement between the parties. The record shows that the proposition was changed in the manner indicated about one week before the election, at which time it became a new proposal, and as there was not sufficient time before the election in which to give the notice required by the statute, the voters could not legally act upon it at that election.

So much has been said in explanation of the rights of the parties, in order to show that the bill is not without merit. There is, however, a defect of parties, which we are unable to overlook, and which will defeat the relief sought in this action.

The right of taxable inhabitants and property holders to resort to equity to restrain misuse of public property and misapplication of public funds has been denied in New York and elsewhere, but we incline to the opposite view, which is also supported by many authorities, in which the reasons upon which our judgment rests are given at length. *Baltimore v. Gill*, 31 Md. 375 ; 2 Dillon's Corporations, § 731.

But where, as in this case, the complainants have no other interest in the question to be determined than that which arises from a liability to pay taxes, the bill should be filed by the complainants on behalf of themselves and all others in the same situation. The general rule would require that all the tax payers in the county should be made parties to the suit, but as this is impracticable, the law will admit one or more to sue on behalf of themselves and others. Story's Eq. Pl., § 97 ; *Phillips v. Hudson*, 2 Ch. App. Cases, 243 ; *Barr v. Denniston*, 19 N. H. 170 ; *Whitney v. Mayo*, 15 Ill. 252.

The bill in this case is obnoxious to the rule, having been filed by appellants for themselves alone, and as the objection was made in the answer, there can be no reason for disregarding it. Story's Eq. Pl., § 75.

In such cases, however, it is enough to dismiss the bill without prejudice, leaving the parties to adjust their rights in another action, and the decree of the court below will be so modified in this court, and costs will be allowed to appellees.

Decree modified.

JONES v. THE PEOPLE.

DAILEY v. SAME.

MILSAP v. SAME.

JUROR—*alienage*—*waiver*. A verdict will not be set aside on account of the alienage of a juror to whom no objection was made at the trial.

Challenge to the favor. A pre-existing opinion in the mind of a juror is, under the act of 1872 (9 Sess. 94), a ground of challenge to the favor, and the decision of the district court thereon is final and not subject to review in this court.

CONSTITUTIONAL LAW—*act relating to qualifications of jurors*. The act of 1872 (9 Sess. 94), concerning criminal proceedings, does not conflict with the sixth amendment to the constitution of the United States, which secures to persons charged with crime the right to be tried by an impartial jury.

WITNESS—*when and how far the party calling may discredit him*. The party calling a witness cannot afterward assail his general character for truth or the testimony drawn from the witness by him.

But the rule does not extend to testimony drawn from the same witness by the opposite party, and where the government first called a witness and afterward the same witness was called on another point by the prisoner, the government was permitted to ask whether, in relation to the matters drawn from him by the prisoner, he had not given a different account of the matter at another time and place.

What will discredit. The same evidence also had a tendency to prove that the witness was more favorable to the prisoner than to the government, and upon that ground it was properly received for the purpose of discrediting him.

When he may be discredited. If a witness has no recollection of a statement imputed to him as having been made out of court concerning the matters in issue upon the trial, the fact that he made such statement may, nevertheless, be proved.

NEW TRIAL—*where the evidence is conflicting* the verdict will not be disturbed.

Error to District Court, Arapahoe County.

OBJECTIONS made to jurors are sufficiently stated in the opinion of the court. The indictment was for robbery. The prosecuting witness, James Leverton, testified that he came to Denver in the afternoon of the 30th of January, 1873; that he met upon the street Dailey and Milsap, who, after

some conversation, induced him to go to a house on Blake street, called the Corn Exchange, in search of one Isaac Pease, with whom the witness was acquainted; that when they had arrived at the place last named, they went into a room and one of the prisoners locked the door; that the prisoners desired the witness to try his luck in a lottery, which the witness declined to do; that, after some conversation upon that subject, prisoners threw the witness upon the floor, and, with some violence, took from his person a sum of money and a bank certificate of deposit; that they afterward compelled him to indorse said certificate; that two of the defendants, Milsap and Dailey, took the witness out a back way into an alley, and put him into a buggy with covered top and sides, and drove him out to the house of one Eldredge, a distance of ten miles or more from the city. There was evidence to show that the witness gave a different account of the affair at Eldredge's house, and he was also contradicted by one Cochran, who testified that he was present in the room at the time of the alleged robbery, and that the witness lost his money by gaming. A witness was called to prove that the buggy was used as stated by Leverton, and the district attorney called Stephen Eldredge, who testified that Milsap, Dailey and Leverton came to his place at or about the time of the alleged robbery; that Milsap and Dailey went back to Denver in the buggy, and Leverton went on toward Golden City. This witness was afterward called by the defendant, and testified that Leverton had stated at his house that he lost \$780 or \$800 in gambling, at the time of the alleged robbery. Upon cross-examination at this time this witness was asked whether he did not have a conversation with George M. Hopkins, at a time and place named, in regard to the case, and whether he did not, upon that occasion, request Hopkins to say nothing as to the advice he (the witness) had given to Leverton.

The questions were somewhat different in each case, and although the witness appeared to admit that he had a conversation with Hopkins, he declared that he did not recollect the statements imputed to him.

In rebuttal, George M. Hopkins was called, who testified substantially as follows: I served a subpoena on Eldredge; he seemed to hesitate; didn't seem very willing to appear as a witness, as I said to Eldredge he had not ought to be backward in appearing in this case; if it was as represented, it was one of the most outrageous robberies ever committed in Denver; I then went on and related the case to Mr. Eldredge; he said Leverton had told him all about it, and he said he never felt so sorry for a man in his life; that he had told him not to go to Central City—to return to Denver and report the case to Cook and Hopkins, and they would recover his money for him; at the same time he asked me not to say any thing about what he had told me, as to the advice he had given Leverton; he said he was in and out of town at all hours of the day and night, and if these fellows found out that he had informed in this matter, he says they would murder me.

The jury found the defendants guilty.

Mr. H. R. HUNT, for plaintiffs in error.

Mr. M. A. ROGERS, district attorney, for defendants in error.

HALLETT, C. J. Plaintiff in error was indicted jointly with Wm. Dailey, Geo. Milsap, and Chas. R. Ward, for robbery committed upon James Leverton, and the parties were separately tried, resulting in the conviction of all excepting Ward, who was acquitted. In each case of conviction the record has been removed into this court by writ of error, and as the evidence was substantially the same in all of them, the questions presented will be considered in this opinion. All of these questions arose and were presented in the case of Jones, save one, which arose in the case of Milsap in the following manner.

After the jury was sworn, a member thereof informed the court that he was not a citizen of the United States, and no objection being made, the trial went on. It is well under-

stood that alienage is a good ground of objection to a juror, but, if not taken at the proper time, the objection will be considered as waived. *Turner v. Hahn*, 1 Col. 24; *Chase v. The People*, 40 Ill. 352. The juror was not examined as to his citizenship, and when he voluntarily notified counsel that he was an alien, no notice was taken of it. The right to object upon that ground having been thus distinctly waived, it cannot be relied upon in this court. It is also urged that jurors called in the other cases had formed disqualifying opinions as to the merits of the case, and that challenges based upon that ground were improperly denied. The examination of the jurors disclosed that they had read in newspapers some account of the alleged robbery, and some of them had heard reports of the matter from witnesses and others. Cromwell, who was called in the Jones case, appears to have entertained a more decided opinion than either of the others. To the question whether he had any prejudice for or against the accused, he answered that he had, and that he did not think that he could give the accused a fair and impartial trial. Upon further examination he declared that he was not acquainted with Jones, and that he had no friendliness or animosity toward him; that he did not remember whether he had ever conversed with any one who had knowledge of the facts, but did not think that he had done so, and that his knowledge of the case was derived principally from newspapers. From some portions of his examination, considered without reference to the remainder, it might be inferred that he was hostile toward the accused, but this inference is repelled by the statement that he did not know the accused, and had no feelings of friendship or animosity toward him. Taking the whole examination together, it appears that he had read newspaper accounts of the affair, upon which he had made up an opinion as to the merits of the case, and that he feared that this opinion would influence him in the trial of the cause. The same may be said of the other jurors challenged by plaintiff in error, and the case is precisely within the provisions of the act of 1872 (9 Sess. 94), which pro-

vides that a pre-existing opinion shall not disqualify a juror if the court shall be satisfied, from his examination or from other evidence, that he will render an impartial verdict in the cause.

In the case of *Solander v. The People*, decided at the last term of this court, we had occasion to construe this statute, and we then determined that challenges founded upon a pre-existing opinion in the mind of the juror, were, under the statute, to the favor only, and that a writ of error would not lie to the decision of the court thereon. The conclusions then announced are abundantly supported by authority, and we see no reason to change them. *Sanchez v. The People*, 22 N. Y. 150.

The suggestion that the act is in violation of the sixth amendment to the constitution, which secures to persons charged with crime the right to be tried by an impartial jury, is not supported by the language of the act. The court is expressly required to ascertain that jurors will determine the case impartially, and if this is not done, both the constitution and the law are disregarded. We see no reason to question the validity of this law upon constitutional grounds, and there is little room for argument as to the proper construction of it. As was said in *Solander v. The People*, any opinion by which the juror may be influenced in the trial of the cause should be regarded as good ground of challenge to the favor, but whether it is so or not, is to be determined by the court of original jurisdiction.

The government called Stephen Eldred to prove that Milsap, Dailey and the prosecuting witness Leverton, came to his house in the evening after the alleged robbery, and the same witness was afterward called by plaintiff in error to prove a conversation with Leverton at that time. After the witness had testified in chief on behalf of plaintiff in error, the district attorney inquired whether, at a time and place named, he had not had a conversation with Geo. M. Hopkins in regard to the interview with Leverton, and whether he had not told Hopkins that he was sorry for

Leverton, and had advised him to go to Denver and report the matter to the officers. The district attorney also asked the witness whether he did not, upon that occasion, request Hopkins to say nothing about what he (the witness) had said as to the advice given to Leverton. Objection was made by counsel for plaintiff in error to these questions, which was overruled and the witness answered in substance, that he did not recollect any such conversation. In rebuttal, the district attorney called Hopkins, who testified to the conversation with Eldred, concerning which the latter had been interrogated, and that Eldred admitted that he knew the facts in the case, and that he had advised Leverton in the interview at Eldred's house to return to Denver and report the case to the officers. Hopkins further declared that Eldred asked him not to say any thing about what he had said as to the advice given to Leverton, for the reason that he feared that the parties implicated would murder him. It is claimed that the government gave credit to Eldred by calling him as a witness, and could not, for that reason, afterward impugn his credibility, even in respect to matter called out by plaintiff in error. The question is peculiar, Eldred having been called by both parties and the government having assailed his credibility in respect to the testimony drawn from him by plaintiff in error only. It is plain that the evidence of Hopkins, whether regarded as showing that Eldred was under the control of plaintiff in error and his associates, or that he had given a different account of the interview with Leverton, tended to prove that Eldred was unworthy of belief. Upon the broad ground asserted in some of the reported cases that a party cannot be allowed to discredit a witness called by him in any degree, even when such witness has been called by the opposite party, and the discrediting testimony relates solely to facts drawn out by him, the testimony of Hopkins must have been rejected. *Com. v. Hudson*, 11 Gray, 64; *Craig v. Grant*, 6 Mich. 447.

The rule which forbids a party to impeach his witness is

said to be founded upon the consideration that he has given credit to the witness by presenting him to the court, and he ought not to have the privilege of accepting the testimony, if it be for him, and rejecting it, if it be against him. 1 Greenl. Ev., § 442.

When applied to testimony called out by the party who seeks to discredit the witness the reason is of great force, but it has little application to testimony drawn from the same witness by the opposite party. By bringing a witness into court the party vouches for his general character for truth and for the truth of his statements in regard to the particular matter of which he inquires. Further than this, neither the reason of the rule nor the policy of the law can be safely extended. Even as to the matter to which the witness is interrogated, if he declares against the party calling him, it is still open to proof by the testimony of other witnesses. 1 Greenl. Ev., § 443.

It is obvious that a party may be willing to accept the testimony of a witness upon one point, while he would be utterly unwilling to accept his testimony upon another point, and it is equally plain that a witness may testify truly as to one fact, and untruly as to another. If by calling a witness to prove a single fact a party shall be held to affirm his truthfulness absolutely and in all things, the rule would appear to be a hard one. It is often necessary for a party to call his adversary, or a witness who is hostile to him and who is a principal witness for his adversary, to prove a single fact; and if in such case the witness is subsequently called by the opposite party, justice requires that the party first calling him should be permitted to show the interest or hostility of the witness, not for the purpose of showing that the latter is unworthy of belief generally, but that he is more favorable to one party than to the other. In our view the rule under consideration precludes a party from attacking the general character of a witness called by him, but does not preclude him from proving statements of the same witness inconsistent with his testi-

mony on the stand, delivered at the instance of the opposite party. *State v. Norris*, 1 Heywood, 504.

The evidence of Hopkins tended to prove that Eldred was under the influence of plaintiff in error and his associates and that he was more favorable to them than to the prosecution. That such evidence affects the credit of the witness and is admissible for that purpose is clear upon reason and authority, and we think that it was rightly received upon that ground. *Baldorf v. Farmers' Bank*, 61 Penn. St. 179; *Swett v. Shumway*, 102 Mass. 869; *Geary v. The People*, 22 Mich. 221.

That the testimony was also admissible for the purpose of contradicting Eldred is equally clear. The latter was called to prove a conversation with Leverton, and if he had given a different account of the same conversation at another time, it was proper to show that fact, to affect his credibility. 1 Greenl. Ev., § 462.

By answering that he had no recollection of the declaration imputed to him, the witness could not defeat the right of the government to prove it, and the objection based upon Eldred's answer cannot be entertained. *Ray v. Bell*, 24 Ill. 451; *Nute v. Nute*, 41 N. H. 60; 2 Phillips' Ev. 960. The evidence in the case is conflicting and not entirely free from difficulty. In the first place it is claimed that the prosecuting witness contradicted himself upon the stand, but we are unable to find that he did so in any essential matter. He misnamed the place to which he was taken by Milsap and Dailey after the alleged robbery, but this he subsequently corrected. On cross-examination, he falsely denied that he had made a statement in the direct examination, which is found in the bill of exceptions. An illiterate man, unused to the proceedings of courts, will often fall into such mistakes, and the jury can best determine what weight should be given to them upon the question of credibility. There was testimony tending to prove that the prosecuting witness, in the evening after the alleged robbery at Eldred's house, declared that he had lost his money in gaming, thus contradicting his statement in court, that it

was taken from him forcibly. It will not be contended that the witness was absolutely discredited by this testimony, although the jury were at liberty to give it that effect, if they considered it sufficient to prove the fact. Even when a witness has knowingly testified falsely as to a material fact, it is said that his credibility is to be determined by the jury, who may give to his testimony such weight as they think it entitled to. *Mead v. McGraw*, 19 Ohio St. 55. And certainly a statement made out of court, and not under oath, inconsistent with testimony given on the stand, will not discredit the witness unless the jury should give to it that effect. This is according to the familiar rule which requires that all questions relating to the credibility of witnesses and the weight of evidence shall be left to the jury. The testimony of the witness Cochrane presents no other or different question. At all points he was opposed to the prosecuting witness Leverton, and it was the right and duty of the jury to determine in whom the truth of the matter was to be found. The circumstances of the case, as narrated by Leverton, were that the money and checks were violently taken from his person by Jones, Milsap and Dailey, in a room to which he had been invited by the two persons last named. Cochrane deposed that he was present at the interview between the parties, and that they played at a certain game, in which Leverton lost his money. One witness affirmed that plaintiff in error secured the money by the illegal act of gaming, while the other witness declared that it was obtained by the illegal act of robbery. In support of the latter, was the extraordinary fact established by the testimony of all the witnesses, that two of the persons charged, seized the unfortunate victim of the crime and carried him a distance of ten miles from the city.

Three juries, successively impaneled in the court below, have found that the prosecuting witness gave a true account of the matter, and we cannot say that they were wrong. We find no error in these records, and the judgments therein recorded must be

Affirmed.

JUROR — CHALLENGE — PRE-EXISTING OPINION in the mind of a juror is a ground of challenge to the juror: *Mitch v. People*, 8 Colo. 445.

WITNESS CANNOT BE DISCREDITED by party calling him; but the rule does not apply to testimony drawn from him by the other party: *Babeock v. People*, 13 Colo. 512.

**THE PEOPLE OF THE TERRITORY OF COLORADO EX REL. THE
DENVER & RIO GRANDE RAILWAY COMPANY v. BOARD
OF COUNTY COMMISSIONERS OF PUEBLO COUNTY.**

SUBSCRIPTION TO STOCK OF RAILWAY COMPANY BY A COUNTY—*when valid.*

Until the board of county commissioners subscribe to the stock of a railway company, and authorize the payment thereof in the bonds of the county, the vote of the legal electors of the county authorizing such subscription to be made, goes for nothing.

The people of a county, in their primary capacity, have no authority under the law to make a contract of subscription binding upon the county; the board of county commissioners, pursuant to the authority delegated by such vote, must enter into the contract of subscription before either the county is compellable by *mandamus* to surrender its bonds, or the railway company to deliver its stock.

Appeal from District Court, Pueblo County.

THIS was an application for mandamus to compel the county commissioners of Pueblo county to issue \$50,000 in the bonds of the county to the Denver & Rio Grande Railway Company. An alternative writ was issued, in which the facts were set forth as follows :

That the Denver & Rio Grande Railway, a corporation existing under and by virtue of the laws of the territory of Colorado, and doing business within the county of Pueblo on the 1st of December, 1871, had constructed its railway from Denver to Colorado Springs, and contemplated extending it thence to the coal fields of Fremont county by the most advantageous route, and that the citizens of Pueblo county, desiring such extension *via* the town of Pueblo, made their petition signed according to law by over 100 voters, praying the board of county commissioners of Pueblo county to order an election for voting to subscribe \$50,000 in this behalf, and to pay the same in the bonds of the county ; that December 9, 1871, said commissioners met to consider the matter, and thereupon ordered that a special election be held for this purpose on the 10th day of January, 1872, reciting the propositions upon which said sub-

scription was to be made; and afterward, December 25, 1871, at a meeting of the said board of commissioners, the said election was postponed and fixed to be held on the 30th day of January, 1872, "for the purpose of voting upon the following questions: shall the county of Pueblo subscribe the sum of \$50,000 to the capital stock of the Denver & Rio Grande Railway Company, to aid in its construction of a railway from the town of Pueblo to the coal fields of Fremont county, on the following conditions:

"1. Said sum of \$50,000 shall be paid by the issue of a like amount of the bonds of Pueblo county, payable,' etc., (descriptive of character of bonds).

"2. The main trunk line of said railway shall be built southward from Colorado Springs, its present terminus, to the town of Pueblo to a point on the north side of the Arkansas river, within one mile of the new court-house, at which point said railway company shall construct its depot.

"3. A railway shall be constructed from said point, last mentioned, up the Arkansas valley to the coal fields of Fremont county.

"4. Said bonds shall issue when the said railway up the Arkansas valley is completed and ready for the running of cars to the coal mines, the same to be completed within one year from the day of the voting of the said bonds.

"5. If the county shall vote in favor of bonds, the county commissioners shall be trustees for the county in all matters appertaining to the issue, delivery and cancellation of said bonds, etc., etc.

"6. The failure of said railway company to comply with any of these conditions shall relieve said county from all obligations to subscribe to its stock.

"The ballots to be used at the said special election shall have written or printed thereon 'For the Bonds' or 'Against the Bonds.' By order of the board of county commissioners, O. H. P. Baxter, chairman. Attest: Sam McBride, clerk."

That the foregoing amended order was duly published in the newspapers of the town of Pueblo, according to law,

and that afterward, on the 30th day of January, 1872, the election was held according to the order and notice and according to law, "and at said election a majority of all the votes cast was 'For the Bonds,' to wit, in favor of the said subscription and issue of the bonds of the said county for the sum of \$50,000 in aid of said railway, according to the propositions above recited, as appears by the canvass of the returns of said election," etc.

That thereupon, afterward the said railway company built the main line of their railway from Colorado Springs to Pueblo, to the point stipulated, and located and built its depot at said point, and afterward, within a year from the voting of the said bonds, to wit, between the 30th day of January, 1872, and the 1st day of November, 1872, built and completed a railway from the point mentioned up the said Arkansas valley to the said coal mines ready for the running of cars, as conditioned, and afterward the board of county commissioners procured to be engraved and printed, bonds of the county to the amount of \$50,000, ready to be signed and delivered to the railway company in accordance with the said propositions, vote and subscription.

That afterward, November 9, 1872, the railway company, by Wilbur F. Stone, one of its attorneys, reported and suggested to the said board of commissioners, at a meeting thereof, the completion of said railway and the fulfillment by the company of all the conditions to be by said company performed, precedent to the issue and delivery of said bonds, and thereupon formally demanded of said commissioners the issue and delivery of said bonds to said company, which demand was then and there by said commissioners refused.

And that afterward, January 11, 1873, at a regular meeting of said board of commissioners, like demand was made and in like manner refused; and afterward, February 8, 1873, at a special meeting of the said board, said demand was renewed and again refused; and afterward, November 14, 1873, the said demand was again renewed at a meeting of said commissioners, and the said railway company then

and there tendered and delivered to the said commissioners a certificate of the capital stock of the said railway company, being the amount subscribed for by said county by the vote aforesaid, such tender being in complete fulfillment of all which the said railway company was and is required by law to do in the premises, and that thereupon the said commissioners again distinctly refused to issue and deliver said bonds.

Recites that the county of Pueblo, by its vote as aforesaid, lawfully authorized the issue and delivery of the bonds upon conditions which were fully complied with, and the said railway company, in good faith, has complied with each and every one of the conditions required to be done by it according to law and the propositions in the premises, and that the said commissioners, upon proper demand, refused to issue the bonds as their duty required of them, and which they had it in their power to do when so demanded, and still have it in their power to do."

A demurrer to the writ was sustained.

Mr. W. F. STONE, for appellant.

Mr. G. Q. RICHMOND, for appellee.

BELFORD, J. From a careful examination of the act, authorizing subscriptions to be made to aid in the construction of railroads, it is apparent that the body clothed with the power of contracting is the board of commissioners, and it is equally clear that the exercise of this power is made dependent upon the approval of the people, expressed at an election called for that purpose.

In this case, it is evident from the form of the proposition submitted to the voters, as from other things in the record, that no stock had been subscribed prior to the election, but that the purpose of the election was to ascertain whether the popular will would authorize and sanction such a subscription. The people can make no contract binding on the county. They can approve or disapprove a contract

made by the board ; beyond this they cannot go. It is clear, also, that to maintain this action, the complainants must have a valid, legal right against the county, springing out of a contract made in a way known to and approved by the law.

To constitute a contract there must not only be parties competent to agree, but also mutuality of consideration and obligation. Both must be bound or neither can be held. The election proceeds upon the petition of the citizens. The railroad company is not a party in this preliminary step. The election is not and cannot be ordered at their request. They may submit their proposals to the board, and through it to the people; but the statute neither empowers the company to contract with the people, nor does it authorize the people, in their primary capacity, to contract with the corporation. This power is vested solely in their representatives, the commissioners, and to make it effectual they must pursue the strict letter of the law granting it.

The most that can be said as to the action of the board in this case is, that at an election they submitted certain proposals — by whom made does not clearly appear — to the consideration of the voters, and that they approved them. This is not enough, for, as we have seen, the people in their primary capacity are not empowered to contract. Nor can the commissioners make a contract that will bind the county until the people, through the ballot-box, tell them so to do. The action of both in their appropriate ways must be had before the negotiations can be consummated. "Until the county has subscribed," says the supreme court of Illinois, "there is no privity between the road and the county." It is the contract of subscription which compels the subscriber for stock to pay the money, and the company to issue to him shares of their stock. When the vote was taken and resulted in favor of subscription, it only amounted to a delegation of power to the commissioners to make the contract of subscription.

The company was no party to this vote, and has no more right to insist upon the execution of the power thus delega-

ted, than it would have in case an individual were to authorize an agent to subscribe for stock in the road, and who should refuse to exercise the power of his principal. *P. & O. R. R. Co. v. Tazewell County*, 22 Ill. 156.

If we were to concede the power of the people to make a contract by a vote to take stock, still their vote could not amount to a contract, till the company, through its proper officers, also agreed to issue the stock. The record fails to disclose any such contract on behalf of the corporation.

The recitals in this writ are simply to the effect that the Denver and Rio Grande Railroad Company had constructed its railway from Denver to Colorado Springs, and contemplated extending it thence to the coal fields of Fremont county by the most advantageous route, and that the citizens of Pueblo county, desiring such extension *via* the town of Pueblo, made their petition, signed according to law, praying the board of county commissioners of Pueblo county to order an election for voting to subscribe \$50,000 in this behalf, and to pay the same in the bonds of the county.

That, pursuant to this petition, a special election was ordered, the notice reciting the proposition upon which said subscription was to be made. Thus far it would appear that the acts performed were done by the commissioners on the one hand, and the people on the other; between the principal and the agents. There is nothing in the record to show that the propositions voted on were submitted by the company, or that they had any knowledge of the same. The connection of the corporation with the transactions only becomes apparent when, through their attorneys, they appear before the board and demand the bonds of the county. Clearly, then, according to the recitals of the writ, there is nothing that would indicate the existence of an obligation on the part of the company.

Had the commissioners, on behalf of the county, brought suit to compel the issue and delivery of stock, the company could well have replied under the facts set forth in this record: "We never contracted to deliver any. The election

was a movement between the people and the commissioners; we made no propositions. The record fails to disclose any agreement, and hence there is nothing on which to predicate a claim against us." And taking the facts set forth, no sufficient rejoinder could have been made by the board. It is insisted, however, that when the proposals were approved by the people, it then became the duty of the board to subscribe. As stated above, it does not appear that these propositions were submitted by the company. If they were not, then the transaction was purely one between the people and their agents, the company being in no sense a party or privy thereto. Under a statute whose language is identical with that of our own, it was held that the vote of the people could create no obligation on the part of the county or railroad company. Mr. Justice NELSON, in answering the argument "that the duty of the board to issue stock after the election was imperative," said "that a subscription was necessary to create a contract binding upon the county, on one side, to take the stock and pay in the bonds; and upon the other, to transfer the stock and receive the bonds for the same. Until the subscription is made, the contract is unexecuted and obligatory upon neither." *Aspinwall et al. v. Davis County*, 22 How. 367; *Commissioners of Crawford Co. v. The L. N. A., etc., R. R. Co.*, 39 Ind. 192; *Union Pacific R., etc., v. Davis Co.*, 6 Kan. 256. In the absence of a contract, we see no obligation resting on the county which the complainants can enforce. It is very questionable whether the proceedings were valid in any sense. The order for the election was made at a special meeting, and there is nothing in the record to show that that meeting was appointed at a regular session of the board.

We are of the opinion that the court committed no error in sustaining the demurrer and refusing the writ.

Judgment is

Affirmed.

HUGUNIN v. McCUNNIFF et al.

TRESPASS — *quare clausum* — plaintiff's possession. To maintain trespass, *quare clausum*, the plaintiffs must have actual or constructive possession of the *locus in quo* at the date of the alleged trespasses.

H. and others, defendants, conveyed a mine to C., and delivered a shaft and level in the mine to plaintiffs as agent of C., retaining a certain other shaft and level in the same lode, not connected with the first, apparently claiming that part as upon another lode. C. contracted to sell to plaintiffs the same mine, and gave them a bond for a deed. Afterward, by sinking and stoping, defendants' took ore from the level and shaft retained by them, but the opening was not extended longitudinally. In trespass for the value of the ore so taken, *held*, that the plaintiffs had not actual or constructive possession of the *locus in quo*, because:

1. Throughout the length of the level retained by them, the defendants had actual possession of the vein, from the surface to the center of the earth.
2. The plaintiffs' possession, whether referred to the bond from C. to them, or as vendees and licensees of C., cannot be extended to the part actually occupied by defendants.
3. The circumstance that C. purchased for the benefit of plaintiffs cannot be effectual in a court of law, since he held the legal title.

Title acquired after suit brought. A title to the premises acquired by plaintiffs after the commencement of the suit, will not avail, since the rights of the parties must be determined by their position at the time of the trespasses.

Appeal from District Court, Clear Creek County.

THE action was trespass, commenced August 30, 1872, by Thomas McCuniff and Eli S. Streeter, against James R. Hugunin, James Lees and David Lees. In the first count the plaintiffs declared for ore taken from the Elkhorn lode. In the second count, for ore taken from the Zillah lode. In the third count, for ore taken from the Zephyr lode. The fourth count was *de bonis asportatis*. The defendants pleaded not guilty and *liberum tenementum*. The evidence was very voluminous, and it will only be necessary to mention several points which were clearly established. But one lode was in controversy, and that had been cut as early as December, 1871, by the defendant Hugunin, in a tunnel opened by him and called the Eaglebird tunnel. This tun-

nel had been opened for a considerable distance beyond the line of the lode, and there was some evidence that the tunnel followed the lode, together with what was known and called the Eaglebird lode, for a distance of 25 or 30 feet, in a westerly direction. East of the tunnel, a level had been opened for a short distance upon the line of the lode in controversy, and in this level, the defendant Hugunin sunk a shaft, called by him the Casket shaft. At a considerable distance east on the same lode was what was called the Elkhorn shaft, and from that a level opened westerly upon the vein for a short distance. A controversy existed respecting the title to the property between the plaintiffs and the defendant Hugunin and others, and William H. Cushman acting for and on behalf of the plaintiffs in this suit, but apparently without communicating to those with whom he was dealing, the fact that he was acting otherwise than for himself, purchased the property and paid therefor or agreed to pay \$75,000.

The contract of purchase was evidenced by an agreement dated March 5, 1872, and several of the parties thereto who were not parties to this suit, but who had, apparently, authority from Hugunin, delivered the shaft and level last mentioned to the plaintiffs in this suit, who were acting as the agents of Cushman in that matter. On the 16th day of March, 1872, the defendant Hugunin, and the others who claimed title to the lode, conveyed the same to Cushman. The title was taken by Cushman in his own name, apparently, to secure him for certain moneys which he had advanced toward the purchase of the property. On the 1st of May following, Cushman executed to plaintiffs a bond whereby he covenanted to convey the same property to them upon the payment of certain moneys due him in the time and manner therein specified. Pursuant to this bond, on the 16th of May, 1873, which was long after this suit was begun, he executed a deed to the plaintiffs for the same property. After the purchase by Cushman, in March, 1872, the plaintiffs opened the level westward from the Elkhorn shaft on the line of the vein, and about the 24th of August,

1872, came into the Casket shaft and level, which, as before stated, had been opened by defendant Huganin and others to the eastward from the Eaglebird tunnel, and thus it was demonstrated that those openings were upon one and the same vein. After the purchase by Cushman and prior to the commencement of the suit, the defendants stoped out the vein to a considerable height in the Eaglebird tunnel and in the level eastward from that which the defendants opened before Cushman purchased and a shaft was sunk in that level, but it did not appear that this opening was extended eastward or westward by the defendants.

Many other points were mooted, but none of them are discussed in the opinion of the court.

The plaintiffs had judgment and the defendant Huganin appealed.

Messrs. W. S. & L. C. ROCKWELL, for appellant.

Mr. W. R. GORSLINE, Mr. WILLARD TELLER and Mr. G. B. REED, for appellees.

WELLS, J. Had this action been in the name of Cushman, it is altogether probable that the appellant would, by his deed of March 19th, 1872, be estopped to assert that the premises mentioned therein did not exist to the extent to which he had assumed to convey them; or that his grantee did not, by the delivery of part in the name of all, become invested with exclusive possession of the whole. Other considerations seem, however, to govern the action of the present plaintiffs. By the strict rule which anciently obtained in the English courts, trespass *quare clausum fregit* lay only by one having a possession, in fact, of the premises trespassed upon, at the time of the trespasses. It may be inferred from what is said in *Sullivan v. Clements*, 1 Col. 261, that with us a constructive possession suffices; and this accords with the current of decision in this country. Whether the defendants in error may maintain the present action depends, therefore, upon whether, at the date of the

alleged trespasses, they had possession, either actual or constructive, of the *locus in quo*. The evidence given upon the trial tended to show that the Elkhorn lode was discovered in the Eaglebird tunnel in December, A. D. 1871, and that, prior to the conveyance executed by Hugunin and his associates to Cushman, the defendant, drifting westward in the Eaglebird tunnel, had passed the point of junction for a considerable distance, and had also drifted westward, upon the Elkhorn crevice, which Hugunin then designated and claimed as the Casket, for the distance of 35 or 40 feet. Work on this drift was suspended before the conveyance to Cushman, and was never resumed, so that from the day of the delivery of possession to Cushman's agent, down to the bringing of this suit, the defendants' workings seem not to have advanced eastward upon the Elkhorn beyond this point; westward of this point, therefore, the defendants always retained actual possession of all their previous workings, both upon the Elkhorn and upon the Eaglebird, and eastward of this point the defendant never intruded upon the possession of the plaintiff, if plaintiff had possession there. Westward of this limit, too, as we conceive, the defendants' possession extended to all depths and levels from the surface to the center of the earth, so that the stoping done in the drift upon the Elkhorn, and the sinking of what is called the Casket shaft, was within the bounds of their own actual occupancy. The plaintiffs, as Cushman's vendees, had received possession of the discovery shaft upon the Elkhorn lode, and of all the workings proceeding from that shaft. The question is, therefore, whether out of their possession of this part of the lode the law implies possession of the residue, including what remained in possession of the defendants. The vendee of lands, in an executory contract which is silent in this respect, is not entitled to possession pending performance; and when admitted thereto, he is said to hold as licensee of his vendor. *Burnett v. Coldwell*, 9 Wall. 290. Whether his possession may properly be said to be a possession under the contract, so that the writing may be referred to, to

determine its limits and bounds, is perhaps not altogether clear. If, as was held in *Kellog v. Kellog*, 6 Barb. 116, and *Talbot v. Chamberlain*, 3 Paige, 219, his possession is to be regarded as a right entirely distinct from the equity given by the contract, then it would seem he must be regarded as holding only to the extent of his *pedis possessio*. In this view, the plaintiffs were not in possession of the *locus in quo*, and cannot maintain the present action. If, on the contrary, we refer their possession to the written contract of May 1, 1872, which was executed after their possession accrued, but in pursuance of a parol agreement previous thereto, its effect was to give to the plaintiffs a constructive possession of all within the limits prescribed in that writing, and without their *pedis possessio*, so far as not in actual possession by another. Constructive possession always yields to a possession in fact incompatible with the implication of law which creates it, and the plaintiffs are no better entitled to their action, under this view of the matter, than under the other; for the defendants, at the inception of the plaintiffs' right, had an actual possession, which, whether adverse to Cushman, or in subordination to his title, was inconsistent with the idea of a constructive possession in the plaintiffs; for the defendants, if not holding adversely to Cushman, must be regarded as his tenants at will; and the actual possession of tenant at will excludes the possibility of an implied possession in another tenant at will, or licensee, holding under the same proprietor. The right of the plaintiffs to the possession of what was delivered into their possession was not superior to the right of the defendants to the possession of that which they retained. Plaintiffs held as licensees merely, and the defendants in a capacity not inferior to that, certainly; and there is as good ground to obliterate the possession of the plaintiffs, as of the defendants. There is as good reason to extend the possession of the defendants, as of the plaintiffs. In neither view, therefore, can the defendants be said to have had a possession,

either actual or constructive of the *locus in quo*, at the date of the alleged trespasses.

Allusion was made in argument, to the circumstance, that from the beginning of the negotiation, which was consummated by his purchase, Cushman acted on behalf of the plaintiffs, and with the purpose that the title should eventually pass to them. But this does not affect the question; the estate passed to him, and remained to him, at the time when these trespasses were committed; he was entitled to the exclusive possession, not only as against the defendants and third persons, but as against the plaintiffs themselves, and the trust upon which he purchased cannot, in a court of law, be considered.

Neither does the conveyance, which, after the institution of the present action, Cushman executed to the plaintiffs, strengthen their case. The rights of both parties must be determined by their position at the time of the trespasses. Defendants, up to the date of that conveyance, were tenants at will to Cushman, and are accountable to him for the manner of their occupation, and to give the conveyance effect from a prior date will deprive Cushman of a right of action which before the conveyance was exclusively in him and with which he has not by express words parted; or else to create in these plaintiffs a right of action cumulative to that in Cushman, which will be in effect to subject the defendants to a double accountability for the same transaction. If Cushman's conveyance shall, as against his tenant at will, have relation back to the contract of purchase, no controlling reason is perceived why the same effect might not be accorded to it as against Cushman himself, had he committed the acts complained of; this would be to create, by fiction of law, a constructive possession in those who had neither possession in fact nor the right of possession as against one in whom both were invested.

The cases of *McMellan v. Hafely*, 2 Car. & K. 89; *Davis v. Evans*, 5 Ired. 529; *Presnell v. Ransom*, 8 id. 507; *Rich v. Baker*, 3 Denio, 80, appear to be in point.

What has been said proceeds upon the idea that the

defendants are not shown to have invaded the possession of the plaintiffs; if such invasion of their possession shall hereafter be shown, they will be entitled to recover such damages only as may serve to compensate them for that disturbance of their possession. For the injury occasioned to the substance of the estate, by the mining and carrying away of the ores, the defendants' landlord is alone entitled to recover. *Starr v. Jackson*, 11 Mass. 519; *Cannin v. Hatcher*, 1 Hill (S. C.), 260; *Spencer v. Weatherby*, 1 Jones (N. C.), 327; *Bulkley v. Dolbear*, 7 Conn. 233.

Inasmuch as the litigation, if it should proceed further, will probably be conducted between other parties, we reserve opinion of the other points presented by the record.

The judgment of the district court is reversed and the cause will be remanded for further proceedings, according to the views here expressed.

Reversed.

MASON v. THE PEOPLE.

ABATEMENT — *another indictment pending.* In a prosecution by indictment for larceny, a plea in abatement which sets up another indictment for the same offense presented at a former term of the same court, is bad on demurrer.

VERDICT — *in larceny — value of property stolen.* Upon an indictment for larceny, it is not necessary that the jury should find specially the value of the property stolen. A general verdict of guilty affirms the truth of all matters charged in the indictment, the value of the property included.

PRACTICE — *instruction as to value of property stolen.* If there is a doubt upon the evidence as to whether the offense is grand or petit larceny, counsel should pray an instruction to the jury to find the value.

Error to District Court, Arapahoe County.

THE facts relating to the plea in abatement are sufficiently set out in the opinion. The indictment contained several counts, in each of which the defendants were charged with the larceny of four mules, and some of the mules were alleged to be of the value of \$300, and others of the value of \$200. The jury returned a general verdict of guilty

against plaintiff in error, and Schræder, who was tried at the same time, was acquitted.

Mr. H. R. HUNT, for plaintiff in error.

Mr. M. A. ROGERS, district attorney, *contra*.

BELFORD, J. The first error assigned is the sustaining the demurrer to the plea of abatement filed by the plaintiff in error. It appears that at the April term of the court, an indictment was found charging Thomas Mason, John Chase, Albert Schræder and Albert G. Brown with larceny. No trial being had at that term, the grand jury, at the ensuing October term, found another indictment against the same parties for the same offense. Mason set up in his plea the former indictment to abate proceedings on the second. To this plea a demurrer was sustained. Another indictment pending for the same offense, constitutes no ground of abatement. *Dutton v. The State*, 5 Ired. 533; *Com. v. Drew*, 3 Cush. 279; Wharton's Am. Crim. Law, 521. The verdict of the jury failed to specify the value of the goods, and it is strenuously insisted that no valid judgment could be pronounced on such verdict. The indictment charges the goods taken to be of the value of \$500. The evidence not being set forth in any bill of exceptions, we must presume that it fully sustained the allegation in the indictment. The verdict being a general one, it must be regarded as a finding of the truth of all the material averments constituting the offense charged, including the allegation of value, so far as that is material. *Schoonover v. The State*, 17 Ohio St. 294; *State v. White*, 25 Wis. 359; *United States v. Tyler*, 7 Cranch, 285. When the evidence fails to fully disclose the precise value of the goods, or is conflicting on the subject, and embarrassment may be experienced by the court in applying or adjudging the punishment, the counsel for the prisoner should pray an instruction and have the court direct the jury to make a finding as to the value. This course was not pursued. We are unable to find any error in this record.

The judgment will be

Affirmed.

TAYLOR v. McLAUGHLIN.

PRACTICE — *with issues pending judgment nil dicit is irregular.* If, after issue joined, the defendant does not appear when the cause is called for trial, a jury should be impaneled to try the issue, and it is error to enter judgment *nil dicit*.

Error to Probate Court, Park County.

THE action was upon a promissory note, and the defendant filed several pleas as stated in the report of this case at the last term, when judgment was reversed upon another ground. *Ante*, p. 12.

After the case was remanded, the plaintiff replied to the several pleas, and at the August term of the probate court the defendant not appearing, judgment of default was entered against him. Upon the succeeding day the plaintiff, by J. M. Paul, his attorney, moved the court to set aside the judgment, which was accordingly done, and the plaintiff then moved for judgment *nil dicit*. The record recites that the defendant, being three times solemnly called, came not, and that the damages were assessed by the clerk, whereupon the court gave judgment against defendant for \$772.50 and costs.

MR. ORRIS BLAKE, for plaintiff in error.

MR. M. BENEDET, for defendant in error.

BELFORD, J. It is difficult to tell whether the judgment rendered in this case is for want of appearance or for want of pleas. It purports to be a judgment *nil dicit*. If we regard it as such, then it is clearly erroneous; such a judgment could not have been entered with issues of fact existing and undisposed of. *Gibson v. Smith*, 1 Col. 7; *Keeler v. Campbell*, 24 Ill. 287.

If, after filing his pleas, the defendant failed to appear and

participate in the proceedings, a jury should have been impaneled to try the issues and assess the damages. This precaution was not observed, and the judgment must be reversed. *Stevens v. Jones*, 1 Col. 67.

Reversed.

FORD v. ROCKWELL.

PLEADING — *when declaration should be special.* If one take his nephew to the house of another, and request the latter to provide board, clothing and other necessities for the nephew and promise to pay for the same (there being nothing to show a promise by the nephew), this is not a collateral undertaking, and it is not necessary to declare upon it specially. When the contract has been fully performed by the plaintiff, he may recover on the common counts for goods furnished and for services rendered.

DEPOSITION — *by whom taken.* A *dedimus* or commission to take the testimony of a non-resident witness, issued pursuant to the statute (R. S. 811), confers authority upon the person to whom it is directed to administer an oath to the witness, and it may be directed to any one for that purpose selected, although such person is not an officer of the State or territory where he resides, or of this territory.

Appeal from District Court, Arapahoe County.

THE declaration contained only the common counts, and the trial was upon the general issue.

Appellant moved to suppress the deposition of David S. Rockwell, the present appellee, and the plaintiff below, upon the ground that it was taken in the State of Connecticut by one Lee, who was not, at the time of taking the same, a justice of the peace, or other officer of the State of Connecticut, having authority to administer oaths. Nor was he a commissioner appointed by the governor of this territory pursuant to the statute (R. S. 114). There was nothing in the commission or the return thereto, to show that he was such officer, and obviously he had no other authority than was conferred by the commission itself. The motion was overruled, and appellant excepted.

Mr. L. B. FRANCE, for appellant, who relied very much on *Stale v. Langley*, 34 N. H. 532, in support of the motion to quash the deposition.

Messrs. BROWNE & PUTNAM, for appellee.

BELFORD, J. The declaration contained only the common counts. It appears from the record that in the fall or summer of 1866, the appellant took his nephew, Frank Ford, to the house of the appellee at New Canaan, Conn., and desired Rockwell to receive the said nephew as a boarding scholar. Ford agreed to pay \$350 for two terms, of 22 weeks each, which said amount was to cover board, washing and tuition of Frank during the 44 weeks of each year. Rockwell was further required to supply the said Frank with clothing, boots, shoes and books, and all other things needed for his comfortable maintenance and for the prosecution of his studies; and the said Hiram F. Ford agreed to pay for the same. It is claimed that the declaration should have been special. We think not. When the contract has been performed the plaintiff may recover on simple contract the price of the services under an *indebitatus assumpsit*, but the contract must regulate the amount of the recovery. *Bank of Columbia v. Patterson's Adm'rs*, 7 Cranch, 299. The promise in this case was a direct undertaking on the part of Ford and not a collateral one.

It is claimed that, inasmuch as the deposition used on the trial was taken before an unofficial person, he had no power to administer an oath to the witness. The statute authorizes the issuing of commissions to such persons, and their appointment as commissioners carries with it all power necessary to execute the commission. It is claimed that the damages are excessive. Rockwell testifies that Ford was indebted to him in the sum of \$350. There is no evidence to the contrary, and this amount the jury found due.

The judgment of the court below is

Affirmed.

APPOINTMENT OF COMMISSIONER TO TAKE DEPOSITION out of State: See *Glen v. Bush*, 3 Colo. 22.

CLAYTON v. SPENCER.

DENVER TOWN SITE — *title under act of congress.* An actual occupant and owner of improvements upon a lot in the city of Denver, at the date of the entry of the town site under the act of congress of May 28, 1864, for the relief of the city of Denver (18 Stat. at Large, 94), is entitled thereto as against one who derives title from the Denver Town Company and not by possession or occupation.

Upon bill filed by a grantee of such occupant and owner of improvements to compel a conveyance and enjoin an action of ejectment, a deed having been made to the respondents by the probate judge without proceeding to settle the title pursuant to the statute (R. S. 631), the relief was granted.

POWER OF ATTORNEY — *by husband and wife.* Under a power from husband and wife which conferred authority to sell and convey all their real estate in the county of Arapahoe, it appearing that they owned no property jointly, and that the husband owned none in that county, the wife's separate estate may be conveyed.

PRACTICE — *how relief may be granted.* Where relief is sought upon the ground that respondents have obtained from the probate judge the legal title, which of right belongs to complainant, the decree of the court may provide for transferring the title to the latter by deed to be executed by respondents, and in default thereof by a master.

Appeal from District Court, Arapahoe County.

THE bill alleged that lot 12, in block 95, in the east division of Denver, was a portion of the lands entered by James Hall in trust for the use and benefit of the rightful occupants and *bona fide* owners of the improvements thereon, on the 6th day of May, 1865, pursuant to the act of congress of May 28, 1864, for the relief of the citizens of Denver; that in the year 1864, Mary J. McLaughlin received a deed for said lot from Henry J. Rogers, who claimed to have title thereto; and that, soon after she received said deed, the said Mary entered into occupancy and possession of said lot and remained therein until the 18th day of March, 1867; that, on the day last mentioned, the said Mary conveyed the said lot to Joseph E. Bates and Joseph B. Coffield, who afterward conveyed the same to Lucretia Holman, who conveyed to complainant. The bill also alleged, that com-

plainant filed with the said Hall, within the time required by law, her claim for the said lot. It was also alleged, that, through several mesne conveyances, George W. and William M. Clayton claimed to have title to said lot; that George W. Clayton also filed with said Hall a claim for said lot, and that Omer O. Kent, successor in office to the said Hall, on the 27th of February, 1866, without any adjudication of the rights of the parties, or any hearing with reference thereto, conveyed the said lot to the said George W. Clayton; that on the 21st of January, 1871, the said George W. Clayton commenced an action of ejectment in the probate court of Arapahoe county, to recover possession of said lot. The title of the respective parties, and the facts respecting the entry of the lands and the conveyance of the same by each of the probate judges to his successor in office, were set out at length. The bill prayed that the defendant George W. Clayton should be enjoined from prosecuting the said action of ejectment, and that the defendants should be required to convey their title to complainant. The material facts were denied in the answer, which was put in without oath, and the proofs were taken before a master. Upon his report it appeared that Mary J. McLaughlin purchased the lot from Rogers in the year 1864, at which time there was a barn upon the lot, and a house standing partly upon this lot, and partly upon the adjoining lot number 11; that both lots were inclosed by a fence, and that the said Mary made some further improvements prior to April 14, 1865; that she occupied the premises and rented the same until March, 1867, when the lot was conveyed by Chever, as attorney in fact of the said Mary, to Bates and Coffield, from whom complainant derived title through Lucretia Holman. The power of attorney to Chever was executed by Enos and Mary J. McLaughlin, and conferred authority in the words following :

“To enter into and take possession of all property, both real and personal, wheresoever situated, to us belonging in the county of Arapahoe and territory of Colorado, and to let and demise the same, and grant, bargain, sell and convey

any or all, or any portion of such real and personal property," etc. It was also in evidence that the said Enos and Mary J. McLaughlin owned no real estate jointly, and that the said Enos owned none in his own right in Arapahoe county, at and after the giving of the said power of attorney until the making of the said deed to Bates and Coffield. It was admitted upon the record that the Denver Town Company assigned the said lot to W. E. Sisty, from whom the defendants claimed title. There was no evidence to show that the defendants, or either of them, or that any person under whom they claimed, had at any time held possession of the lot.

The decree of the court required the defendants, George W. and William M. Clayton, to remise, release, and quitclaim unto the complainant all the estate, title and interest which they acquired by the deed from Omer O. Kent, probate judge, to them within 60 days from the date thereof, and if the said George W. and William M. Clayton should fail to make such deed, then the master in chancery should make the same. The said defendants were enjoined from prosecuting the said action of ejectment, and from claiming any interest in or to the lot. From this decree the defendant William M. Clayton appealed.

Messrs. SAYRE & WRIGHT, for appellant.

Mr. H. R. HUNT, for appellee.

BELFORD, J. In the view I take of this case it is immaterial to inquire as to the character of Rogers' title.

The evidence shows that Mary McLaughlin, through whom the appellee claims title, was in the actual occupancy of this property prior to, and at the date of the entry, and that her possession continued until March, 1867. The record further shows that she made her filing within the 90 days, provided by law, and upon so doing, she was entitled to a conveyance. Clayton's title is derived through the Denver Town Company, and it does not appear that either Clayton

or his grantors were ever in the actual occupancy of these lots. There was no way of deriving title except as pointed out by the act of congress and the act of the legislature. And neither the act of congress nor that of the territorial legislature recognizes any claim in this company.

If the Denver Town Company had no right, it could impart none. Objection is made to the deed executed by Chever, as attorney in fact of Mary and Enos McLaughlin. This letter authorized Chever to convey all the property belonging to Mary and Enos, and it is insisted that, inasmuch as lots 11 and 12 were the separate property of Mary, the attorney could not convey them under this power. The proof shows that they owned no property in common, and Enos had none in his individual right. The only property owned by either was the lots in controversy, and they belonged to Mary. There was, then, no joint estate to which the letter of attorney could apply. Such being the case, it seems clear that the intention in making the letter was to authorize Chever to convey these lots. *Dodge v. Hopkins*, 14 Wis. 636; *Dolton v. Cain*, 14 Wall. 476. According to the rule laid down in *Silver v. Ladd*, 7 Wall. 228, the decree is not improper in form.

The decree of the court below is

Affirmed.

TOWN-SITE TRUST — Actual occupants are entitled to lots in a town site, as against those who never have been in possession nor owned the improvements, and claim only under a conveyance from a third party, and such persons cannot be admitted, after deed to the occupant, to contest his title: *Smith v. Pipe*, 3 Colo. 186; *Adams v. Binkley*, 4 Colo. 248; *Freemore v. Keithman*, 6 Colo. 125; *Anderson v. Bartels*, 7 Colo. 261; *Aspen v. Aspen T. & L. Co.* 10 Colo. 203.

ATKINSON v. ATKINSON et al.

PLEADING — *when it should be under oath.* Where, to an action on a promissory note, the defendant pleaded the statute of limitations, and the plaintiff replied a new promise in writing within six years, the action was upon the new promise.

And the rejoinder to the replication having been put in without oath, proof of the defendant's signature to the new promise was not required.

BILL OF EXCEPTIONS — *when necessary.* Where a cause is tried to the court without a jury, and no exception is taken to the judgment of the court, the question of damages is not open to review in this court.

Error to District Court, Arapahoe County.

DEFENDANTS in error in the court below declared upon a promissory note, dated August 18, 1860, payable two months after date, for the sum of \$1,000, which they alleged was made by plaintiff in error and others, by the name and style of Atkinson, Madden & Co. Of the defendants, plaintiff in error only was served, and he pleaded non-assumpsit, and that the action did not accrue within six years. To the second plea the plaintiff replied that within six years, to wit: on the 1st of June, 1866, the defendant made his certain indorsement in writing upon the back of the said promissory note, and which said indorsement he, the said John Atkinson, then and there duly signed, which said indorsement bore date, etc., in and by which indorsement he, the said John Atkinson, acknowledged the payment by him to the said plaintiffs of the sum of \$72 in part payment of the said sum of money in the said promissory note mentioned, etc. Upon this replication, issue was joined and the cause was tried to the court without a jury.

Messrs. BROWNE & PUTNAM, for plaintiff in error.

Messrs. FRANCE & ROGERS, for defendants in error.

HALLETT, C. J. The action was upon a promissory note to which plaintiff in error pleaded *actio non accrevit infra sex annos*, and defendants in error replied a new promise in writing, and thereupon issue of fact was joined.

A demurrer to the replication would have presented the question whether the action was rightly brought on the note, but by rejoining to the replication plaintiff in error passed that question by and it cannot be considered. Upon the pleadings the action stands upon the new promise in the same way as if that had been declared on with the note as an inducement. *Little v. Blunt*, 9 Pick. 488. And if the action was upon the new promise by the 14th section of our

Practice Act (Rev. Stat. 506), plaintiff in error was required to put in his rejoinder under oath if he desired to call for proof of the indorsement. If defendants in error had declared upon the new promise, the case would have been precisely within the statute, and it cannot be different where an issue is made, as to the fact at a subsequent stage in pleading. We see no error in receiving the note with the indorsement thereon, and as to the amount of the judgment, plaintiff in error is not in a position to complain.

The cause was tried by the court without a jury, and we have often held that in such case error cannot be assigned upon the judgment when no exception was taken at the time the judgment was rendered. *Phelps v. Spruance*, 1 Col. 414. To the ruling of the court in admitting the note to be read in evidence, plaintiff in error duly excepted, but he made no objection to the judgment.

The judgment of the district court is affirmed, with costs.

Affirmed.

SKINNER v. BESHOAR.

PLACITA — *whether necessary.* A record of a probate court should show the style of the court, the day when, and the place where, it was convened, the judge who presided, and what other officers were present, and failing in this the judgment will be reversed.

WRIT OF ERROR — *record not properly authenticated.* Although in the absence of a placita it cannot be certainly known that what purports to be a record of a court is in fact such, yet, if it carries upon its face an adjudication between the parties, the writ of error will lie.

ATTACHMENT PROCEEDINGS — *amendment of writ and affidavit.* If a writ of attachment be not properly attested, it may be amended pursuant to the statute (R. S. 55).

And so also an affidavit in attachment may be amended by affixing the jurat when that has been omitted.

Where no affidavit was filed. But if no affidavit was made or filed before the writ of attachment was issued, a motion to quash, based on that ground, should prevail.

Error to Probate Court, Las Animas County.

At the head of the transcript were the words, "Regular August Term of Probate Court, 1872;" following this was the title of the cause, with the affidavit, the writ, and the declaration in the order in which they are here named.

The jurat in the affidavit was dated August 5, 1872; the prefatory statement of the clerk showed that it was filed June 26, 1872, which was the date of the writ.

The writ was attested as follows:

Given under my hand and seal this 26th day of June, A. D. 1872.

DANIEL S. TAYLOR,
(Probate seal) *Probate Judge.*

M. BISHOP, *Clerk.*

By JEROME G. ABBOTT, *Deputy.*

The judgment was in the usual form.

Mr. A. W. ARCHIBALD, for plaintiff in error.

Mr. G. W. CHAMBERLAIN, for defendant in error.

WELLS, J. This record, as certified to us, sets forth divers proceedings between these parties upon different days, and at different terms of the court below, but omits to show at what day or place these several terms were convened, or who presided therein, or what ministerial officers attended. The first error assigned brings this omission into view.

Except in the case of special terms of the district courts for which provision is made, all the courts of law are appointed to be held at particular times and places, which are designated by public law. Upon the proposition that if the presiding justice assumes to convene the court at a time or place other than that fixed by the statute, his proceedings and determinations will lack the obligatory force

of judgments, there can scarcely be two opinions, and notwithstanding what was said in argument, we are of opinion that the record must show upon its face, that the requirements of the law are observed. The records of the courts of superior jurisdiction import absolute verity; they ought, therefore, to bear within themselves evidences of their own identity and authenticity. The name and style of the court of whose proceedings they assume to be the memorial, should be set forth, in order that all who read may know to what authority to ascribe the determinations therein recorded. It ought to appear at what day and place the court assembled, for if at a day or place other than that appointed by law, no suitor would be required to attend, and the adjudication would bind no one. It ought also to be shown that the proper functionary presided; otherwise, at least, if the one who assumed to give judgment were a mere intruder, without color of authority, the same consequences would result. An omission in all these respects will render it impossible to determine at what day recognizances of bail have become forfeit, or defendants in default, or what justice may properly authenticate bills of exception, and many other like doubts and uncertainties will arise, impossible of resolution, without resort to external sources of evidence, which is to turn the records of the courts into parol. Doubtless, where the question arises collaterally and within limits, this may be admissible, *e. g.*, if the record omit to show the style of the court, proof of the place or custody wherein it is kept may be received to explain this; this would, perhaps, be necessary in any case, and the day of the meeting and adjournment of the court may probably be also established by parol evidence, where in collateral issues these become material. But a resort to parol may in many cases breed doubts and difficulties, to which those interested ought not to be subjected. Every one in whose favor, or against whom an adjudication has once been had, has the right to insist that he shall not, if afterward called in question touching the same matter, be required to depend upon the infirmity of human memory

to establish the time or place at which the court sat, or the identity of the record wherein the former adjudication is preserved. To omit to set forth these particulars, has, therefore, been held to be error. *Planting Mill Lumber Co. v. Chicago*, 56 Ill. 304.

But the writ of error is the process provided by the common law to afford relief against an erroneous judgment; it lies only to a judgment, and debate has arisen whether the omissions of the record now under consideration have not the effect to turn all the proceedings into absolute nullities. If the record transmitted show that no judgment at all has been given, or that though it contain words in the form and similitude of a judgment, they lack the binding force of the law's adjudication, there would seem to be plausible ground to assert that the party complaining should seek his remedy in another forum. And so, where the record contained only an informal entry, succeeding the title of the cause in these words, "judgment rendered for the plaintiff in the above-entitled suit, at the above-named term by the court, for the sum of \$78.37 damages and his costs, against the said defendant," the writ of error was summarily dismissed. *Wheeler v. Scott*, 3 Wis. 364.

Culver v. Leary is more precisely in point to the present case. The record there showed that what is termed in the practice of Louisiana the signing of judgment, had occurred in vacation; and this being brought in question, it was held to be a judicial act, whereby the judgment is completed and made executory, and not to be capable of being performed in vacation; and because, by reason of this irregularity, the judgment was not yet made final, the signing judgment in vacation being a mere nullity, the appeal was dismissed as premature. 21 La. Ann. 306. In *Wicks v. Ludwig*, the defendant justified, under a writ of restitution issued upon a former judgment, given upon the same matter of controversy, between the same parties. Upon the trial it appeared that the judgment relied upon had been given in vacation, in pursuance of a stipulation of parties; the district court nevertheless received the record as conclusive. In

the supreme court it was insisted for the appellee that the supposed judgment being regular upon its face, could not be questioned collaterally, but only by appeal. But said TERRY, C. J., "appeals can be taken only from judgments of a court; here there is no judgment of any tribunal having jurisdiction; the proceeding was a mere nullity." 9 Cal. 175. In the same case is quoted the language of the court in *Doss v. Waggoner*, 3 Texas, 515, which would seem to be much in point. But the same court had, in three instances before that, entertained appeals from judgments rendered, as appeared of record, in vacation, and without, so far as appears, the sanction of the consent of parties. *Smith v. Chichester*, 1 Cal. 409; *Coffinberry v. Howill*, 5 id. 493; *Peabody v. Phelps*, 7 id. 53; and these accord with the current of decision elsewhere. *Galusha v. Butterfield*, 2 Scam. 227; *Davis v. Fish*, 1 G. Gr. 406; *Gregg v. Cooke*, Peck, 82; *State v. Roberts*, 8 Nev. 240. Certainly it would seem more consonant with the good order of society, and the stability of titles, to permit such counterfeit and void presentments to be questioned and set aside in due order, upon a proceeding looking directly to that end, execution being superseded in the meantime, than to leave the party aggrieved to await the issuance of process, and then to resist its execution, *manu forte*; or to restrain it by some counter process; or submitting to a sale of his estate, to afterward assert title still continuing in him by reason of the invalidity of the judgment. In *Hoehne v. Trugillo*, 1 Col. 161, it was determined that error might be maintained to a judgment less certain and formal than that in *Wheeler v. Scott*. By this case, therefore, this court seems to be committed to the doctrine, that error shall lie to review what assumes to itself the force of an adjudication in law, even though, upon the face of the record, it may want the essentials of validity.

In what is said as to the apparent nullity of the record in question we must be understood to speak of the record as presented to us; we must not be supposed to deny the power of amendment in the court below; nor the propriety of stay-

ing proceedings here, upon application for that purpose, in order that opportunity for such amendment may be afforded. In the present case the cause has been submitted, upon this record, as it now is, with all its imperfections. A resolution of the question is therefore inevitable.

Inasmuch as the cause must be remanded for further proceedings, it may be well to advert to the questions which may possibly be presented by the motion to quash the writ of attachment. The writ in question appears to have been issued by the probate judge. The subscription thereto, of the name of the clerk and his deputy, neither add to nor impair its effect. The omission of the name of the judge and the averment that it bears the seal of the court from the attestation clause are matters which may be amended.

The affidavit, which is set forth in this record, appears to have been made and filed long subsequent to the issuance of the writ, but the writ recites that an affidavit had been made. This probably accords with the truth, and if so, the omission of the officer before whom the oath was taken to affix his jurat, or of the judge to file it, at the time when it was deposited in his office, may also be corrected by amendment. But, if no affidavit was ever in fact made, or if made, it was not deposited in the probate court, before the writ issued, the writ must, if this motion proceeds upon this ground, be quashed, and the estate attached be discharged. The judgment is reversed, and the cause will be remanded for further proceedings according to law.

Reversed.

WRIT OF ERROR WILL LIE to review what assumes to itself the force of a judgment, although on the face of the record it may want the essentials of validity: *Cooper v. American Cent. Ins. Co.*, 3 Colo. 321; *Bean v. People*, 6 Colo. 99. What is sufficient to reverse a judgment can never be cause to quash a writ of error: *Vance v. Rockwell*, 3 Colo. 248.

ARCHIBALD v. THOMPSON.

ATTACHMENT — *amending the writ.* A writ of attachment which is returnable to the second term of court after its date may be amended, and therefore it is not void.

JUSTIFICATION — *in trespass under defective writ.* In trespass against a sheriff for levying on goods under such writ, he may justify the seizure.

Error to District Court, Las Animas County.

THE facts are sufficiently stated in the opinion.

Mr. A. W. ARCHIBALD, plaintiff in error, in person.

No appearance by defendant in error.

BELFORD, J. This was an action of trespass, brought by Archibald against Thompson, to recover damages for the alleged wrongful seizure of certain goods belonging to the plaintiff in error. The defendant, Thompson, justified under a writ of attachment, sued out of the probate court of Las Animas county, on the 22d day of November, 1872, in a suit then pending, wherein John P. Smith was plaintiff and Archibald was defendant. The only error assigned is the ruling of the court below in allowing the writ of attachment to be read in evidence. The writ was tested and dated November 22, 1872, and made returnable to the February term, 1873. A term of court intervening between the suing out and the return day of the writ, it is claimed by the plaintiff in error that the writ was void and afforded no justification to the officer executing it. Unless the writ is amendable under the eighth section of the attachment act (Rev. Stat. 55), which provides that no writ of attachment shall be quashed on account of any insufficiency, the objection of the plaintiff is well taken. A process actually void, either from a fatal defect in itself or from want of authority to issue it, is wholly insufficient either to pass a right or to justify an act done under it, and it may be so treated whenever it comes in question. When, however, the process is not void but voidable only, it will furnish a protection to the officer executing it. *Levin v. Gilpin*, 6 Dana, 229. And on the trial of a cause the court will regard the process as amended, when the defect complained of is of a character to be amended. *McBee v. Petty*, 8 Cold. 178; *Buler v. Huddleston*, id. 201. To constitute a sufficient writ, it must

run in the name of the people; be addressed to the sheriff or constable; signed by the clerk and attested by the seal of the court; it must be certain in its commands and returnable to the first day of the ensuing term of court. If it contains all these requisites, we characterize it as sufficient. If any one is omitted, we adjudge it insufficient. The legislature certainly designed in the use of the word "insufficiency" to cover more than mere formal or technical defects; such defects in pleadings and proceedings were amendable and curable at common law; without any statute such power was exercised by courts, at all times, to further justice and promote the rights of litigants. It is just as important that a writ should be signed by the clerk as it is that it should be returnable to the first day of the ensuing term, and yet it has been held that such an omission is curable by amendment. *Potter v. Smith*, 7 R. I. 55; *Jump v. Battin*, 35 Mo. 193; *Budd v. Thompson*, 22 Ark. 363. So a clerical error in the date of a writ may be amended. *Jackson v. Burling*, 5 English, 578. And the teste of writs, whether original or judicial, have almost invariably been held amendable. *Whiting v. Bebee*, 7 English, 535-6; *Ross v. Luther*, 4 Cow. 158; *Brown v. Alpin*, 1 id. 203; *Barber v. Smith*, 4 Yates, 185; *United States v. Camp*, 5 How. (Miss.) 516; *Shumaker v. Knox*, 1 Dallas, 197; *Ripley v. Warren*, 2 Pick. 592. In *Davis v. Wood*, 7 Mo. 163, the defendant justified under an execution which did not run in the name of the State as required by statute. Objection was taken on that ground, and the court held, that although the requisites of the statute had not been complied with in that respect, still it was only voidable and would furnish the officer protection.

In the case of *Potter v. Smith*, *supra*, the clerk had omitted to attach to the writ the seal of the court, and this omission was held amendable. The court say, "These amendments are in the discretion of the court, and that discretion has been exercised at different times, and amendment allowed as to all other requisites of a writ; as to the signature of the clerk; the direction to the officer for ser-

vice; the teste of the writ; the statement of the cause of action; the time and place of appearance, and all, upon the ground that they were irregularities of process or mere omissions of the clerk." Pp. 57, 58.

So, too, when through inadvertence the affidavit to a writ of attachment was not signed, the defect was held curable by amendment. *Stout v. Folger*, 34 Iowa, 71. See *Garnet v. Wimp*, 3 B. Monr. 360; *Banta v. Reynolds*, id. 80.

So, too, when process has been made returnable to a wrong time it is amendable. *Graves v. Cole*, 2 G. Greene, 467; *Townsend v. Stodard*, 26 Ga. 430; *Lawrence v. Chase*, 54 Me. 196. We are aware that cases at variance with those above cited may be found, but a careful examination of all the authorities convinces us that the tendency of modern decisions is to favor amendments when the spirit of justice can be advanced and promoted. It is difficult to discover a settled rule anywhere, and in the absence of such a rule, the true guide in allowing such amendments would seem to be the principle announced by Lord HARDWICKE, and cited by Lord KENYON in 7 T. R. 698, viz.: "that an amendment shall or shall not be permitted as it will best tend to the furtherance of justice." It is not questioned that the court issuing the writ had jurisdiction of the subject-matter, nor that it was issued in a proper case, nor that it lacks any essential requisite of a writ, except the one complained of. If it embraced a proper return day, then nothing would be wanting to constitute it a perfect process. We think that the legislature designed that just such mistakes as this might be corrected, and the eighth section, being remedial in its character, should be most liberally construed. It was competent, then, for the plaintiff in attachment to appear in the court below and have this writ amended. A writ that is amendable cannot be regarded as void, nor can it be attacked collaterally. It must still have its effect until annulled. If a contrary doctrine were to prevail, every erroneous writ might be drawn in question collaterally, for defects which ought to be, and can only be questioned directly by a revising power. *Owens v. Starr*,

2 Littell, 231; *Turner v. Folgate*, 1 Lev. 95. We are, therefore, of the opinion that the ruling of the court below was proper inasmuch as the writ was simply voidable under the eighth section of the attachment act.

The judgment will be

Affirmed.

ATTACHMENT — RETURN OF WRIT.— Writ of attachment made returnable to a day other than the first day of the term may be amended, and is not void; *Talpey v. Doane*, 3 Colo. 23.

TILTON et al. v. COFIELD et al.

ATTACHMENT — lien of — for what amount. As against other creditors of a defendant in attachment and purchasers from him, the lien acquired by levying the writ cannot be for more than is specified in the affidavit and writ.

May be dissolved by adding to the demand. If, after levy of an attachment, the property attached be sold by the debtor, and the creditor thereafter add to his demand, and with notice of such sale take judgment for more than was first claimed in the affidavit, the lien of the attachment is thereby avoided as against the purchaser.

Whether, if the creditor, without knowledge of the sale and conveyance of the attached property, add to his demand and take judgment for a greater amount than was originally claimed, he will lose his lien, is not clear.

But, whatever rule may be applied, when the creditor has only constructive notice of other liens upon the property, if, with actual knowledge of such liens, he attempts to enlarge his own demand against the property, he is guilty of fraud.

What shall be notice of sale and conveyance in such case. That the purchasers attempted to intervene in the attachment suit, and to contest the plaintiffs' demand after it had been increased and before judgment, was sufficient to put plaintiffs upon inquiry as to their title.

POWER OF ATTORNEY not under seal. A deed executed by an attorney in fact, under a power which is not under seal, will not pass the legal title.

DEED defective may have effect as contract of sale. But such deed may be regarded as a contract for the sale of the property, sufficient, under the statute of frauds, and enforceable in equity.

EQUITABLE TITLE is enough. And complainants holding such equitable right are entitled to protection and relief in a court of equity, in the same manner as one holding by legal title.

PLEADING AND EVIDENCE — how far the evidence must support the bill. And this is so, as against appellants, who are attaching creditors only, although complainants set up a legal title in their bill, and did not ask to have the contract specifically performed.

It might be otherwise if the vander and judgment debtor should complain, but as he has not appealed, the court presumes that he is satisfied with the decree.

Appeal from District Court, Arapahoe County.

THE bill was filed by Joseph B. Cofield, Daniel Witter, Richard E. Whitsitt, John Roache, Erastus F. Hallack, Charles Hallack and Amos Steck against Alfred E. Tilton, Charles E. Tilton, David J. Cook, Judson H. Dudley and John Alexander ; it alleged that on the 28th of August, 1865, Alfred and Charles E. Tilton sued out of the district court of Arapahoe county, an attachment against Judson H. Dudley and Thomas P. Ames, for the sum of \$2,620.80, which writ was levied upon a large number of lots in the city of Denver, as the property of said Dudley ; that said Tilttons filed their declaration in that cause in which they claimed damages in the sum of \$8,000 ; that at the December term, A. D. 1865, of the district court, the Tilttons recovered judgment against Dudley for \$2,591.44 and costs, which was afterward reversed in the supreme court of the territory ; that on the 9th of March, 1867, Dudley conveyed the lots levied upon to David H. Moffat, Jr., as security for the sum of \$2,500, loaned by Moffat to him ; that Cofield, Witter, Whitsitt and Steck, purchased from Dudley all the lots so conveyed to Moffat and other lots and land, for the sum of \$5,100 ; and that Moffat conveyed the same to them with the assent of Dudley, on the 23d of May, 1867. The several interests of the complainants in the lots described are set out at length in the bill, but these are not material to the questions discussed in the opinion. It was further alleged, that on the 12th of September, 1868, the Tilttons filed in the attachment suit against Dudley and Ames, an amended affidavit, claiming that the said Dudley and Ames were indebted to the said A. E. and C. E. Tilton, in the sum of \$2,620.80 on an account and promissory note, and for goods, wares and merchandise sold and delivered, and for money loaned, laid out and expended for said Dudley and Ames ; that said note was given for part of the purchase

price of said goods, wares and merchandise, dated 17th of September, 1864, payable to the said A. E. and C. E. Tilton four months after date, for the sum of \$2,592.80, with interest at the rate of two per cent per month from date until paid ; that, on the same day, the plaintiffs in that suit filed an amended declaration claiming damages against the said Dudley and Ames upon said promissory note and upon the other counts in said declaration, in the sum of \$7,000 ; copies of the original and amended pleadings were attached to the bill as exhibits ; that on the 5th of May, 1869, Dudley confessed judgment in the attachment suit for \$5,652.80 and \$29.50 costs, upon which the court awarded a special execution and order of sale of the lots of said Dudley, levied upon by virtue of said writ of attachment ; that the complainants bought the lots in good faith and without any knowledge of any claim or indebtedness on the part of the plaintiffs in the attachment suit against the said Dudley and Ames, other than appeared in the record and papers in said suit then pending ; that the Tiltons had sued out execution upon the said judgment and were about to sell the lots described to satisfy the same ; complainants asked that so much of the judgment in favor of A. E. and C. E. Tilton against said Dudley as provides for the issuing of a special execution and order of sale might be vacated and set aside, and the several lots released and discharged from the lien of said judgment : that the Tiltons and the said Cook as sheriff might be enjoined and restrained from selling under the said execution, etc., a portion of exhibit K, which is referred to in the opinion of the court, and which was admitted in evidence by the stipulation of the parties, was as follows :

November 1, 1869.

A. E. & C. E. TILTON v. JUDSON H. DUDLEY, impleaded with THOMAS P. AMES.	<i>Attachment.</i>
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And now, on this day, come the said plaintiffs, Messrs Charles and Elbert, their attorneys, and also comes the said

J. Bright Smith by Amos Steck, Esq., his attorney, and comes the said Daniel Witter, Joseph B. Cofield and Richard E. Whitsitt, by Amos Steck, Esq., their attorney, and the said Amos Steck in his own proper person, and also comes the said defendant Judson H. Dudley, by L. B. France, Esq., his attorney, and the court having heretofore, at the last term of said court, taken the motion of the said J. Bright Smith to strike the said plea of the said defendant confessing judgment in said suit, filed on the 5th day of May, A. D. 1869, by L. B. France, Esq., as the attorney of the said defendant, the power of attorney of the said defendant authorizing the said France to file said plea, from the files of said suit, also the said motion and petition of the said Witter, Cofield, Whitsitt and Steck, praying to be made parties, and for leave to contest the said plaintiffs' claim in the suit under advisement, and the court having duly considered said motion and petition, and being fully advised in the premises; it is therefore considered by the court that said motion and petition be overruled and denied. And the court having also heretofore, to wit: on the 6th day of May, A. D. 1869, and of the May term of said court, A. D. 1869, taken under advisement the motion of the said plaintiffs for judgment on the said plea of the said defendant, confessing judgment in this suit, and the court having considered the same, and being fully advised in the premises; it is, therefore, considered by the court that the said plaintiffs do have and recover of the said defendant, Judson H. Dudley, the said sum of five thousand four hundred and seventy dollars and eighty cents (\$5,470.80), together with interest on said sum from the date of filing said plea at the rate of 10 per centum per annum to the date of entering this judgment, amounting to the further sum of \$272, making the full sum of five thousand six hundred and forty-two dollars and eighty cents (\$5,642.80), as their damages so as aforesaid confessed by the said defendant in his said plea, and the interest thereon as aforesaid, and also their costs by them about this suit in this behalf laid, and expended, taxed at dollars, and that they have execution there-

for, and that a special execution and order of sale for the sale of the property of the said defendant, Judson H. Dudley, attached on the writ of attachment issued herein, do issue. In their answer appellants admitted the commencement of the attachment suit, and the various proceedings therein down to the rendition of judgment; they denied that they had notice of any of the conveyances set forth in the bill. By stipulation, the original and amended affidavits and the other papers in the attachment suit were put in evidence. It was also admitted that the first judgment in the attachment suit for \$2,591.44 was entered on the 27th day of January, 1866, and that judgment was reversed on the 10th of February, 1868; that, after the reversal of that judgment, the amendments referred to in the bill were made in the attachment suit. In evidence it appeared that the deed by Dudley to Moffat was made by Chever under a power of attorney which was not under seal; it also appeared that the note mentioned in the amended affidavit and declaration was given for the consideration mentioned in the original affidavit, but such note was not referred to in the original affidavit; there was much more testimony which it is unnecessary to insert here. In a supplemental bill it was alleged that the lots were sold on the 13th of March, A. D. 1871, by the sheriff of Arapahoe county, under the execution and judgment aforesaid; that the said Tiltens became the purchasers at such sale, and had received a deed therefor; these allegations were admitted by appellants. At the hearing the court set aside the sale so made, and so much of the judgment as relates to a sale of the lots for the satisfaction of the judgment. The court also decreed that the lots should be released and discharged from the lien of the judgment, and enjoined Tiltens from selling under the same. From this decree the Tiltens, Alfred and Charles, appealed.

Mr. J. Q. CHARLES and Mr. A. C. PHELPS, for appellants.

Mr. AMOS STECK, for the appellees.

Mr. JUSTICE BELFORD dissented.

HALLETT, C. J. Appellants sued out an attachment against Judson H. Dudley and Thomas P. Ames for the sum of \$2,620.80, which was levied upon property belonging to Dudley. Pending the suit Dudley conveyed two of the lots to John Alexander, who, subsequently, conveyed the same lots to the appellees, Erastus F. and Charles Hallack. Other lots upon which the writ was levied were conveyed to David H. Moffat, Jr., to secure a loan of \$2,500, made by him to Dudley, and Moffat, with Dudley's assent, subsequently sold and conveyed these lots to the appellees, Cofield, Witter and Whitsitt. The other appellees claim by assignment from the parties last named. In the affidavit for attachment the demand was alleged to be for goods sold and delivered, and the declaration contained the common counts. After the above-mentioned conveyances had been made, appellants amended the affidavit and declaration, and counted upon a promissory note for the sum of \$2,592.80, dated September 17, 1864, bearing interest at the rate of two per cent per month from date until paid, and increased the damages laid in the declaration from \$3,000 to \$7,000. Upon the declaration as amended, Dudley confessed judgment for \$5,652.80, which, it will be observed, is more than double the amount claimed in the original affidavit. To satisfy this judgment, execution was awarded against the property upon which the attachment had been levied, and this bill was filed to set aside that portion of the judgment, and enjoin any sale of the property. By a supplemental bill, and the answer thereto, it appears that since this bill was filed, the property has been sold to appellants, under an execution issued on the judgment. The statute regulating attachments provides that the writ shall be issued upon affidavit filed by the creditor, stating the nature and amount of the indebtedness, and the officer is required to levy the writ upon the property of the debtor, of value sufficient to satisfy the sum sworn to be due. Rev. Stat. 52. When the writ is levied upon real estate, the officer is required to file a certificate of the fact in the office of the county recorder, as notice to other creditors and subsequent

purchasers. Rev. Stat. 378. The purpose of the law is to enable the creditor to seize property, and hold it for the satisfaction of the judgment to be obtained in the cause, and of course the lien of the attachment cannot be greater than the indebtedness stated in the affidavit and writ. Accordingly, it is held, that without service of process or appearance by the defendant, the judgment cannot exceed the sum stated in the affidavit with accruing interest. *Hobson v. Emporium R. E. & M. Co.*, 42 Ill. 306; Drake's Attachment, § 449, a. And it would seem that in cases commenced by attachment in which process is served upon the defendant, he may confine the plaintiff to the cause or causes of action stated in the affidavit, as well as the sum therein named. *Tunnison v. Field*, 21 Ill. 108. But when the defendant, without objection, pleads to matters not alleged in the affidavit, or confesses judgment for a greater sum than is therein demanded, he passes by the question of variance between the writ and declaration, and waives objection upon that ground. This is not, however, material to our present inquiry, which relates to the effect of the attachment proceedings upon the right of third parties who have acquired an interest in the property pending the suit.

Whatever the rule may be as to the defendant, it is clear that purchasers of the attached property take it subject to the lien of the plaintiff for the sum stated in the affidavit and writ, with accruing interest, if he shall obtain judgment in that action for so much. To this extent, the record which is made for that purpose advises them of the incumbrance upon the property, and, therefore, they may be presumed to have knowledge of the fact. But it is said that the right to amend attachment proceedings is conferred by statute and liberally indulged by courts under which new causes of action may be added or the sum stated in the affidavit and writ increased and the property held liable for the whole amount. It will be observed that the eighth section of the attachment act, which confers the right to amend, relates only to insufficiencies in the affidavit, writ and bond, and not to causes of action altogether omitted therefrom. But, con-

ceding that a mistake as to the amount of the indebtedness may be corrected, and even that a cause of action omitted from the affidavit by mistake may be inserted under the authority of that section without prejudice to the proceedings upon which the defendant may rely, it is obvious that third parties cannot be affected by an amendment of that kind. Purchasers and creditors who acquire an interest in the property during the pendency of the suit are entitled to stand upon the record as it existed at the time such interest was acquired, and, of course, they cannot be supposed to have knowledge of any matter of which the record does not advise them. That the plaintiff, by an imperfect statement of his case, may give such notice of his right as will affect purchasers and creditors as well as the defendant in the cause, there is every reason to believe. If, for instance, the creditor should state the facts upon information and belief instead of upon his own knowledge, or if he should claim several distinct sums of money and then state the aggregate amount of them incorrectly, he would probably give to all full notice of his right, although not in the precise manner prescribed by the act. But the present case cannot be brought within any rule, however liberal, upon which amendments may be allowed in attachment proceedings to affect the right of strangers to the suit. In the original affidavit appellants claimed an indebtedness of \$2,620.80 for goods, wares and merchandise, sold and delivered, and there was nothing whatever to advise the defendant, or any other person, of any additional claim for interest or upon any other account. The writ followed the affidavit, and the declaration contained the common counts with a general statement attached corresponding with the several counts, and denominated a copy of the account sued on. The damages were laid at \$3,000, exceeding somewhat the amount stated in the affidavit according to the usual practice by which the pleader may state any sum which will cover his demand. Nowhere in these papers was there any thing to indicate, even remotely, that appellants had any other demand than that which was set forth in the

affidavit, and so the record remained until after the attached property was sold to appellees. It is claimed that the promissory note, which was afterward brought in by amendment, might have been given in evidence under the common counts in the original declaration, but this will not impair the rule which must control the decision of the question. If we suppose that appellees were by the declaration notified of every cause of action which might have been proved under the common counts, the lien of the attachment could not attach for more than was expressed in the writ and affidavit, with accruing interest, and the interest here referred to is that which might have been recovered upon the case made in the original affidavit, of which only appellees had notice. The promissory note which was subsequently brought into the proceedings by amendment, although given for the consideration stated in the original affidavit, contained a stipulation for interest at a much higher rate than could have been obtained without its aid, and this was, in substance if not in fact, a new cause of action. By it the amount of the judgment was greatly increased, and if the property should be held liable for its payment, appellees would become responsible for a demand of which they had no notice, actual or constructive, at the time they purchased. No argument is required to prove that the right to amend cannot be exercised in that manner to the prejudice of strangers to the suit. Several cases are reported which illustrate the principle. A writ of attachment was levied in March, 1827, and the officer's return was dated June 6 of that year. On the 22d May, in the same year, a mortgagee of the premises attached, recorded his mortgage, and thus obtained a preference over the creditor, notwithstanding the return to the writ was afterward amended so as to show the true date of the levy. It was said *arguendo* that a purchaser for a valuable consideration, ignorant of any attachment at the time of his purchase, would unquestionably have held against a creditor claiming under that attachment, and no amendment of the officer's return would defeat his title. *Emerson v. Upton*,

9 Pick. 167. Upon an execution against Wm. Kroger, the goods of Benjamin were seized, and the amendment of the judgment and execution, by which the latter's name was inserted, was not allowed to defeat the title of an intervening purchaser. *Shirley v. Phillips*, 17 Ill. 471. The principle is also affirmed in *McCormick v. Wheeler*, 36 Ill. 114, and doubtless other cases may be found to the same point. We have, therefore, no hesitancy in saying that the amendment of the affidavit, writ and declaration did not affect the rights of appellees in the property attached, or authorize the entering of a judgment against the property in their hands for more than could have been claimed upon the record as it stood prior to that time. Assuming that appellees acquired an interest in the property attached before the writ and declaration was amended, a matter which will be considered more at length hereafter, we will endeavor to ascertain the effect of the amendment and the judgment taken in pursuance thereof, upon the lien of the attachment. As we have seen, appellants had a lien upon the property attached at the time of the sale to appellees, for the sum of \$2,620.80, for which they might have taken judgment. The most that can be claimed now is, that this lien still subsists, and that the judgment against the property may be enforced for that amount. In a proceeding by attachment the lien of the writ merges in the judgment taken in the cause, and the latter takes effect upon the attached property as of the date of the levy. *Bagley v. Ward*, 37 Cal. 121. When, as in this case, the judgment is for more than the plaintiff may rightfully demand against the attached property, there would appear to be some difficulty in giving effect to it, contrary to its tenor. If, for instance, appellants had sought and obtained a special execution against the property for the \$2,620.80, specified in the affidavit before the amendment, the judgment being for a larger sum, there would be some question as to the power of the court thus to limit the effect of the judgment.

If, however, this is a difficulty which equity will disregard, the form of the judgment being immaterial, if in good

conscience, appellants are entitled to a lien upon the property for any sum, it will not be profitable to discuss this point further.

As between attaching creditors, it appears to be well settled that a prior attachment will be dissolved if the creditor take judgment for more than he is entitled to under his writ, or upon a cause of action not specified therein. Drake on Attachment, § 282.

The suggestion that this rule cannot prevail in this territory because of the peculiarity of our statute, which admits creditors whose writs are returnable to the same term of court to share *pro rata* in the proceeds of the attached property, is not supported by the reason upon which the rule is said to be founded. In *Willis v. Crocker*, 1 Pick. 204, it was said that the subsequently attaching creditor had a vested right to the excess beyond the amount of the judgment to be rendered upon the writ of the first attaching creditor as it was when served, and the same reason for the rule is assigned in other cases. The proposition affirmed is, that he whose writ is first levied shall not be allowed to appropriate more of the common fund than he has demanded in his writ, and thus diminish the sum to which others are entitled, and it is just as applicable to the case in which the creditors share *pro rata* as to the case in which one holds a preference over the other. In either case what is taken by one creditor cannot be awarded to another, and although the effect of the rule may be different, its applicability in both classes of cases cannot be doubted. Whether changing the cause of action or adding to the demand, without actual knowledge on the part of the creditor of the existence of other liens upon the attached property, will work a dissolution of the attachment is not entirely clear upon authority. The cases are reviewed in *Page v. Jewett*, 48 N. H. 441, and the language of the court, although not directly to the point, appears to support the notion that the attachment will, in such case, be dissolved.

But in *Fellon v. Wadsworth*, 7 Cush. 587, the mistake of the plaintiff's attorney, in taking judgment for too much,

was not regarded as sufficient to dissolve the attachment, and the idea advanced is, that there must be an intention to do wrong, or fraud, in fact, on the part of the plaintiff, before such a consequence can be visited upon him. The conclusion of the court was, that there must be fraud to bring a case within the principle of the adjudged cases, and this could hardly subsist without a consciousness of wrong on the part of the creditors. To apply this principle to a case in which judgment has been taken with the assent of the debtor, for a sum that was clearly due, and without actual knowledge of the existence of any other lien upon the property attached, it would seem that the creditor, not being chargeable with any intention to do wrong, should not, in equity at least, be deprived of his right. But this distinction, if it exists, does not arise in the case at bar, inasmuch as it is shown by the record, that appellants had knowledge of the sale to appellees before they took judgment and sued out execution against the property. Whatever rule is applied when the creditor has only constructive notice of the existence of other liens upon the property, if with actual knowledge of such liens he attempts to enlarge his own demand against the property, he is clearly guilty of fraud in fact as well as in law. In such case the creditor, with full knowledge of the rights of the others, attempts to appropriate their property to his own use, through and by means of the forms of law, and he is therefore justly amenable to the charge of fraud. In the bill of complaint filed by appellees, it was alleged that appellants had notice of the sale to appellees at the time it was made, and although the charge is denied in the answer, it is, I think, sustained by the copy of the judgment in the attachment suit which was attached to the bill, and was put in evidence by the stipulation of the parties. By the transcript of the judgment, it appears that the appellees, Cofield, Witter, Whitsitt and Steck, appeared in the attachment suit before judgment was rendered and asked to be made parties and for leave to contest appellants' claim, but they were not allowed to do so. It is not shown upon what ground appellees proposed to

contest appellants' claim, but the fact that they appeared in the case and demanded a hearing was sufficient to put appellants upon inquiry, and if they did not ascertain the facts in regard to appellees' title, the fault was their own. In this feature the case is like that of *Hale v. Chandler*, 3 Mich. 532, in which the like circumstance was held to be sufficient to charge the plaintiffs in attachment with notice. That was a bill by an attaching creditor to postpone a judgment obtained by another creditor upon a writ levied prior to the complainant's, and the principles upon which such relief may be granted are very fully discussed. In addition to the circumstance that appellees attempted to interfere in the attachment suit, a special execution was obtained against the property attached for the whole amount of the judgment, and we learn from the supplemental bill and answer that since this suit was begun, the property has been sold under such execution, and that appellants have become the purchasers. It is obvious that appellants knew before they took judgment that appellees had, or claimed to have, some interest in the property, and by proceeding to judgment and execution against the property, they have manifested a disposition to appropriate the property to their own use without regard to the right of appellees, and this brings the case within the principle of all the authorities that I have examined. The circumstance that appellees are purchasers of the property cannot be relied upon to distinguish this case from those cited. A purchaser is entitled to the same protection as an attaching creditor, and he may as confidently appeal to a court of equity for such protection. The appellees, Erastus F. and Charles Hallack, holding two of the lots by an unquestioned title from Dudley, are fully in the attitude of purchasers. The other appellees have an equitable right, only having failed to obtain a legal title by reason of the want of a seal on the power of attorney from Dudley to Chever. The deed to Moffat was for that reason insufficient to pass the legal title. *Mons v. Worthington*, 3 Scam. 26; *Peabody v. Hoard*, 46 Ill. 242;

and parol ratification of the deed did not cure the defect. Story on Agency, §§ 242, 252. But the instrument was a sufficient memorandum under the statute of frauds, and has every element of a perfect contract which will be enforced in equity. It is a doctrine of the court that things agreed to be done shall be regarded as actually performed, and the appellees other than the Hallecks are for the purposes of this suit, equally with the latter, to be regarded as purchasers. The circumstance that they have not obtained the conveyance which a court of equity will award, cannot defeat their right. I understand that one who holds under an executory contract cannot defeat a prior equity, as perhaps he may who holds by legal title. *Villa v. Rodriguez*, 12 Wall. 323. But this principle has no application to the case at bar, in which appellants are visited with the consequences of their own wrong. By doubling the amount of their judgment, and seeking to charge the property attached with an amount to which in the hands of appellees, it was not subject, they abandoned the lien of their attachment, and lost their right to enforce it, and this must be true in support of an equitable as well as legal title. The allegations of the bill as to the title of Coffield, Witter, Whitsitt, Roche and Steck, are not, strictly speaking, according to the fact, inasmuch as those parties have an equitable title only. To have complete relief these appellees should have brought their bill for specific performance of the contract with Dudley, making appellants parties thereto. Probably, Dudley might, if he were here, object that the controversy is not determined by the decree of the court below, but he has not appealed, and we must presume that he is satisfied with the decree. *Williams v. Starr*, 5 Wis. 534. The evidence establishes an equitable title in the appellees' excepting the Hallecks, who, as we have seen, have a legal title, and thus falls short of the allegations of the bill, but does not vary therefrom. So far as it goes the evidence is in support of the bill, but it does not come up to the point of establishing a legal title in those who claim under the deed to Moffat. The deed to Moffat, as we have for con-

venience called it, which is relied upon in the bill to establish the legal title of those claiming under it, is the evidence of the equitable title which the court by its decree sought to protect, and, therefore, there was no surprise to any one. We do not say that the bill is sufficient to maintain a decree for specific performance, but at the time it was filed, no sale had been made to appellants, and we think that the court might protect appellees' rights in the property attached against the unwarranted assault of appellants. Notwithstanding the fact that the bill claimed more than the parties complainant were entitled to, such was the relief given by the court below, and we find no error in the decree of which the appellants may complain. The decree of the district court is affirmed with costs.

BELFORD, J., dissenting. I am unable to concur in the conclusion reached by the majority of this court. The property at the time of the sale by Dudley to Cofield and his associates was in the custody of the law, being bound by the levy of the attachment. They were then purchasers with notice and chargeable with every fact that the record disclosed at the date of their purchase. *Davis v. Chrisham*, 15 Gratt. 41; *Rey v. Doe*, 2 Blackf. 258.

He who buys property while it is in the custody of the law and subject to a decree or judgment that may be made or entertained by a court in the enforcement of a specific lien is not a favored purchaser, nor is he entitled to the most benignant consideration of a court of equity. Anciently, such purchases were regarded as void, but this harsh doctrine has yielded to the softening influences of time, and the later decisions, instead of holding that a conveyance is annulled by the pendency of an action, simply affirm that the property purchased shall be held subject to the rights of the parties in litigation. *Julor's Lessees v. Harvey*, 11 Md. 524; *Meux v. Anthony*, 6 Eng. 422; *Whiting v. Bebee*, 7 id. 566; *Harrington v. Slade*, 22 Barb. 166. At the time of the purchase the demand of the attaching plaintiffs amounted to something over \$2,620.85. This

claim was evidenced by the record, and Cofield and Steck were bound to take notice of it when they bought the property. The defense set up to avoid the payment of this sum is, that after the purchase the attaching creditors increased their demand so that ultimately they obtained judgment for \$5,000. There is nothing in the record to show that, at the time the amendment was made, the plaintiffs had any knowledge of the alienation of this property. A fraud at that time could not have been meditated against Steck and Cofield because their connection with the property was not then known. Nor is there any thing in the record to show that the claim of the Tiltons was other than honest and just in every respect. I take it to be well settled that a plaintiff can proceed in the suit without noticing the alienation, and the decree he obtains will bind the purchaser. If the plaintiff makes the purchaser a party, the alienee is bound by the previous proceedings in the suit before he was made a party, and he comes before the court in the same plight and condition as the former party, and is bound by his acts and may be subject to the cost of the proceedings from the beginning of the suit. *Harrington v. Slade, supra*. I am willing to admit that the purchaser should not be chargeable with an amount greater than that claimed by the plaintiffs at the date of the alienation, with interest, but I am not ready to hold that the mere increase of their demand, when honestly made, forfeits their right to the whole claim against the property seized. Such a doctrine as this would practically arrest and preclude all amendments of the pleadings pending the progress of a case, and what is more, would devolve on the plaintiff a duty never yet recognized or enjoined, namely, that of keeping trace of all alienations made by a defendant *pendente lite*. *Green v. Cole*, 13 Ired. 425, 480. The forfeiture, if it can be justified on any principle, must be that of punishment for a fraud attempted or committed. In this case, I am unable to discover any fraud in the amendment made, for the reason that the increase of the claim was just, and that the plaintiffs were ignorant of any rights acquired by Cofield or

his associates, nor do I think that Cofield and company were misled, for it nowhere appears that either of these parties felt enough of interest in the suit prior to their purchase to inquire and ascertain the amount of Tiltons' demand. Whitsitt swears that he bought the property to make money out of it; that he had heard the controversy between Dudley and Tilton canvassed, and the general impression was that it would not amount to much. Cofield had heard that there was a judgment against Dudley for about \$2,500. Witter swears that Steck told him that the attachment could not be sustained. What Steck knew, or tried to know, about the amount of indebtedness does not appear, as he was not examined. They were all anxious, however, to buy the property. A fair inference from all the testimony is, that these gentlemen took advantage of Dudley's embarrassed circumstances to buy the property cheap, trusting to Steck's opinion that the attachment could not be sustained. A speculation promising rich profits was in sight, and the eagerness for trade deadened the caution that would have prompted unimpassioned men to make inquiries as to the status of the property. It is difficult to say that these gentlemen were misled when not one of them, so far as the evidence shows, ever deigned to make an inquiry at the clerk's office, or to examine a paper in the case prior to their investment. I am aware that, as between attaching creditors, it has been held that an increase of the demand of the first creditor will have the effect to dissolve his attachment as to the subsequent creditors. The ground on which some of these decisions is made to rest is, that the subsequent attaching creditor is entitled to the excess, if any, that remains after satisfying the first claim, and that to permit the first creditor to swell this original claim by adding thereto other demands, might lead to the absorption by him of the whole property. With all deference to the courts that have pronounced these decisions, I must say that such a doctrine can only be sustained on the ground that such increase is made with a fraudulent intent, and with a view to secure a dishonest advantage;

and that as a punishment for such fraud the attachment is dissolved, and the preference given by the law is destroyed; were it otherwise, the doctrine would uproot the whole power of amendment; a power essential to the administration of justice, and not infrequently used, even when it does affect existing rights. *Green v. Cole, supra*, 430; *Cobargo v. Segar*, 17 Penn. St. 514. Every man who buys property in *custodia legis* should, as against an honest creditor having a lien upon it, be understood to act with a full knowledge that the courts can, and, in cases deemed proper by them, will amend not only the pleadings, but their records and process as far as they can do so consistently with truth.

A most diligent research has not been rewarded by the discovery of a case that applies the doctrine announced by the majority of this court to a subsequent purchaser. Until this time such a purchaser has never been regarded as a favored suitor in any court. Thus in *Scott v. McMillen*, 1 Litt. 308, the court says: "Here the property gives jurisdiction to the court; the right of property is in contest, and during the pendency of such a contest, no transfer of the property by the debtor can be admitted to produce any prejudicial effect on the complainant's demand." In *Murray v. Lyburn*, 2 Johns. Ch. Rep., Chancellor KENT said: "There is no principle better established than that the purchase of the subject-matter in controversy, *pendente lite*, does not vary the rights of the parties in that suit, who are not to receive any prejudice from the alienation." "He who purchases during the pendency of a suit is bound," says Sir WILLIAM GRANT, "by the decree that may be made against the person from whom he derives title. The litigating parties are exempt from the necessity of taking notice of a title so acquired. The rule may sometimes operate with hardship, but general convenience requires it." *The Bishop of Winchester v. Payne*, 11 Vesey, 194; *Osborn v. Bank*, 9 Wheat. 733. Numerous other authorities might be cited to the same effect, but it is unnecessary; see, how-

ever, the case of *Whiting v. Bebee*, 7 English, 565, and the cases there cited.

There is another view of this case which strikes me as being entitled to more than ordinary consideration. The power of attorney from Dudley to Chever, who makes the deed to the complainants, is not under seal.

In *Hayward v. Haswell*, 6 Adolph. & Ellis, 265, it was held that where an agent or attorney had no properly authenticated power to execute a deed of conveyance, but his authority was sufficiently witnessed to authorize him to execute an agreement to make such conveyance, it was held to operate merely as an executory agreement. We then have the complainants Steck, Cofield, Whitsill and Witter, clothed simply with an executory contract, or in other words, with a contract for a conveyance. To perfect their title, they must either voluntarily obtain a legal conveyance, or bring their bill for specific performance. To this proceeding the Tiltons would have to be made parties. Now, if the complainants whose title, if they have any, is merely equitable, seek to compel Tiltons to convey to them the legal estate, would not equity enjoin upon them the payment of the amount which the record disclosed at the date of their ineffectual purchase from Moffatt? In *Villa v. Rodriguez*, 12 Wall. 338, it is held that a party holding under an executory contract like this is not a *bona fide* purchaser. That the doctrine only applies where the legal title has been conveyed and the purchase-money fully paid.

In conclusion, let me recapitulate the facts. We have the complainants clothed simply with a contract for a conveyance. We have a suit pending where the indebtedness claimed amounted to \$2,620.85, and a levy by virtue of attachment on the property in question. We have the further fact that the complainants in this bill were informed by the record of the amount of Tiltons' demand, and they were bound to know that in the progress of the trial this indebtedness might, or probably would, ripen into a judgment. We have the further fact that the complainants

bought this property for speculative purposes, and doubtless in fixing the price they were willing to pay for it, considered that the plaintiffs in the attachment suit might possibly recover a judgment for \$2,620.85, together with interest. To this claim then they were in no sense innocent purchasers. They bought with their eyes wide open, and should not now be permitted to close them against the performance of a duty which equity and good conscience enjoins upon men thus situated. This would be simple justice, and the conscience of every man, be he jurist or layman, could not but approve such a determination of the issue. It would seem to me, therefore, that the decree of the court below ought to be so far modified, as to require the Tiltons to execute to Cofield and the other complainants a quit-claim deed for this property upon their paying to them the sum of \$2,620.85, together with interest at the rate of ten per cent to the day when said money is paid.

Affirmed.

ATTACHMENT — AMENDMENTS. — Where no local statute or rule is involved, the power to amend is the same in attachment suits as in others: *Tilton v. Cofield*, 93 U. S. 163, reversing the judgment in the principal case.

EQUITY COURT CANNOT ACT AS COURT OF REVIEW, and correct errors of a court of law, nor can it, in the absence of fraud, collaterally question the conclusiveness of a judgment at law: *Tilton v. Cofield*, 93 U. S. 163, reversing the judgment in the principal case.

TAMELING v. UNITED STATES FREEHOLD LAND AND EMIGRATION Co.

MEXICAN LAND GRANT — act of congress. The unconditional confirmation of a Mexican land claim by act of congress, when such confirmation is made in conformity with the recommendation of the surveyor-general of New Mexico, that it be confirmed by certain specified metes and bounds is, *ex necessitate*, a confirmation of the whole claim, and this is true without regard to the question whether the claim was originally valid or void.

When congress has, by confirming a grant as recommended in the report of a surveyor-general or other tribunal, sanctioned the rules and principles on which such report is based, it is in effect a legislative affirmation and ratification of the construction put by the surveyor-general or other tribunal on the laws in pursuance of which the grant was made. A confirmatory statute of congress, being the act of a sovereign power, unlike the deed of a private person may make valid a void conveyance. The act of confirmation of June 21, 1860, entitled "An act to confirm certain private land claims in the territory of New Mexico," is in law a conveyance by way of quit-claim, and release of any interest which the United States may have had in the premises confirmed.

Appeal from District Court, Pueblo County.

THIS was an action of ejectment brought by the United States Freehold Land and Emigration Company against John G. Tameling for a parcel of land lying within the Costilla estate. It was submitted upon an agreed statement of facts. It was agreed that the parcel of land described in the plaintiff's declaration, and for the possession of which the plaintiff brings this suit, is now, and at the time of the commencement of this suit was situate in the county of Costilla, in the territory of Colorado, and at the time of the commencement of this suit, was in the actual possession of the said defendant, who, before the commencement of said suit, had made valuable improvements thereon.

That the said piece or parcel of land is within the exterior boundaries of and forms a part of a larger tract or parcel of land claimed by the plaintiff in fee simple, and known as the "Costilla Estate," which said estate is bounded as follows, viz.: Beginning at a point one league below the confluence of the Rio Costilla and the Rio del Norte; thence up the Rio del Norte, on the eastern bank thereof, to its confluence with the Rio Culebra; thence easterly, following the southern bank of the Rio Culebra, to a point at or near the junction of the Rio Seco with the Rio Culebra; thence easterly to the Culebra Peakes; thence southerly, to the boundary of the lands of Miranda and Beaubien, and to a point at or near the road to Maxwells; thence westerly following the mountain ranges along the boundary of the lands of Miranda and Beaubien, to a point about one league south of the Rio Costilla, and thence westerly to the place of beginning, containing, by estimation, five hundred thousand acres, or thereabouts.

That the said Costilla estate, prior to the commencement of this suit, formed a part and parcel of a yet larger tract or parcel of land, known as the "Sangre de Cristo grant;" from said grant the said estate was segregated by the conveyance thereof by Morton Coates Fisher to the plaintiff, which said conveyance is hereinafter referred to; and which

said grant as an entirety (including said Costilla estate) is described as follows: Beginning at a point one Spanish league below the confluence of the Rio de Costilla and the Rio del Norte; thence up the Rio del Norte, on the eastern bank thereof, to a point one league above the mouth of the Rio Trinchera; thence north-east to a point on the mountain; thence along said mountain south-east to a point established on the top of said mountain; thence south to the boundary of the lands of Miranda and Beaubien; thence along said boundary to a point about one league south of the Rio de Costilla; and thence west to the place of beginning.

That the said Costilla estate is included in the Sangre de Cristo grant, whether reference be had to the description thereof given in the judicial certificate of possession, or in the petition of Charles Beaubien, herein set forth.

That the said Sangre de Cristo grant is known and designated as "Claim No. 'Fourteen' of Charles Beaubien," in the letter of the secretary of the interior of the United States, transmitting a transcript of the claim of the said Beaubien to said grant to the Hon. N. P. Banks, speaker of the house of representatives, said letter bearing date February 11, 1857, and which said letter, and all of the documents pertaining to said Sangre de Cristo grant, therein referred to, are in the words and figures following, viz.:

Here follows a complete transcript of all the proceedings had by the Mexican authorities for the purpose of vesting title to the Sangre de Cristo grant in the co-grantees, Louis Lee and Narciso Beaubien, and the report of William Pelham, surveyor-general of New Mexico, setting forth the boundaries of the grant, and recommending that it be confirmed. Full reference is made to these proceedings, and to the report in the opinion in this case.

That by purchase and descent, Charles Beaubien acquired, had and possessed all of the rights, titles and interests, both in law and equity in said grant, which were by the proceedings above referred to, in the aforesaid letter of the secretary of the interior, originally vested in the said Narciso Beaubien, and the said Louis Lee. That the said Charles

Beaubien retained his aforesaid interest in said grant, until after the passage and approval of a certain act of congress of the United States, entitled: "An act to confirm certain private land claims in the territory of New Mexico," approved June 21st, 1860.

That the claim designated in said act of congress as claim No. 14, is the claim of the said Charles Beaubien to that tract of land hereinbefore described by its boundaries, and herein designated as the "Sangre de Cristo grant," and which tract of land includes the said "Costilla Estate."

That after the passage and approval of the said act of congress, and on the 7th day of April, A. D. 1864, the right, title and interest of the said Charles Beaubien in and to the said Sangre de Cristo grant, otherwise the said claim No. 14, was absolutely conveyed and vested in Hon. William Gilpin, and thereafter, and prior to the 14th day of July, A. D. 1870, the said Gilpin conveyed the right, title and interest in said grant, by him so derived, to one Morton Coates Fisher; that thereafter, and on the day and year last aforesaid, the said Morton Coates Fisher absolutely conveyed to the plaintiff his right, title and interest derived as aforesaid, in and to that part and portion of the said "grant" or claim No. 14, generally known and herein designated as the "Costilla Estate," the boundaries of which said estate, as taken from the said conveyance thereof, are hereinbefore given, and include the piece or parcel of land described in the plaintiff's declaration, and the possession of which is in controversy in this suit.

That the said plaintiff has not conveyed or granted his title, derived as aforesaid, to the piece or parcel of land described in the declaration in this cause, nor the right of the possession thereof to the defendant or other person, but has claimed the title to, and possession of, said land ever since the conveyance as aforesaid by the said Fisher to the plaintiff.

Upon the agreed statement of facts, judgment was entered in the court below for the plaintiff, from which the defendant

took an appeal. His assignments of error are substantially alike, and are in the words following :

1st. The district court erred in rendering judgment for the plaintiff on the agreed statement of facts filed in this case (which was all the evidence in the case), in this that under the colonization act of Mexico, in force at the time the Sangre de Cristo grant was created, no grant could legally be made in excess of 22 leagues to two grantees, it being conceded by said agreed statement of facts that the Costilla estate alone, which is a part and parcel of said Sangre de Cristo grant, contains alone by estimate 500,000 acres of land, or thereabouts, which is five times as much land as could legally be granted to two parties.

2d. Because the district court erred in construing the act of confirmation by congress to ratify the original grant to a greater extent than that for which, under the colonization act of Mexico, A. D. 1824, it could have been originally created.

Messrs. GERRY and TAYLOR, for appellants.

Mr. HENRY C. THATCHER and Messrs. SAYRE & WRIGHT, for appellee.

Mr. Justice WELLS did not sit in this case.

BELFORD, J. The agreed statement of facts filed in this cause in the court below, and in pursuance to which judgment was rendered, presented but a single question for decision, namely, was private land claim *number fourteen* (14), usually known as the Sangre de Cristo grant, a valid grant as to all the land contained within the exterior boundaries of said grant, as shown by the judicial certificate of possession, and the report of the surveyor-general of New Mexico to the commissioner of the general land office, or is the act of congress, approved June 21, 1860, entitled, "An act to confirm certain private land claims in the territory of New Mexico," to be construed as only a confirmation of

22 square leagues, 11 square leagues to each of the original grantees?

The record shows that the premises in controversy are situated within the exterior boundaries of a certain tract of land known as the "Costilla Estate," which estate constituted a part, and was carved out of the Sangre de Cristo grant. The court below held, that the plaintiff was entitled to the premises in dispute in fee, and that it have a writ of possession therefor. From this finding the defendant prayed an appeal. The assignment of errors presents the same point raised in the court below. It is well known as a matter of history, that from a time coeval with the establishment by Spain of colonies in this country the king and likewise his provincial governors, were in the habit of making extensive grants of land to individuals for pastoral, agricultural and colonization purposes. After Mexico had achieved her independence, the same policy was pursued by the supreme and local governments of that country. On the 27th day of December, 1843, Luis Lee and Narciso Beaubien petitioned Manuel Armijo, civil and military governor of New Mexico, for a grant of land "embracing the Costilla, Culebra and Trinchera rivers, including the Rito of the Indians, and Sangre de Cristo, to its junction with the Del Norte river." This petition was referred, on the 30th day of December, 1843, by Manuel Armijo, governor as aforesaid, to the prefect, with instruction to give the possession asked for by the petitioners, in case there was no impediment.

On the 7th day of January, 1844, Juan Andres Archuleta, the prefect, directed the justice of the peace of the demarcation wherein the land was situated, to place the parties in possession in accordance with the decree of the governor, by virtue of which the justice of the peace, Jose Miguel Sanchez, on the 12th day of January, 1844, accompanied by his instrumental and attending witnesses, proceeded to the point where the land petitioned for was situated, and going through the prescribed method of investiture, placed Lee and Beaubien in possession of a tract of

land, whose boundaries were indicated in the following manner: "Commencing on the east side of the Del Norte river, a mound was erected at one league distance from its junction with the Costilla river; thence following the Rio Del Norte, on the same eastern bank, to one league above the junction of the Trinchera river, where another mound was erected; and continuing from west to north-east, following up the current of the Trinchera river, to the summit of the mountain, to the boundary of the lands of Miranda and Beaubien, the fourth mound was established; and continuing on the summit of the Sierra Madre, and following the boundary of the afore-mentioned lands, to opposite the first mound erected on the Del Norte river, where the fifth and last mound was erected, and from thence in a direct line to the first erected on the north." If the act of congress, of June 21, 1860, above referred to, is to be regarded as a confirmation of the Sangre de Cristo grant by metes and bounds, and to the extent of all the land contained within the exterior boundaries of said grant as shown by the judicial certificate of possession, then the judgment of the court below is correct, for the plaintiff derives its title through this act of congress, and the tract sued for constitutes a part of said grant. The act of congress is in the following language: "That the private land claims in the territory of New Mexico, as recommended for confirmation by the surveyor-general of that territory, and in his letter to the commissioner of the general land office, * * * designated as numbers one, three, four, six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen and eighteen, *be and they are hereby confirmed*. Provided, that the claim No. 9, in the name of John Scolly and others, shall not be confirmed for more than five square leagues; and that claim No. 17, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than 11 square leagues to each of said claimants.' It becomes important to inquire how and to what extent the claim, No. 14, of Lee and Beaubien was confirmed. The act itself furnishes the answer, "as recommended for con-

firmation by the surveyor-general." What was his recommendation? That the tract of land petitioned for by Lee and Beaubien, "embracing the Costilla, Culebra and Trinchera rivers, including the Rito of the Indians, and Sangre de Cristo to its junction with the Del Norte river," being the land of which they had been placed in possession by the justice of the peace, under the directions of the governor and prefect, be confirmed. The surveyor-general's report is made a part of the act of confirmation by reference in express terms, and "when the king's grant refers in general terms to a certainty, it contains an express mention of it, as if the certainty had been expressed in the same charter." 10 Coke, 64 a.

It is claimed, however, by counsel for appellant, that by the colonization laws of Mexico, passed in 1824, the provincial governors were restrained from granting to any individual more than 11 square leagues; and, inasmuch as the Costilla estate alone contains 500,000 acres, being five times the quantity which could legally be granted to two persons, the act on the part of the governor was simply void, and that no obligation resting on the United States, under the treaty of Guadalupe Hidalgo, to grant to any citizen more than he was entitled to claim from the Mexican government, the confirmation must be limited to the exact amount of 11 square leagues to each of the parties, Lee and Beaubien. It is further insisted, that inasmuch as the report of the surveyor-general states that Lee and Beaubien "were the legal owners in fee of said claim," and that inasmuch as they could be the legal owners of but 22 square leagues, the maximum amount which could be granted the original grantees by the governor of the province, it must follow that their application to congress was for a confirmation of "a legal estate in fee," to wit, "22 square leagues." It is apparent, from the report of the surveyor-general, that the quantity of land included within these natural boundaries was not known when its recommendation was made to the commissioner of the general land office, or submitted to the senate. It is also apparent that this fact was within the

knowledge or open to the knowledge of congress when the act above referred to was passed ; and had it been the intention of congress to limit the quantity granted to an amount less than that embraced within the natural boundaries, they could have imposed such limitations in their act of confirmation and quit-claim. It does not appear that any fraud or suppression of facts had been committed by the parties seeking the confirmation, and therefore it seems to me that the act must be regarded as an unconditional ratification of the grant as previously made, and as such, was equivalent in law to an original authorization. Furthermore, the claim was for the entire tract included within the natural boundaries, for it affirmatively appeared that the lands had been marked out and delivered by the Mexican officers, and were possessed by the claimants and those holding under them. The confirmation of such a claim is *ex necessitate* of the whole. And the fact that the quantity of land turns out to be larger than supposed, should not be allowed to diminish the force of the act.

We must regard it as a valid confirmation for the entire tract, or treat the act of congress as void, and conferring no rights on Lee and Beaubien, for it nowhere points out the location of a less quantity than the whole. Nor does it provide a mode for the location of the twenty-two square leagues, so that they may be distinguished from the additional lands within the boundaries of the original claim. That this could not have been the intention of congress is apparent, not only from the language of the act itself, but also from the fact that the same act confirmed claims Nos. 5 and 17 to only a limited extent each, and provided the mode in which the amount of land so confirmed should be definitely located and set apart from the balance of the land claimed, but not confirmed to the respective claimants. As to the proposition that the surveyor-general only recommended a confirmation of the legal estate to which the claimants would be entitled under the Mexican law, we think it is met by the argument of counsel for the appellee. The surveyor-general recommended the confirmation of the

grant to the full extent of the petitioner's claim, because it is his opinion, "that the grant is a good and valid one, and that the legal title vests in Charles Beaubien, as the successor of Lee and Narciso Beaubien." He tells us substantially that the grants by governors of provinces, though not sanctioned positively by enactments of the Mexican congress, yet had been long regarded valid, and that this grant, by reason of the custom of the country, and the undisputed occupancy of it by the grantees and their representatives from the time it was made, should, in justice, be confirmed to the claimant, he having a title sufficient thereto under the jurisdiction of the former rulers of the country. However inferior this estate may have been to an English fee simple, our government was bound by treaty to respect whatever rights the claimant had. The treaty of Guadalupe Hidalgo found the grantees in the full undisturbed possession of the premises in question, holding under a grant duly made by the governor. The eighth and ninth articles of that treaty embraced provisions similar to those contained in all treaties between civilized nations which provide for a cession of territory from the one to the other; stipulations intended to guard and protect in the most efficient manner the private property of individuals. In the case of the *United States v. Arredondo*, 6 Peters, 710, the supreme court say: "When congress have, by confirming the reports of commissioners or other tribunals, sanctioned the rules and principles on which they were founded, it is a legislative affirmation of the construction put by these tribunals on the laws conferring and prescribing the rules on which it should be exercised, or which is, to all intents and purposes, of the same effect in law; it is a legislative ratification of an act done without previous authority, and the subsequent recognition and adoption is of the same force as if done by pre-existing power, and relates back to the act done." It may be proper here to remark, that the mode of adjudicating land claims in New Mexico differs widely from the manner of adjudicating claims of like nature within the State of California. In the case of California

claims, congress provided a commission of inquiry and a judicial investigation, under certain rules and regulations applicable to all claims. Whereas, in New Mexico, congress provided for the ascertainment and confirmation of these rights of property to the soil by the appointment of a surveyor-general, whose prescribed duty was to ascertain the origin, nature and extent of claims to land under Spanish and Mexican law and usage, and to report on all such claims as originated under those laws, which report was to be laid before congress for final action. It would seem on principle and from a parity of reasoning, that if congress, by confirming the reports of commissioners to whom were referred like questions, sanctioned the rules and principles on which they were founded, that a like doctrine must be applicable to the report of a surveyor-general. In 1857, the report of the surveyor-general, upon claim No. 14, was transmitted to congress. It is full and complete, giving all the proceedings and evidence pertaining to the origin, nature and extent of the claim. The petition of the claimant is embraced in the report, and among other things, contains the statement, "that he cannot show the quantity of land claimed by him only so far as set forth in the foregoing description of points and bounds. Nor can he furnish a plat or survey of the same, as no survey has ever been made." The description given in the petition is the same as that heretofore set forth. There was then no pretense either before the surveyor-general, or afterward before congress, that the claim was measured and contained a specified number of square leagues; or that the claimant only asked that a certain extent of land within the given boundaries should be confirmed to him. On the contrary, his claim was openly made to the whole of the described tract, whatever its superficial area might be. In *Fremont v. The United States*, 17 How. 561, the court say: "The court could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were intrusted with their execution." We have already seen

how the Mexican authorities interpreted their laws by the manner in which they invested the claimants with this estate. But conceding that under the Mexican laws the claimants could take but twenty-two square leagues, still it would appear that by virtue of the treaty of cession the United States became seized of the entire tract, if the antecedent grant was null and void ; and it would seem to follow that they would in such case have the power to grant or withhold, to concede with or without limitations, and they have chosen to do the latter. It is said, however, that there is nothing in a void estate upon which a confirmation can act, for there is nothing to confirm. This overlooks the distinction to be made between the acts of a sovereign power and an individual. With regard to the former, it has been held that a legislative act, unlike a deed of a private person, may confirm and make valid a void conveyance. *Wilkinson v. Leland*, 2 Pet. 627. In *Soulard v. The United States*, 4 id. 511, when considering the import of the term in a stipulation contained in the treaty by which Louisiana was acquired, providing that the inhabitants of that territory should be protected in the enjoyment of their property, the court say : " It comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which are executory as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away." I think it cannot be questioned that had no treaty of cession taken place, the Mexican congress could have ratified and confirmed the unauthorized act of the governor in making this grant. Is the power of the American congress which succeeded the Mexican in the right to dispose of the public lands any less ? The act of confirmation is in law a conveyance by way of quit-claim and release of any interest which the United States may have had in the premises. If A should be in possession of a certain tract of land defined by certain natural boundaries, and B, being the owner thereof, should execute a release deed to A for the premises,

who would be warranted in saying that the deed conveyed less than the whole tract?

It is contended, however, that congress did not intend to confirm more than twenty-two square leagues of claim No. 14, because of what is said in the report of the senate committee upon this and other claims mentioned in the act of confirmation. The report of a committee of one house of congress is no expression of the will of both houses and of the executive. Where no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty, when the language is plain. Cooley's Const. Lim. 69. "In expounding this law," says TANEY, C. J., in *Aldridge v Williams*, 3 How. 1, "the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of congress in the debate which took place on its passage, nor by motives or reasons assigned by them for supporting or opposing amendments that were offered. The law, as it passed, is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself, and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

Should we, however, overlook this salutary rule, it would appear that the report of the senate committee, when fully understood, shows that each claim was, by the committee, separately considered and passed, according to its merits, by the committee, and subsequently by congress.

Other considerations are urged in favor of a different construction of the act, but we deem it unnecessary to pursue them.

We are of the opinion that the judgment of the court below is correct, and accordingly affirm it. *Affirmed.*

LAND GRANT — CONFIRMATION BY CONGRESS of a private land claim, as recommended by the surveyor-general, is not subject to judicial review: *Tameling v. Western Union Tel. Co.* 33 U. S. 644, affirming the decision in the principal case.

SULLIVAN et al. v. HENSE et al.

MINING CLAIMS—manner of locating and conveying. Before any law was enacted by the territorial assembly, regulating the manner of locating and conveying mining claims on the public domain, that matter was regulated solely by rules or by-laws made by the inhabitants of the district in which the claim was situated, or in the absence of such rules and by-laws, by the local customs and usages of the district.

In the year 1860, a valid location of a mining claim on the public domain could be made only according to the rules, usages and customs of miners in the district where such claim is situated.

EVIDENCE—as to rules, usages and customs in mining districts. Judicial notice cannot be taken of the rules, usages and customs of mining districts, and they should be proved at the trial like any other fact, by the best evidence that can be obtained respecting them.

MINING CLAIM—on public land—location of. Plaintiffs in ejectment, who seek to recover a mining claim upon the strength of their paper title, there being nothing to show that they or their grantors were ever in possession, must prove a valid location of the claim according to the rules, usages and customs of the district prevailing at the time such location was made.

EVIDENCE—as to execution of a deed. A deed for a mining claim executed and recorded in the district where the claim is situated, before any act was passed by the territorial assembly relating to such instruments cannot be given in evidence without proof that it was executed by the grantor.

1st. According to the local rules and customs of the district ; or

2d. By the subscribing witnesses (if there are any), as provided in the 15th section of the chapter relating to conveyances. R. S. 109.

Record or office copy of deed or power of attorney. A deed or power of attorney cannot be proved by the record thereof, or by a copy taken from the record, except in the manner prescribed by section 19 of the chapter relating to conveyances. R. S. 112.

The preliminary affidavit mentioned in that section should be made by all of the persons, plaintiffs or defendants, by whom the record of an instrument, or the copy thereof, is offered in evidence.

Record or office copy of certificate of location. A certificate of location of a mining claim may be proved by the record or by a transcript from the record under another statute (R. S. 466), without the affidavit of the party desiring to use it as to the possession of the original certificate.

As to length of claims by district record. In the absence of better evidence, the rule or custom of a mining district as to the length of claims located in the district may be proved by the record of such claims.

Appeal from District Court, Gilpin County.

EJECTMENT by John H. Hense and Charles O. Welsh against Dennis Sullivan, Theodore E. Wheeler and the Central Gold Mining Company, to recover claim No. 3 west of discovery claim on the Borton lode in Illinois Central District, being in length 100 feet and in width 50 feet. The plaintiffs claimed the right to occupy and possess the premises under the local laws of Illinois Central Mining District, by virtue of a purchase made by them. The defendants pleaded not guilty, and the trial was had at the April term, 1873, of the district court. The plaintiffs gave evidence tending to prove that the Borton lode was discovered in the year 1860, and that a shaft was sunk on the discovery claim in that year. William D. Arnett, the only witness who seemed to have a knowledge of the fact, testified, that in the year 1860 and up to the latter part of September or the first or middle of October, 1861, he owned and occupied the surface of claim No. 3 west, as a "patch claim," and that no other person was in possession thereof; the plaintiffs also offered parol evidence as to the rule or custom of the district in the year 1860, relating to the length of discovery claims, which was said to be 200 feet; it was also in evidence, that the rules and regulations of the district were at one time in the office of the county recorder, and that they could not be found there at the time of trial; the plaintiffs also gave in evidence a copy of a certificate of location taken from the records of the district, as follows:

SAMUEL WILSON,

Recorded November 2, 1860.

The undersigned claims 100 feet by 50 on the Borton lode, known and described as claim No. 3 west of the discovery

SAMUEL WILSON.

November 3, 1860.

Also, copy of a warranty deed from Samuel Wilson to John B. Goldsberry; conveying claim No. 3 west of the

discovery on the Borton lode, dated October 6, 1861, witnessed by James Tolman and Ben Short; also, copy of a power of attorney from John B. Goldsberry to Henry Chatillon, dated September 21, 1866; also, warranty deed from John B. Goldsberry by Henry Chatillon, his attorney in fact, to John H. Hense, conveying claim No. 3 west from the discovery claim on the Borton lode, dated December 21, 1866; also, quit-claim deed from John H. Hense to Charles C. Welsh, conveying, undivided, one-half of claim No. 3 west on the Borton lode; defendants objected to the certificate of location and to the several deeds, on the ground that it was not shown that they were signed by the persons whose names were attached thereto, and also, upon the ground that the affidavit as to the possession of the original instruments was made by one of the plaintiffs only; it was also objected that no right was shown in Wilson to make the location or to convey. The affidavit as to the possession of the original certificate of location and of the several deeds of conveyance was as follows:

"John H. Hense, being first duly sworn, on his oath, says: That he is one of the plaintiffs in the above-entitled cause, that he desires to use, on the trial of this cause, a certified copy of the record of a certain pre-emption certificate of Samuel Wilson for No. 3 west Borton lode in Illinois Central Mining District in said county and territory, and also a certified copy of the records of a certain deed for the conveyance of said claim No. 3, from said Samuel Wilson to John B. Goldsberry, also a certified copy of the record of a certain power of attorney from said Goldsberry to one Henry Chatillon, being a general power to sell and convey all said Goldsberry's interest in and to any mining claim or claims in said territory of Colorado, dated 1st September, 1866, recorded in Gilpin county aforesaid, October 9, 1866, book 30, page 411. That the originals of said papers, and each of them, are not in his possession or power to produce, and they have not been lost or destroyed by any fault of this affiant."

The defendants gave evidence tending to prove that the

claim in controversy was upon the Rhoderic Dhu lode, located in the year 1861; they also put in evidence several conveyances of property on the Arnett lode, but as this evidence is not referred to in the opinion, it is not necessary to set it out; the defendants also offered book two, of the records of the Illinois Central Mining District, for the purpose of showing the length of discovery claims located in that district, and this, upon plaintiffs' objection, was excluded by the court. Upon request of the plaintiffs the court charged as follows:

1st. The court instructs the jury that if they believe, from the evidence, that the Borton lode was discovered and taken up in 1860, and duly recorded in accordance with the customs of miners when said lode was discovered, the said lode or vein was not open to exploration or occupation, and no one could make a second legal and valid discovery on the said Borton vein or lode after the same had been so recorded and taken up.

2d. The court instructs the jury that when two crevices are discovered at a distance from each other, and are known by different names, and it appears that the two are one and the same lode, the persons having recorded on the first discovered lode are the legal owners.

3d. The court instructs the jury that if they believe, from the evidence, that the Borton lode was discovered in 1860, and No. 3, west, was recorded by Samuel Wilson, and that the plaintiffs derived a title from Samuel Wilson and his grantees, and that the defendants worked and occupied said No. 3 at the time of the commencement of this action, claiming it as the Rhoderic Dhu lode, and the jury believe, from the evidence, that the Borton and the Rhoderic Dhu lodes are one and the same, then the plaintiffs are entitled to recover in this action, unless the jury believe, from the evidence, that the Rhoderic Dhu lode was discovered before the Borton was.

Upon request of defendants, the court charged as follows:

1st. The plaintiffs must recover upon the strength of their own title and not upon the weakness of the defendants'.

2d. A mining claim in the year 1860 could only be acquired by occupation and possession of the same, or by compliance with the local laws and customs of the district, if there were any, where the same was situated. If claimed by occupancy and possession, the possession must have been defined and marked by monuments and marks. And if claimed under the local rules and customs of the district, it must be shown what those rules and customs were, and that the person so claiming complied with the same.

The court refused to give the following instruction, asked by the defendants:

2d. The plaintiffs, in order to recover, must prove to your satisfaction what were the rules, customs and regulations of Illinois Central Mining District, if there were any, and that the grantor, through whom they claim to have acquired a title to the premises in dispute, complied with such rules, regulations and customs, and if they have failed to do so, you must find the defendants not guilty.

The jury found the defendants guilty, and that plaintiffs were the owners of the claim, and there was judgment on the verdict.

Mr. Justice WELLS did not sit at the hearing.

Mr. HUGH BUTLER, for appellants.

MESSRS. WILLARD TELLER & G. B. REED, for appellees.

HALLETT, C. J. The title upon which appellees obtained judgment in the court below, originated in a location made by one Samuel Wilson on the 3d day of November, 1860. In that year, a shaft was sunk on the discovery claim, and some persons occupied the surface of the claim in dispute as "patch diggings," but it does not appear that anything was done upon this portion of the lode. On the contrary, Arnett, a witness for appellees, who worked the "patch claim," and was, therefore, well acquainted with the property, testifies that no one, other than himself,

was in possession up to the latter part of September, or first or middle part of October, 1861, and his testimony is not contradicted. Wilson conveyed to Goldsberry, October 5, 1861, and the latter to Hense, one of the plaintiffs below, December 21, 1866. Neither appellees nor their grantors were ever in possession of the lode, and the judgment rests upon the paper title set out in the bill of exceptions. It will be observed that the claim was taken and recorded by Wilson, and that the conveyance to Goldsberry was made before any law regulating such matters was enacted by the territorial assembly. The manner of locating a mining claim upon the public domain, and of conveying title to the same, was then regulated by rules or by-laws made by the inhabitants of the district in which the claim was situated, or in the absence of such rules and by-laws, by the local customs and usages of the district. To give effect to such rules, usages and customs, the legislative assembly, by an act approved November 7, 1861 (1 Sess. 168), enacted that all rights of occupancy, possession and enjoyment of any tract or portion of the public domain acquired before the passage of that act should be ascertained, adjudged and determined by the local law of the district or precinct in which such tract was situated as it existed on the day when such rights were acquired, and if there was no such local law, then by the common custom prevailing in respect to such property, and this provision was retained in the Revised Statutes of 1868 (531), and is still of force. The validity and force of such rules, usages and customs has also been recognized by congress (13 Statutes at Large, 441 ; 14 id. 251 ; 17 id. 91), and by the supreme court (*Sparrow v. Strong*, 3 Wall. 97), by which they are established, without doubt or question. We may, therefore, assume that a valid location of the claim in dispute could have been made in the year 1860, only according to the rules, usages and customs of miners in Illinois Central District, where it is situated, prevailing at that time, and it is important to determine in what manner such rules, usages and customs are to be ascertained. To say that the court

is advised as to the nature and extent of such regulations is contrary to the fact, and, therefore, they cannot be the subject of judicial notice.

In California, provision is made by statute for introducing proof of such regulations at the trial (Code of Prac., § 748), and so the practice has been with us from the earliest time. No other course can be pursued, and no good reason is perceived for adopting a different rule. That it may work hardship, in cases where the proof is difficult, or impossible to obtain, is readily understood, but as such proof lies at the foundation of the title, it is impossible to dispense with it. What this evidence shall be, must depend very much upon the circumstances of the case, and it would be difficult to frame a general rule upon the subject. It is well known that in most of the mining districts, rules governing the location and transfer of claims were reduced to writing, and preserved in the records of the district, which were afterward deposited in the office of the county clerk and recorder. In some instances the regulations were printed in pamphlet form, and copies of such pamphlets may be found; in others, no record of them remains, and resort must be had to the testimony of living witnesses, or to other evidence to establish them.

Whenever a copy of the rules can be had, no other evidence of them should be received, for in this, as in all other cases where a fact is to be proved, the law demands reasonable diligence in procuring the best evidence at command. An early statute required that the records, laws and proceedings of mining districts should be deposited in the office of the county clerk (1 Sess. 187), and for the purpose of introducing secondary evidence it may be sufficient in the first instance to show that the local laws of the district are not of record in that office. Such proof was made by appellees upon the trial below, and as it was not contended that a copy of the rules of the district was accessible, oral or other evidence tending to explain or establish the fact, was clearly admissible. There was, however, but little evidence offered upon the trial respecting the rules

and customs of Illinois Central District, and that was directed to one point — the length of the discovery claim. No effort was made to show what was necessary to be done in locating a claim in that district, or that any thing was done according to local regulations. It may have been necessary to sink a shaft on the claim, or to define the location, by monuments or in some other way. We cannot assume that a certificate of location, on the records of the district, was all that was necessary to make a valid title to a mining claim, or indeed that the certificate itself was made according to the local rules of the district. The evidence should show the essential features of a good location in that district, and that Wilson made such a location of the claim in dispute. So, also, the deed from Wilson to Goldsberry, dated October 5, 1861, was not shown to have been executed according to the rules and customs of the district, nor was there any proof of the execution of it. In the 15th section of the chapter relating to conveyances (Rev. Stat. 109), provision is made for proving the execution of a deed attested, as was this one, by subscribing witnesses, and appellees could have pursued that method if they desired to avoid the necessity of proving the rules and customs of the district; but it was necessary to prove the execution of the deed in some way. It is true that the statute declares that the records of mining districts shall be taken as evidence in the courts (Rev. Stat. 466), but this cannot be extended beyond records made according to the local rules and customs of the district. It would be absurd to suppose that the legislature intended to give validity to every instrument which may have been placed upon the records contrary to the local laws and customs of the district, for in that way those laws and customs which the legislature has always sought to perpetuate and enforce would be ignored and nullified. Therefore, it was not enough to show that the deed from Wilson to Goldsberry was found upon the records of Illinois Central District, but proof of the local rules and customs regulating the transfer of mining claims should have been offered in order that it might appear that the deed was executed conform-

ably to those rules and customs, or failing in that, proof of execution should have been made under section 15 of the chapter relating to conveyances. The 19th section of that chapter declares the law upon this point so fully and clearly that no doubt can be entertained respecting it.

Passing to the question of the proof by office copy of the certificate of location, and the several deeds of conveyance, it will be necessary to refer to the statutes bearing upon the point. The act above mentioned (1 Sess. 167) by which the records, laws and proceedings of mining districts are rendered admissible as evidence, does not require preliminary proof of the existence or loss of the instrument recorded, and probably under that act the record of a deed or other instrument which was by law admitted to the record, might have been used without laying a foundation for secondary evidence. In the year 1868, another rule was prescribed upon the same subject in section 19 of the chapter concerning conveyances (Rev. Stat. 112), and although the earlier act was substantially retained in the Revised Statutes of that year (466), we think that the later act should control.

The act of 1861 may be regarded as having effect from the date of its enactment, and probably the legislative assembly of 1868 did not weigh its provisions as carefully as those which were newly prepared and adopted at that session. In the revision; these acts were approved on the same day, but it is fair to presume that the one which was last prepared contains the best expression of the will of the legislature, and for this reason effect should be given to the act of 1868. That act requires that the party desiring to use the record of any deed, bond, agreement or power of attorney, or a transcript thereof, shall make affidavit that the original deed or other instrument is not in his possession or power to produce, and thereupon the record or transcript may be given in evidence with the same effect as the original deed or other instrument. That the oath must be made by all of the persons seeking to use the record or transcript is manifest from the language of the act and the fact to be stated. Generally the word "party," as used in the statute,

will comprehend all who appear on one side of the case either as plaintiffs or defendants, the evidence being available to all who are in that way associated, and all of them being desirous to use it. In the case at bar, it is impossible to apply the word "party" in the sense in which it is used in the statute to either of the appellees, inasmuch as there can be but one party plaintiff in that sense, and they together constitute the party who desired to use the secondary evidence. The purpose of the law is to compel the production of the deed or other instrument, if those who desire to use it have the possession or control of it, and this purpose can only be effected by requiring all of them to testify as to the fact. The affidavit of Hense did not and could not disclose whether the deeds and power of attorney, copies of which appellees gave in evidence, were in possession or under the control of Welsh, and if they were in the possession of the latter, the law certainly required that they should be produced.

The statute demands nothing more than the affidavits of all persons, plaintiff or defendant, as the case may be, as to their ability to produce the original document, which is a great modification of the old rule, and there can be no great hardship in observing its provisions. The affidavit of Hense was not of itself a sufficient foundation for secondary evidence, it being equally necessary that his co-plaintiff should testify in that behalf. The certificate of location is not, however, mentioned in the act of 1868, and as the record of it appears to be within the terms of the act of 1861, no affidavit was required preliminary to its introduction. Doubtless it was necessary to show that the certificate was made according to the rules and customs of the mining district, but the absence of the original document was not matter for objection.

Upon the trial below, appellants proposed to show the rule or custom of Illinois Central District as to the length of discovery claims by the record of claims in the district. In the absence of the rule itself, it may be doubted whether better evidence could have been found. If, at and before

the discovery and location of the Borton lode, the claims recorded in that district were uniformly of a certain number of feet, that circumstance would be evidence tending to prove that the rule of the district prescribed that length of claim. Such evidence would be far more satisfactory than that of a living witness whose memory might be at fault, and therefore it should have been received. Objections to evidence were made, upon which much time might be expended without advantage to the parties in this litigation. Enough has been said to determine the substantial questions presented in this record, and counsel should not ask more.

The judgment of the district court is reversed and the cause is remanded for a new trial. *Reversed.*

VALID LOCATION OF MINING CLAIM on the public domain could formerly be made only according to the rules, usages, and customs of the mining district: *Consolidated E. Mfg. Co. v. Lebanon Mfg. Co.* 9 Colo. 344; *Becker v. Pugh*, 9 Colo. 332.

WALLING v. WARREN.

CONTRACT—*not to sue—effect of.* An agreement not to sue within a time limited cannot be pleaded in bar of a suit brought in violation thereof.

PRACTICE—*in examining a witness.* When a question has been asked and answered it may be excluded if again asked.

INSTRUCTIONS—*to the jury—modification of.* The court is not required to give an instruction in the language of the prayer. If it is given in other words, it is enough.

CONTRACT—*whether it must be fully performed.* Upon an entire contract to build a house, the builder cannot recover until the work is completed.

In an action of assumpsit, the defendant sought to set off against plaintiff's demand, money alleged to be due under a contract for building a house for plaintiff, which contract contained no stipulation as to payment, nor as to time, but it appeared that the house was not in fact completed. *Held,*

1st. That the contract was entire.

2d. That the omission to specify a time for completing the house was supplied by presumption of law, that a reasonable time was intended.

3d. That the defendant not having completed the house, could not be allowed for work done and material furnished in building it.

Of the charge as to such contract. A charge to the jury that if defendant agreed to build the house for a fixed sum, and did not complete it, he was not entitled to a credit therefor, was not misleading, because:

1st. The burden was upon the defendant to excuse his failure to perform the contract.

3d. And if the question whether a reasonable time for building the house had elapsed, was for the consideration of the jury upon the evidence, no other result could have been obtained under a proper instruction as to that matter.

3d. It is not material that the instruction was predicated upon the supposition that the house was to be built for a fixed sum.

NEW TRIAL — *where there is conflicting testimony.* Where the plaintiff and defendant contradict each other upon the stand, and neither of them is supported by other testimony, the verdict will not be disturbed.

Upon the ground of newly-discovered evidence. An application for new trial upon the ground of newly-discovered evidence of admissions by the plaintiff, touching the matters in controversy, should show that the defendant used diligence to obtain such testimony before trial, and if he submitted his defense upon insufficient and unsatisfactory proof, and it does not appear that he inquired into the relations between the plaintiff and the alleged witness, and whether any declarations had been made by the plaintiff to the witness; and he has not excused his failure to make such inquiry by showing that there was such intimacy between the plaintiff and the witness, that he could not reasonably expect to get the truth from the latter, diligence is not shown. This is with regard to the particular circumstances of this case.

The application should also show the witnesses' place of residence.

Appeal from District Court, Gilpin County.

THE declaration contained the common counts for work and labor done, for goods sold and delivered, for money loaned, etc. The defendant pleaded *non-assumpsit*, and a set-off. In the third plea referred to in the opinion, the defendant averred, that, October 1, 1872, he entered into a contract with plaintiff to furnish lumber for, and erect a dwelling-house in Central City for plaintiff, and that the amount to become due for said house should be applied in payment of any and all sums then due, or to grow due, to plaintiff, on account of any dealings between plaintiff and defendant; that he, the defendant, commenced work on said house, and that he has used reasonable diligence in constructing the same, and that said contract between plaintiff and defendant is still existing, and that when the contract should be completed, plaintiff would be indebted to defendant.

To this plea plaintiff demurred, and the demurrer was

sustained. A trial before a jury resulted in a verdict for plaintiff for \$1,024. At the trial the plaintiff testified that he worked for defendant 32 months, and that he was to receive for his services during a portion of the time \$60 per month, and during another portion \$40 per month. A question which arose upon the cross-examination of this witness is sufficiently stated in the opinion. The defendant gave evidence tending to prove that he had built a house on Spring street in Central City for plaintiff, but he admitted that the house was not completed at the time of the trial. The defendant also testified that he delivered lumber at several places in Central City for defendant, but the plaintiff denied that he requested such delivery. As to this point, the evidence is sufficiently stated in the opinion. The principal witnesses on both sides were the parties themselves. The court instructed the jury as follows:

"The burden of proof is on the plaintiff to show the services rendered, and when this fact is once established and the defendant sets up payment, the burden of proof is on him to show that payment has been made. When there are unsettled accounts between parties, no interest is allowed except on the amount due on the settlement of account.

"As to the High street property, if Walling agreed to build the house for plaintiff at a fixed sum, and the agreement was not performed and completed at the commencement of this suit, then Walling would not be entitled to any credit for the High street house."

Upon the motion for a new trial, the defendant read his own affidavit, setting forth that since the trial he had discovered new evidence that he did not know of and had no means of finding out until after the trial; that such evidence consisted of admissions made to one Robert B. Smock; that, some time during the year 1870, plaintiff stated to Smock that defendant was indebted to him in the sum of \$350. Defendant further averred, that since such admission was made, he had paid to plaintiff more than that sum. Defendant also read the affidavit of Smock, in which the latter stated, that in the year 1870, plaintiff made such an admis-

sion to him. The motion for new trial was denied and defendant appealed.

Mr. H. M. TELLER and Mr. WILLARD TELLER, for appellant.

Mr. L. C. ROCKWELL, for appellee.

WELLS, J. The agreement set up in the third plea amounted to an undertaking by the plaintiff, that during the reasonable time allowed for the completion of the house, he would not bring his action for the moneys then due from the defendant, or for what might in the meantime accrue. It was of no greater effect certainly, than a covenant not to sue during the same time. But a covenant not to sue for a limited time was never held to bar an action brought in the meantime. The reason is, that if the defendant plead such covenant in bar and succeed upon his plea, the plaintiff will be precluded from bringing his second action after the time limited has expired. *Guard v. Whiteside*, 13 Ill. 7. To give the agreement set up its fullest effect, therefore, it could not be pleaded in bar. The demurrer was for this reason properly sustained. The plaintiff upon his examination went out of his way to assert that, of certain moneys received by the defendant to his use, no part had been repaid to him. The defendant was therefore entitled to cross-examine to the question of payment, but in the opening of his cross-examination, the plaintiff had stated that he had received money from the defendant at different times; and the question afterward propounded, and for the exclusion of which error is assigned, called for no more than this. It was, therefore, entirely proper to exclude it. If the question propounded had been directed to whether particular sums had not been paid, or whether payments had not been made at particular times, or the like, it must have been allowed. But the court was under no requirement to permit counsel to renew a question already propounded and answered.

The instruction prayed by the defendant below upon the

question of interest was substantially given by the court, though in other language; in this, as has been repeatedly decided, there was no error. There was evidence tending to show, that at sometime during, or prior to the summer of 1870, the defendant had entered into an agreement to erect for plaintiff, who was then in his employment, the dwelling-house alluded to in the second instruction given, upon the promise of plaintiff, that if, when it should be completed, the demand of the defendant therefor should amount to more than the indebtedness of the defendant to him, he would pay the difference. The defendant himself was the only witness examined as to this, and the only inference that can fairly be drawn from his testimony is, that he was to build and complete the structure. It was an entire contract. So far as appears, nothing was said as to the time within which it was to be completed. But this omission the law supplies by the presumption that a reasonable time was contemplated and no action would lie at the suit of defendant *upon the contract*, unless he had fully performed it, as well in point of time as in other particulars, or unless he had been prevented from performing it by the act or default of the plaintiff, or unless the time of performance having been subsequently enlarged by agreement of the parties, he had performed the contract as so modified. Nothing of this sort was pretended. Neither, if the contract were not fully performed, would *indebitatus assumpsit* lie upon the *quantum meruit* for what had been done, except under special circumstances, *e. g.*, such action would not lie if the defendant had willfully, and without excuse, abandoned his undertaking. *Dermott v. Jones*, 2 Wall. 1. Neither, in the like case, could defendant have advantage of what he had expended by way of set-off, in an action brought by the plaintiff. But while it sufficiently appeared that a time reasonably sufficient for the completion of such a structure had, long before the bringing of this action, elapsed, and that the house was still incomplete even down to the date of the trial, no circumstance excusing this delay was anywhere shown; for any thing that appears, the defendant refused or

omitted to perform his undertaking, without any reason or excuse for his omission. The burden of accounting for his defalcation on this behalf was, of course, upon the defendant, and he having failed to explain it, it was not improper for the court to charge the jury, that the evidence was not sufficient to warrant them in allowing the set-off claimed. This was the effect of the instruction now under consideration. The question of reasonable time, reasonable diligence and the like, is, it is true, ordinarily for the jury under proper instructions, and perhaps it would have been proper to have submitted it in this case; the final proposition asserted in the instruction given as to this point, being made dependent upon how the jury should find as to whether time, reasonably sufficient for the completion of the house, had or had not elapsed before plaintiff brought his action. If the court had so charged, it would have been necessary to further charge, that if the contract contemplated the erection of a house such as spoken of in testimony, of the reasonable value of \$1,200 or thereabouts, and if the period of one year and over had elapsed between the date of the contract and the bringing of the plaintiff's action, the defendant had not proceeded with reasonable diligence. But, upon the evidence heard, the jury would not have been warranted in resolving either of these questions of fact in the negative, so that the defendant cannot be said to have been prejudiced by the omission of the court in this respect, even if the omission were erroneous, which is not admitted. Neither is it material that the instruction is predicated upon the supposition of a price agreed upon, for whether the price, which should be paid by plaintiff for the erection of the house, was fixed and agreed upon, or left to be supplied by the legal presumption that a reasonable price was intended, is not in any manner material to the residue of the proposition, which the instruction asserts; and however the jury may have found upon the question of price the defendant cannot have been prejudiced. Evidence was given in the court below, touching certain material, amounting in all to the value of \$600, or there-

abouts, which was said to have been delivered by the defendant to the use of the plaintiff, at certain localities in Nevada street and Eureka street. The defendant in error, in his examination, denied that he gave authority for such delivery, and the jury seem to have given him credit. It cannot be said that we are entitled to review their action in this. As we understand the testimony, no other witness was examined as to this matter. Other witnesses declare, in general terms, that the defendant delivered lumber for the plaintiff at these places ; but none of them speak to any express direction given by the defendant, authorizing such delivery. The jury seem to have regarded these witnesses as speaking to their understanding of the purpose for which the lumber was delivered, and not as declaring that of their own knowledge the delivery was by authority. It is true that a portion of this lumber was afterward removed by the plaintiff and appropriated, but neither this nor plaintiff's declaration to Walters, when informed that the lumber in question was being carried away, can be regarded as conclusive, that plaintiff had, in truth, authorized the lumber to be placed where it was found. The jury must be supposed to have given to these circumstances their due weight ; and considering the whole evidence, we cannot say that they have erred in rejecting these items of the defendant's demand. Rejecting these items, and those as to disbursements, for which no authority from the plaintiff is shown, *e. g.*, the sum of \$98.50, said to have been paid to Long for his labor, and \$55 paid to Root for the erection of a chimney at the house in Spring Gulch ; and those items, as to which the testimony of the defendant is contradicted by the plaintiff when examined in reply, *e. g.*, the items of \$100, claimed by the defendant on account of going to seek the plaintiff's brother, and \$100, money paid for his transportation and subsistence, all of which, certainly, the jury were warranted in rejecting, the verdict cannot be said to be excessive. The motion for a new trial was also based upon the recent discovery of additional evidence.

All other questions aside, the party who desires a new

trial, upon this ground, must show that by the exercise of reasonable diligence the new evidence might not have been obtained at the first trial. He is required to negative every circumstance from which negligence might be inferred. What is negligence, is, of course, to be determined by all the circumstances of the particular case. When the defeated party has upon the first trial produced evidence sufficient to make a strong case, to support the issue on his part, it would be difficult to charge him with negligence in omitting to search for additional testimony, the existence whereof was unknown to him. On the other hand if the testimony produced at the trial on his part is of frail and inconclusive character, he may, as we think, be charged with negligence if he omits to seek additional evidence on all these sources where there may be a reasonable expectation of securing it. If, having submitted the issue to a jury upon insufficient and unsatisfactory proofs, he is defeated, he ought, upon the discovery of additional evidence, to satisfy the court that he had, in advance of the trial, no reason to believe that such additional evidence existed.

In the present case the plaintiff is a laboring man, he had served the defendant many months continuously. If he had any intimate friend or confidant, it would be exceedingly probable that the state of plaintiff's account with the defendant would be mentioned between them. It is reasonable to suppose that this was the relation between the plaintiff and the witness Smock, by whom the newly-discovered admission is proposed to be established, and for aught that appears, the defendant, long before the trial, may have been advised of this intimacy and confidence, and if so advised, he ought, as we think, to have approached the witness to inquire whether the claim of plaintiff against defendant had been the subject of conversation between them; and as to the plaintiff's statements in that regard, or if, as may have been the case, his relations to the witness did not permit such inquiry with the hope of a free and indifferent disclosure, which would probably excuse the omission, this

should have been made to appear. The affidavit appears to us defective in this respect. The averment that he used all diligence in trying to discover evidence, involves matter of law, and so of the averment that he had no means of knowing of the evidence until after the trial. The averment that he never was aware of any conversation between plaintiff and the witness to the new matter, is entirely consistent with a knowledge of such a state of facts as would lead any reasonable person interested in the matter to believe that conversation had occurred between them in regard to the matter in issue. It seems to us, also, that the affidavit ought to disclose the residence of the witness; at least, this should be made to appear by the affidavit of either the party or witness; for the prevailing party, resisting the motion, is entitled to impeach his credit. *Parker v. Hardy*, 20 Pick. 246. And he cannot do this unless advised as to where he may be found.

For these reasons the motion for a new trial was properly denied. No error appearing, the judgment of the district court must be

Affirmed.

VERDICT WILL NOT BE DISTURBED where the evidence is conflicting, if not manifestly wrong (*Barter v. Hawley*, 4 Colo. 327, 341); and this is so where the plaintiff and defendant contradict each other, and neither is supported by other evidence: *Schiller v. Luodetke*, 6 Colo. 327.

KANSAS PACIFIC RAILWAY CO. v. MILLER, administrator.

EVIDENCE — circumstantial. Discussion of the sufficiency of certain circumstances to establish the allegation of the death of plaintiff's intestate, in an action for injuries resulting in death, under the statute, the question being one of identity of person.

Pedigree. Declarations of a decedent, contained in letters shown to have been written by him, are competent to show his marriage.

Documents purporting to be transcripts from certain official registers, found in the baggage of a railway passenger, who was killed in an accident, were held admissible upon the question of his marriage, without evidence of their authenticity.

In the same case, the decedent, whose family relationship was in issue, had, next before his death, been found traveling in company with a woman, and certain young children, toward whom these adults were observed to perform the office of parents; the baggage inferentially shown to belong to deceased, contained wearing apparel, apparently suitable to all the

party in common, these circumstances were held to afford an inference that the relation of husband and wife existed.

Handwriting — letters. M. had resided at Brackenheim, in Germany, and there knew one B., then a youth; many years after his removal to this country he received a letter from B., and replied to it, addressing his reply to B. at Brackenheim; to this letter he received a response, purporting to come from B., and bearing the post-mark of Brackenheim, and that of New York; *held*, that the letters received by M. were admissible, as the letters of B., without further evidence of the handwriting of B.

The cases of *Harrington v. Frey*, 1 Ry. & Mood. 90, and *Tharpe v. Gierne*, 2 Q. & P. 21, cited with approval.

Secondary. Party who attempts to raise a presumption that certain letters are in the handwriting of his deceased intestate, from the fact that they were received by himself by post, in response to letters addressed to decedent at his place of residence, must produce the envelopes in which such letters were received, and bearing the post-mark, if in existence.

Case by administrator for negligently causing the death of his intestate, under the statute, upon the question of the identity of a deceased person, killed by an accident, upon the defendant's railroad, with the plaintiff's intestate, it was shown that, upon demand for the baggage of the persons who had been killed in the accident, certain boxes had been delivered up by the officials of the company, and it was held that the inscriptions upon the boxes might be given in evidence, without producing the boxes

Public documents — originals admissible. The statute directs letters of administration to be preserved in the probate office, and makes transcripts thereof evidence. *Semble*, the originals are admissible.

Admissions by conduct. Case by administrator for injuries resulting in the death of his intestate, by the subversion of a bridge on defendant's railway, by which the train wherein intestate was traveling was wrecked; *held*, that the subsequent construction of a new bridge over the same channel, in a different manner, amounted to an admission that the former one was improperly constructed.

But not that these defects were attributable to negligence. In the same case for the purpose of showing that a person who came to his death by an accident on defendant's railway was the plaintiff's intestate, plaintiff was permitted to show that the deceased person in question was buried at the instance of the superintendent of the company, and then to inquire whether any name was inscribed upon the head-board which marked the place of burial.

Relevancy. The question being as to the character of a stream, a railway bridge over which had been destroyed by a flood, and whether the defendants were negligent in not foreseeing and providing against such occurrence; *held*, that evidence of floods subsequent to that which occasioned the injury was improperly received.

Error in receiving irrelevant evidence may be cured in some cases by an instruction to the jury to disregard it.

Opinions of witnesses. A witness who had ridden in a railway train with a party composed of adults and children, during a portion of two days, was permitted to express the opinion formed from the observation of their demeanor and conduct, their dress, conversation and general appearance, that they were of one family, and of German nationality.

A witness may express an opinion of the age of a child from its size and general appearance.

PRACTICE — rebutting. Case, for negligence in the construction of a railway bridge, which, being undermined by a flood of waters, fell under the train in which plaintiff's intestate was being carried. Plaintiff, in opening, gave direct evidence of faults and negligence in the construction of the bridge; that the injury occurred by reason of the washing away of an embankment, forming the eastern approach to the bridge; that this embankment had been carried out from the eastern bank, into the deepest part of the channel; that it was composed of light and unsubstantial material, liable to yield to the action of water; that, at the time of the construction of the bridge, there existed indications of a previous flow of water there, and that the attention of the engineers was called to these circumstances. After the defendant had closed his evidence, which was directed to show, among other things, that no such indications of a previous flow of water there existed at the time of the construction of the bridge, or afterward, the plaintiff was permitted to call a witness, to show that at the time of the construction of the bridge, there were saplings growing upon the low ground in the immediate vicinity of the bridge, and that to the distance of two or three feet from the ground these saplings bore water-marks. This was held to be within the discretion of the court.

DAMAGES. Exemplary, are not to be given for mere error of judgment not accompanied with negligence, evidencing an indifference to consequences.

STATUTES — construction of. Where a statute gives an action in a new case, and no rule for estimating the damages is given, those ordinarily applicable in like cases, at the common law, must be held to govern.

RAILROADS — diligence required. It is the duty of a railroad company, in its capacity as a carrier of passengers, to exercise the highest degree of care in the construction and maintenance of its roadway, and the appurtenances.

But the carrier is not liable for injuries resulting from an accident against which the highest degree of skill, foresight and diligence would have been unavailing.

Where the company located a bridge over a channel then containing no water, and wherein no flow of water was known to have occurred; held, that due diligence required an inquiry and examination as to its character and the declivity of the circumjacent country, to ascertain the quantity of water likely to flow there in the future; that if indications existed in the vicinity, of former floods, *e. g.*, drift-wood and the like in the branches of bushes, or water-marks upon the trunks of trees, it was gross negligence to construct the bridge with its approach of light and unsubstantial soil, reaching into the water-way.

A violent storm occurring near the sources of a channel or water-way, ordinarily dry, was observed at a station on the railway, nine miles distant from a bridge, by which the road crossed the channel in question. *Held*, that diligence required of the agents of the company to examine the bridge after the storm, and before the passage of trains.

PRACTICE — *examination of witness by the court.* Plaintiff had given evidence in his own behalf, to lay the foundation for the admission of certain letters. After his examination by counsel upon both sides was completed, and the witness had been discharged, the admissibility of the documents being yet doubtful, the presiding justice of his own motion recalled him, and propounded questions, the answers to which tended to show the letters admissible; *held*, not an abuse of the discretion of the court.

PRESUMPTIONS — *death of husband and wife by the same casualty.* Where two persons, husband and wife, are shown to have perished in the same casualty (the wrecking of a railway train by the giving way of a bridge), nothing appearing to the contrary, it was said to be a presumption of law that they died at the same moment.

JURY — *questions for.* When an injury to a passenger upon a railway train is shown to have been occasioned by the giving way of a bridge on the line of the road, it is for the jury to ascertain whether the occurrence was due to faults in the construction of the bridge or to other causes.

May refer to their own experience. In case by the administrator to recover for injuries occasioned by negligence and resulting in the death of his intestate, it was said that the jury in estimating the damages should take the facts in proof, and connecting them with the knowledge and experience possessed by them in common with men in general, arrive at a rule which should be just between the parties.

NEGLECT — *evidence.* When an injury occurs to a railway passenger, by reason of the giving way of a bridge under the passing train, proof of the casualty is *prima facie* evidence of negligence in the location or construction of the bridge, or in both its location and construction.

So, too, where the subversion of the bridge appears to have been occasioned by an unusual flood or freshet.

Aliter. Where the injury occurs from causes entirely foreign to the apparatus or operations of the road.

NEGLECT RESULTING IN DEATH — *surviving descendants necessary.* In case, under the statute, for injuries occasioned by negligence and resulting in the death of the party injured, the existence of any of the descendants or kin named in the statute, suffices to maintain the action.

Character of the administrator as plaintiff. The administrator is a mere nominal plaintiff, suing for the benefit of the surviving widow or children.

Damages. When the injury is the result of wantonness, violence or gross negligence, exemplary damages may be given.

Semble. That where an interval of time occurs between the injury and death, nothing is to be allowed for the suffering of the injured party during this time.

The anguish of the survivors is not to be considered in estimating the damages.

Manner of estimating damages in such case, and the elements which enter into the computation considered.

WATER-COURSES — *extraordinary freshets*. A railway company in carrying their road across a water-course or channel, are bound to provide for even those extraordinary floods which, by the exercise of the highest circumspection, may be anticipated.

Appeal from District Court, Arapahoe County.

CASE by the administrator, suing for the use of the surviving children, for injuries occasioned by the negligence of the defendant and resulting in the intestate's death.

The statute, which gives the action (Acts 1872, p. 117), declares that "when the death of any person is caused by the wrongful act, misconduct, negligence or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he or she lived, against the latter for the same act, misconduct, negligence or omission, *provided*, that the action be commenced in two years, and that the damages shall inure to the exclusive benefit, first of the husband or wife, if living, and if there be no husband or wife, to the child or children of the deceased."

Miller, as administrator of David Buger, deceased, brought his action against the railway company for causing the death of his intestate by negligence, while being transferred as a passenger for hire on one of the cars of the company. In two counts the declaration attributed the injury to negligence in the construction of a bridge, by means whereof the car was thrown down, broken, etc. Other counts alleged negligent conduct in general without specifying the particulars of such negligence, and each count alleged that the intestate left two minor children, named, to whom the damages might be distributed.

The issue was tried at the April term, A. D. 1873, before the Hon. EBENEZER T. WELLS and a jury.

It was admitted that one David Buger, alleged to be the plaintiff's intestate, was a passenger for hire upon the defendant's train, before, and at the time of the alleged accident.

The locality of the accident was at a bridge or trestle over what is commonly termed Coon creek ; the stations nearest are Mirage, about one mile to the east, and Hugo, about nine miles to the west from the trestle. The railway at this point runs nearly east and west, pursuing the valley of the Big Sandy creek.

The trestle in question, though spoken of as the Coon creek bridge, is in reality located in a semi-circular basin formed by a bend in which the Sandy formerly flowed ; Coon creek proper has its source or beginning in a divide about nine miles to the north, and empties into the old channel of the Sandy about 1,100 feet above the trestle.

The trestle was constructed in June or July, 1870 ; at that time there was a defined channel of Coon creek for six or seven hundred feet above its mouth, at the old bed of the Sandy ; in places there was water standing in pools ; the channel was from 25 to 30 feet in width, and with banks sloping in some places and precipitous in others ; above that, there were places where the water had cut gullies or holes, but no continuous defined channel, and for three miles or more at the head of the valley there were no indications of the passage of water there at any time ; there were numerous dry ravines opening into this valley, but none wherein water had ever been seen to flow. There was testimony tending to show that, at some former time, the course of Coon creek had carried it to the Sandy, considerably to the east of the trestle, and crossing the line of the railroad half way between that and Mirage station.

The mouth of that channel by which, on the occasion in question, the flood entered the old channel of the Sandy, is, as before said, about 1,100 feet above the trestle ; from this point to the trestle the ground descends gradually toward the trestle. The old bed of Sandy has upon its eastern and northerly boundary a bank nearly perpendicular at the top, and with a slope at its foot. The height of this bank is about 13 feet.

The bottom of the old channel was everywhere nearly level across its whole width, the testimony being in conflict

as to whether the lowest point was close under the eastern bank, or at some distance from it. At the time of the construction of the bridge this old channel was filled with sand in places, and everywhere else was covered with grass and weeds. Prior to the accident, no water had ever been seen to flow there, or at any point in either channel of Coon creek; though besides the bluff bank of Sandy, and the water-worn channel of Coon creek, Keating, a witness examined for the plaintiff in chief, swore that at the time of the construction of the bridge, the bank of the old channel of Sandy exhibited traces of the action of water, and John Burk, a witness for the plaintiff, against the defendant's objection, testified in rebuttal to having seen at the time of the construction of the bridge, water-marks upon saplings growing in the vicinity. Storms had frequently occurred in that region, but a flood of such volume as the one which occasioned the accident, had never, according to the testimony, been previously known. As originally constructed, the bridge was formed of a trestle upon piles five or six bents, each of 15 feet in length; from the east it was approached by an embankment of dirt about eight feet in height, and extending into the dry bed of Sandy creek, from 30 to 50 feet,—as to its length the witnesses varied in their recollections; the foot of the western slope of this embankment was near the easternmost row of piles. As to whether this embankment did or did not extend across the lower part of the old channel of the Sandy, was a point upon which the witnesses were not agreed. The trestle was connected with this embankment by stringers, which had a bearing of eight feet or more upon the embankment. From the east the railway approached this trestle through a cut 800 feet long, and the eastern embankment was composed of sand, or clay and sand taken from this cut. The witnesses agreed that it was of inferior character for such a purpose, but the best that the region offered; no stone was found nearer than 100 miles distant, or thereabouts. The witness, Keating, who, working under a contract, had superintended the grading this portion of the road, swore

that he extended this embankment according to his own discretion ; that he had instructions to leave a 70-foot opening for water-way, and that, originally, the engineer had directed that this opening should be left next the eastern bank, and that the material from the cut should be wasted at the side of the roadway ; that when witness had requested permission to carry the material into the bed of Sandy, thereby forming an embankment there, the engineer had at first refused, but afterward yielded, instructing him, however, to leave the same opening. Witness further deposed, that he had, during the progress of the work, called the engineer's attention to the evidence of a former flow of water there, and the probability that this embankment would be washed out.

The defendant gave evidence that at about 100 to 150 feet above the trestle there was a projection from the eastern bank of the Sandy which, in the opinion of the engineer, would divert the water from the eastern embankment. The professional witnesses generally agreed that the bridge, as originally constructed, exhibited no lack of care or engineering skill. Subsequent to the accident, however, it was shown that the defendant had reconstructed the bridge, leaving a wider water-way. This evidence was received against defendant's objection, and an exception was reserved.

A witness who resided at Hugo station, testified that on the evening previous to the accident, a violent storm had been observed, near the head of Coon creek, apparently, accompanied by violent thunder and lightning, and an unusual roaring ; and that these appearances had been the subject of general conversation at the hotel in Hugo.

No evidence was given of precautions taken by the employees of the railroad company in view of these appearances.

Witnesses sworn for the defendant testified to having been at the trestle late in the evening previous to the accident ; that but a slight shower occurred there or anywhere

in the neighborhood of Mirage, and the channel was perfectly dry.

The western bound train which had left Kansas City on the evening of the 27th reached Mirage at 1:15 of the morning of July 29. The night was cloudy and dark. As the train approached the trestle its speed was about 15 miles per hour; the head-lamp was burning and enabled the engineer to see the rails for the distance of 300 to 400 feet.

The rails were in place and no indication of the insecurity of the bridge appeared. In fact, by a flood of water coming down Coon creek entering the old channel of Sandy above the bridge, the eastern embankment had been washed away so that the stringer constituting the approach to the bridge being sustained by the rail merely, and without support from beneath, yielded under the weight of the train. The engine leaped the chasm, but the baggage car fell and the second car colliding with this was broken in pieces. The water in the old channel of Sandy was then from three to five deep feet and running with great violence.

The evidence failed to show any defect in the equipment of the train, or negligence in its management. The plaintiff gave evidence, by a witness who had traveled upon the train from Kansas City, that in the second-class car were eight or ten passengers; that among them were one party of five or six, three of them being children; that one of these children was eighteen months old or thereabouts, one three or thereabouts, and the other seven or eight; the eldest child was a girl, the other two, boys. The witness was permitted, against the objections of the defendant, to express the opinion formed from the conduct and demeanor of the party, that they were all of one family; and the opinion, formed from observing their dress, general appearance and conversation, that they were of German nationality; though the witness professed himself not well acquainted with the German language. The witness deposed that the adults of this party were killed in the accident, while the children survived. This witness, and an undertaker who laid out and buried the bodies, deposed

with particularity to the physical appearance of the man of this party, who was found dead after the accident, and this description corresponded with that given of John David Buger, the elder in the documents afterward introduced. On the day following the accident, the bodies of the dead, and the wreck of the train, with the baggage of the passengers, was conveyed to Denver, and plaintiff gave evidence that on the 30th a witness had called at the baggage-room of the depot used by defendant and two other companies for the baggage of the people who were killed on the railroad; that the baggage-master had directed him to go to the office of the superintendent of the defendant and get the checks; that he went to that office and informed one of the clerks that he wanted the checks for the trunks of those German people who were killed on the road, by the name of Buger; that upon being interrogated as to his authority, he had replied that Mrs. Shirmer sent him; that the clerk thereupon gave him two or three checks, and that upon these he obtained certain wooden boxes or chests, banded with iron, and such as are called emigrant chests.

The witness further stated that his purpose in seeking the trunks was to obtain clothing for certain German children whom he had first seen on that day at the house of Mr. Shirmer; that there were three of the children, one a girl, eight or nine years old, the other, boys, 16 to 18 months, and two to three years of age, respectively; they spoke German, and the older boy said his name was Charley Buger. The witness was permitted to speak of the age of the children from their size and general appearance, defendant reserving an exception. The witness was also permitted to give the contents of the chest against defendant's objection, defendant excepting. They contained men and women's clothing, some of which was marked D. B., and some of the female clothing, A. B., clothing suitable to children of the ages and sex of these children, shoemaker's tools, and certain documents hereafter set forth. This witness and others were permitted to state, against objection, that the boxes

bore the inscription, "David Bugar, Botenheim, Bremen, New York."

To prove lawful issue surviving the intestate, plaintiff relied upon the conduct and demeanor of the adults, who came to their death in the accident, both toward the children of the party and each other, and also upon certain letters and the documents found in the chest before mentioned. The plaintiff was sworn in his own behalf, and deposed that he was born in Botenheim in the kingdom of Württemberg; that he knew one David Bugar there, and only one person there of that name; that he had received in 1872, certain letters purporting to come from this person, some of which he produced; they were in the German language and plaintiff deposed that in consequence of the receipt of these communications he had bought in Denver two through tickets and had sent them with a sum of money to New York, in order that the writer of the letters might come to Denver. The witness did not profess to have any acquaintance with the handwriting of the decedent, except as acquired by this correspondence.

After the examination of this witness by counsel of both sides and his discharge, the letters, accompanied by a translation, were offered, and, objection being made, the judge presiding, after an adjournment, recalled the witness, and of his own motion, examined him at length against the objection of counsel for the defendant, and this was made the ground of an exception. Upon this examination the plaintiff swore, that during an 18 years' residence in this country he had maintained a correspondence with friends residing in Botenheim; that his correspondence with Bugar commenced on the part of the latter; that witness had responded to this; other letters upon both sides had followed, witness directing his communications to David Bugar at Botenheim, and receiving replies; that these letters received by him in this correspondence bore the post-mark Brackenheim (which was the post town nearest Botenheim), and New York.

The envelopes containing the letters offered, witness swore

were destroyed, though he might be able to produce some of those in which the earlier letters of the correspondence (which witness swore was destroyed) had been received, if he were at home. Upon this showing the court admitted certain portions of these letters as translated. The first, dated Botenheim, February 16, 1862, and signed, Shoemaker Buger, contained a statement as follows: "My wife is the youngest of your sisters, and I have three children, a daughter of seven years and two boys, one two, and the other one year old."

The second was dated New York, May 14, 1872, and contained the following passage: "Dear brother-in-law, perhaps you don't recollect me; my name is David Buger, and my wife Augusta Neuschwander. I have a girl eight years old, a boy of two years, and one of one year; that is my whole family." The letter also contained the statement that the girl spoken of was born before his marriage.

The third was dated New York, June 11, 1872, and subscribed, David Buger, and repeated the statement of his marriage.

Plaintiff swore that his own name was Neuschwander; that he had assumed the name of Miller many years previous. The documents found in the chest obtained at the railroad depot were also received, against defendant's objection, accompanied by translations, and were as follows:

1st. An extract from parish register, entitled "Bailiwick Brackenheim, Botenheim," and set forth the illegitimate birth on February 23, 1865, to Augusta Neuschwander of a daughter baptized Marie.

2d. Extract from parish register of the same title and setting forth the legitimate birth, February 18, 1871, of a child baptized John David, to John David Buger and Augusta, daughter of Neuschwander.

3d. Extract from parish register, entitled "Bailiwick Brackenheim, municipality Botenheim," and set forth the legitimate birth, March 5, 1870, of a child baptized Karl David, to John David Buger, shoemaker, and Augusta, daughter of Neuschwander.

4th. Of the like title and character, and setting forth the legitimate birth, March 9, 1842, of a child baptized Augusta, to George Adam Neuschwander and Augusta, daughter of Rucker.

5th. One of the same character and title, setting forth the birth, October 20, 1844, of John David Buger.

All these documents were attested and certified March 25, 1872.

6th. A document purporting to be an emigrant's pass from the Kingdom of Württemberg to John David Buger, "native of Botenheim, and resident there up to this date, from his home through Baden and Prussia by way of Bremen to North America." A full description of the person was written upon the margin, and the name of his companions were subjoined as follows: "*His wife* Augusta, Neuschwander's daughter, born March 9, 1842. *Children*, Karl David, born March 5, 1870; John David, born February 18, 1871; the illegitimate daughter of his wife, Marie Neuschwander, born February 23, 1865."

7th. A discharge from citizenship in the Kingdom of Bavaria to the shoemaker, John David Buger, from Botenheim, Bailiwick Brackenheim, born October 20, 1844;" who the paper recited "desires to emigrate to North America."

Plaintiff gave in evidence the original of his letters of administration from the probate office; objection was made that a certified copy only could be received, and this being overruled, an exception was reserved. The statute (Rev. Stat., ch. 60 and 61, § 10) requires the originals to be kept in the office of the probate judge, and transcripts thereof are made evidence (Rev. Stat., ch. 21, art. 10, § 4).

The court charged the jury that to a recovery by the plaintiff it must appear that Buger died before action brought, leaving one or more children born in wedlock; that his death was occasioned by negligence of the defendant; that upon the question of decedent's marriage they might consider the letters read in evidence, and the documents said to have been found in the chests obtained at the railway depot, but that these last were not to be regarded

official or authentic documents; that their character as evidence depended solely upon whether they were or were not in possession of the intestate in his life-time; that as to the question of negligence the giving way of the bridge, if established, made a *prima facie* case, which it rested with the defendant to overthrow; that the company, though not an insurer against accident to passengers, was bound to exercise the highest degree of care for their safety; that it was not bound to observe every conceivable precaution; but that such a man of more than ordinary prudence and foresight could put forth in like case to prevent injury to himself was bound to observe; that in locating its roadway across any stream or water-way, it was bound to inform itself of the nature of the stream and the quantity of water, which might reasonably be expected, and to provide water-way, not only for the usual and ordinary waters of the stream, but for such freshets and floods, though not usual, might be anticipated by the exercise of the highest circumspection. That if they should neglect for the plaintiff they might take into account the anguish of mind experienced by the children, upon their bereavement, the loss of the protection and fatherly care of the parent during their minority, and what the father, had he lived, would reasonably have expended for their proper maintenance during minority. That upon all the evidence, they were of opinion that the employees of the defendant, at the time of the construction of the bridge, or afterward, must, in fact, have foreseen the probability of such a flood, as the one which was said to have occasioned the accident, and that the consequence might probably be the destruction of passing trains, it was gross negligence not to provide against such consequences, and they might award exemplary damages. The jury were cautioned, however, not to award exemplary damages for errors of judgment, or for negligence merely not accompanied by an apparent reckless disregard of consequences.

To the giving of each of these instructions, the defendant excepted, and each point of the charge was specially assigned for error.

The jury found the defendants guilty, and awarded damages in \$15,000. The defendant moved for a new trial upon the ground of alleged error in receiving and excluding testimony, and in the charge, assigning also for cause, that the damages were excessive, and the verdict against the evidence. This motion the court denied, and judgment was given upon the verdict.

The chief-justice concurred in the result only.

Mr. Justice WELLS dissented.

Messrs. SAYRE & WRIGHT, for appellants.

Mr. E. L. SMITH and Mr. D. W. CRATER, for appellees.

BELFORD, J. When the plaintiff rested his case, the defendant moved for a nonsuit, on the following grounds

1st. No negligence proved against defendant.

2d. It did not appear that David Bugar is deceased, or if so, that he left any heirs.

3d. That it did not appear that the wife of the intestate who would be exclusively entitled to damages, is dead.

4th. That the evidence is insufficient to support a verdict. The motion was denied, and the ruling of the court is assigned for error.

The declaration charges that the plaintiff's intestate was a passenger for hire on the defendant's train of cars. That he had made a contract with the defendant to be safely carried from Kansas City to Denver, and that, by reason of defects in the location and construction of a certain bridge over Coon creek, the cars collided, and that Bugar was killed; that he left surviving, as heirs, two children of tender years, etc. The evidence shows that by reason of the giving away of the eastern embankment, on which the bridge rested and abutted, the accident occurred. That it is the

imperative duty of a railway company to keep their track in a sound and safe condition, cannot be disputed. If it has no track, or a chasma is suffered to exist on it, it is either incapable of performing the duties it has contracted to discharge, or it puts the limbs and lives of its passengers in jeopardy. In this case, instead of carrying the plaintiff's intestate safely over its road, as the defendant had contracted to do, he is killed by the breaking down of a bridge, which forms part of its roadway. The moment such a state of affairs was shown to exist, the presumption of negligence on the part of defendant necessarily arose, and it required evidence on its part to overcome that presumption, and establish affirmatively that no negligence existed on its part, to which the accident could be attributed. This is the doctrine clearly and ably announced in *Brehan v. The Great Western R. R. Co.*, 34 Barb. 256, which is a case similar in almost every respect to the one at bar. The presumption of negligence, however, does not attach itself to every injury which may overtake a passenger, while being transported in a car; it belongs only to that class of accidents where the injury is caused by a defect in the road, cars or machinery, or by want of diligence or care in those employed, or by some other thing, which the company can and ought to control, as a part of its duty to carry the passenger safely, because in all these matters it is the duty of the company to use the highest degree of care to have all their arrangements safe and in good condition. *Meters v. Pennsylvania R. R. Co.*, 64 Penn. St. 225; *Curtis v. Rochester & Syracuse R. R. Co.*, 18 N. Y. 534; *Am. Law Review*, January No., 1871. Whatever diversity of opinion may exist on the subject of the burden of proof in cases of negligence, the courts seem all agreed in holding that where the accident occurs in one of the ways mentioned above, that is, on account of a defect in the road or machinery, or through the carelessness of the agents employed by the company, the accident is *prima facie* evidence of negligence, and the defendant must establish affirmatively that no negligence existed on its part. *Louis*

ville & Portland R. R. Co. v. Smith, 2 Duvall (Ky.), 556
McLean v. Burbank, 11 Minn. 277; *Illinois Central R.
 R. Co. v. Phillips*, 49 Ill. 234; *The Great Western Rail-
 way Co. v. Baird & Faucett*, 1 Moore's P. O. 101 (N. S.)
Stokes v. Saltonstall, 13 Peters, 181.

The carrier may, however, rebut this presumption by showing that the injury arose from an accident, which the utmost skill, foresight and diligence could not prevent. It is claimed, however, by the counsel for the appellant, that when the accident occurs from causes entirely foreign to the operation or apparatus of the road, mere proof of the accident is not sufficient. There are cases where it is held, and properly too, that when an injury is occasioned by an agency disconnected with the operations or apparatus of the road, no negligence will be presumed; for instance, if a passenger in the car is shot by a person without; but we know of no case that excludes the presumption of negligence when the accident occurs from a defect in the road itself, or from that cause concurring with others. When the accident and injury were shown, it then became a question for the jury to determine whether the breaking down of the embankment was owing to faults committed in its construction, or to causes unexplainable, and involving no responsibility on the part of the company, or from the hidden forces of nature and the interposition of a superior power, which no care, skill or precaution on its behalf could avert or control. The circumstances in evidence, when the motion for nonsuit was made, were sufficient to create a presumption of negligence if the law did not raise that presumption from the accident, injury and the destruction of the embankment. It seems to me, therefore, that the motion was properly overruled on the first ground.

As to the second, that it does not appear that David Bugar is dead, our holding cannot be different. The stipulation filed by counsel in the court below, admits that David Bugar was before the alleged accident, and at the time thereof, a passenger for hire in one of the cars or coaches of the defendant, as stated in the declaration. Does the evi-

dence show that he lost his life in the accident mentioned ? On this subject there is no direct proof, but the circumstances detailed point unerringly to that conclusion. First, we have the fact that in that train and in the baggage car were three boxes, two of them bearing the name of David Buger, also the name of Botenheim, the town from whence he started on his western trip. In these boxes was found clothing marked with the letters "D. B." and A. B.," being the initials of David Buger and his wife, Augusta. Further, we find in them clothing for children, and documents, which, on their face, purport to be transcripts of the parish register, containing the date of the birth of his children and their names. The evidence further shows, that in the car which was wrecked a German man, two women, and three children of the same nationality were seated ; that they consorted and fellowshipped together as one family. We further find that this man and the two women were killed, and that the little boy gave his name as Charley Buger. We have the further fact, that when Stockdorff called at the depot for the checks accompanying the trunks of the German people that got killed on the road by the name of Buger, they were furnished by the employees of the company, and the trunks delivered to him. We have the further fact, that after the death of these parties, no one came forward as claimant of these boxes, and what is still more significant, no father or mother asserted their parental claims to the bereaved and homeless children. When children of tender age are found traveling in a railroad car, in a strange land, with a man and woman who seem to care for their wants, and furnish them needed comfort and protection, it is a fair and natural presumption that the parties performing these offices are their parents. Strangers rarely are found making long journeys with children who have not passed the bounds of nurture. We think, then, that the circumstances above detailed, and others found in the evidence, were sufficient to warrant the jury in finding that Buger was numbered with the slain, and that the children with whom he had been consorting were his own. Evidence of affection, solicitude and care

under the circumstances cannot be said to have been simulated. The purpose of such conduct is not apparent.

What has been said as to the death of Bugar may be said as to the death of his wife. It seems to me, therefore, that upon the evidence before the court at the time plaintiff rested his case, he was entitled to a verdict, and that no error was committed in overruling the motion for a nonsuit. On the trial various objections were taken to the admissibility of evidence to establish the marriage of Bugar. A number of letters were admitted which Miller testified to having received from Bugar at different times, also documents purporting on their face to be transcripts from the parish register of Botenheim. It is claimed by the appellant that this was secondary evidence, and therefore inadmissible. These letters were received by Miller in due course of mail from Botenheim in Germany, and from New York. Miller, the recipient of them, had been a native of Botenheim, knew Bugar when he was a lad, and was acquainted with his parents. The first letter imparts to Miller the intelligence of Bugar's marriage with Miller's youngest sister, Augusta, and their intention to embark for America. This letter bears date February 16, 1872. The second letter, dated New York, May 14, 1872, makes mention of the marriage, and that he is there awaiting some assistance from his brother-in-law, Miller. The third letter is of a somewhat similar character. The documents above referred to recite the fact of Bugar's marriage to Augusta, and the birth of the children. If this evidence was rightfully received, the proof of the marriage is satisfactory.

Miller testifies that the envelopes in which these letters were inclosed bore the post-marks of Botenheim and New York, and these circumstances must be taken as *prima facie* evidence that the letters were deposited in the offices at those places. If a letter is sent by the post, it is presumed, from the known course in that department of the public service, that it reached its destination at the regular time, and was received by the person to whom it was

addressed, if living, at the place and usually receiving such letters there. Greenl. Ev., vol 1, § 40.

There can be no question that the identity of the correspondent whose letters have been received, with the party whose handwriting is to be proved, should be established, either by the witness who received the letters, or by other reasonable evidence. A witness to prove the handwriting of S. F., said that he had never seen S. F., but had corresponded with one S. F. of Plymouth Dock; that he had so addressed his letters, and received answers from him, and had from that correspondence acquired such a knowledge of his handwriting as enabled him to say that the paper produced was in the same handwriting; evidence was given that the defendant lived at Plymouth Dock, and that no other person of the same name resided there, and it was held that proof was sufficient. *Harrington v. Frey*, 1 Ry. & Mood 90. In *Thorpe v. Gisburne*, 2 C. & P. 21, the witness said he had never seen the party, but believed the instrument to be in his handwriting, from having received letters from him, upon which he had acted. BEST, C. J., ruled that this was quite sufficient for the witness to ground his belief upon, which he said was all that was required. See Phillips' Ev., vol. 2, top p. 503, note 481.

I fail to see why the doctrine thus announced is not applicable to this case. It seems to us, however, that the envelopes which inclosed these letters should have been produced, if the same were in existence.

It will be conceded that a declaration made by Buger, as to the fact of his marriage, would be held admissible. *Campalle v. Ferrin*, 23 N. Y. 104; *Charlotte School v. Greenwell*, 4 Gill & Johns. 414. Is the declaration different when committed to writing? Miller swears that he knew of one David Buger in Botenheim, and in absence of opposing proof, we are not called upon to presume that there were others there of that precise name. It must be conceded that the letters could not have been written for a purpose. It cannot be said that David Buger, or any one else, deliberately set to work to prepare evidence to be used in a case

which could only arise from the fact of Buger's death, growing out of an accident to a particular train on which he was to travel — such prescience as that would be unexampled in judicial history. Standing alone, the letters may be regarded as weak, but when supplemented by the concurrent circumstances, which stamps this case at every point, they were entitled to admission and consideration, upon the production of the envelopes, or the accounting for their loss. The declarations in these letters seem to be verified by facts disclosed throughout the entire evidence. It was also proper to receive evidence as to the inscriptions on the boxes. If the production of the thing on which the inscription is found is indispensable, it would be impossible to proceed in many cases. If a sign were painted on a house, it would hardly be contended that the house would have to be produced, nor can it be said that the law converts the court-room into a receptacle for wagons, boxes, tombstones, and the like, on which one's name may be written. So, too, I think the transcripts of the parish register, under the peculiar circumstances of this case, were admissible as a collateral fact, showing the marriage, especially when regard is had to the place where they were found. It was competent for the plaintiff to have obtained certified copies of these documents, duly authenticated, but it would have entailed considerable cost, and great delay. While courts, in the administration of the law of evidence, should be careful not to open the door to falsehood, they should be equally careful not to shut out truth. They should not incumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy — itself a serious evil — without giving any additional safeguard to the interests of justice. SWAYNE, J., 3 Wall. 141. But there is another circumstance which gives these documents weight, sufficient to entitle them to the consideration of the jury on the subject of marriage. The behavior of two persons of different sexes as husband and wife always affords an inference of greater or less strength that a marriage has been solemnized between

them. Their conduct being susceptible of two opposite explanations, we are bound to assume it to be moral rather than immoral, and credit is to be given to their own assertions and acts, whether express or implied, of a fact peculiarly within their own knowledge. We have this man and woman traveling together, surrounded with small children; their wearing apparel and bedding in the same trunks, and their initials on them. These facts certainly indicate a very intimate relation, and one that would warrant the presumption of marriage on the principle above stated. Charts of pedigree made by members of the family, or found among family documents, or hung up in family mansions, have been held admissible, even although without proof of their having been made by the directions of the family on the ground of their being acknowledged by the family. Phillips' Ev., vol. 1, top page 212.

These documents reciting the birth of the children and the marriage of the decedent being found among his effects may be taken as a declaration by him of the legitimacy of the children, and of his own marriage, and on this ground the court below adjudged them admissible. Before leaving this branch of the case it is proper to advert to the strictures made by counsel on the conduct of the judge, who, it appears, took upon himself the examination of Miller as to the time when the letters were received, and to the circumstances which led to the correspondence between Miller and Buger. It is sufficient to say that the admissibility or non-admissibility of these letters in evidence was a question exclusively for the court. It was the duty of the judge to advise himself fully as to all facts connected with them so that he might pass intelligently upon the question of admissibility, and I fail to see that the right with which the law clothes him has been abused or transcended.

It is further insisted by the appellant, that, conceding the death of Mrs. Buger, there is nothing in the evidence to show at what precise time she expired; that there is nothing in the evidence inconsistent with the theory that she survived her husband. If she survived him for a moment

it is claimed that this action cannot be maintained. When two persons, husband and wife, are killed in the same accident, and there is no proof on the subject, the presumption of the law is that they died co-instantaneously. The right of action does not depend on the existence or non-existence of the wife. The existence of any legal representatives falling within the rules of the statute is sufficient. A more difficult question arises as to the true measure of damages; whether they shall be compensating and confined to the pecuniary loss sustained by the survivors, or shall go farther, and afford a salarium for the wounded feelings. When death is occasioned by gross negligence or willful misconduct, can punitive damages be recovered? On these subjects the statute itself is silent.

In England and New York, the courts have held that the damages are compensatory, but the statutes under which the decisions have been made are different from our own. In England, great stress is laid on the title of the act, which reads as follows: "An act for compensating the families of persons killed by an accident." The New York statute provides that "in every action the jury may give such damages as they shall deem a fair and just compensation, with reference to pecuniary injuries resulting from such death." The title to the statute on which this suit is brought is, "An act concerning damages." The body of the act prescribes no rule. From the careful examination I have given this subject, the conclusion seems clear that the legislature designed to confer on the personal representatives of a decedent, a right which was not enjoyed at common law. The latter part of the act fixes the order of distribution; all else is left to the operation of rules already in existence, for the admeasurement of damages. When a rule is prescribed in a statute, all other methods of computation must be ignored. When none is prescribed, then the statute must be taken to embrace those ordinarily applied to like cases. So far as I have examined, the authorities seem to be uniform in holding that, in actions brought by one to recover for injuries sustained through the negligence or misconduct

of another, mental anguish and suffering are legitimate subjects for compensation. The method of estimating them is difficult indeed, but they have been uniformly allowed. So, too, when the injury has been the result of wantonness, violence, or gross negligence, punitive damages have been awarded. I have been unable to find any solid reason which would preclude the application of these principles to a case brought by one who has survived his injuries. The fact that damages for mental anguish cannot be actually measured by a pecuniary standard, is entitled to consideration.

But the courts have never allowed this difficulty to prevail in actions of trespass or slander. In the latter case the insult offered, and the humiliation endured, are the ingredients that make up the basis of the assessment. Can this rule as to mental anguish, when the action is brought for the benefit of the survivors, be applied? The subject is not free from difficulty. The personal representative is the trustee of an express trust created by the statute, and the children are the *cestuis que trust*. He is the mere instrument through which their rights are asserted, and his representative character cannot abridge or curtail the measure of damages which, under the law, they are entitled to recover. He is a mere nominal plaintiff, and the object of the law in allowing him to bring the action is to secure, in one suit, damages, which otherwise might require a multiplicity of actions. It seems to be settled that no damages can be recovered for the suffering which precedes the death. The grave bars out this right; upon what known principle can the mental sufferings of the survivors be estimated. If the family is large, and the grief proportional to its size, then the damages would be immense. If the family was small, but the grief were boundless, how could it be compassed. How could a jury estimate the relative mental anguish of a widow and twelve children. Furthermore, it would involve a minute scrutiny into the personal relations of all parties. Affection would have to be measured by a graduated scale. An account would have to be taken of the familiarity which existed between the deceased and the survi-

vors. If a confirmed drunkard, or a person of vile associations, the grief at his departure might not be so poignant.

If the widow had wearied of her lord, or the husband of his wife, death might be a joy instead of an anguish. How determine the duration of this mental suffering or the degree of its intensity? When a large number of survivors were found, an inquiry would have to be instituted into the feelings of each. This certainly might, in many instances, tend to scandal and disgrace. Neither the interests of the litigants nor the policy of the law could be subserved by such a course. None of these difficulties are encountered in estimating the mental suffering in the case of one suing for direct injuries to himself; his relations to others are in no sense material; it is a personal, not a relative, suffering.

It seems to me, therefore, that the survivors are not entitled to compensation for such anguish as they may have endured by reason of the taking off of their parent. What, then, is the measure of damages, and how shall they be estimated? It is extremely difficult to prescribe any satisfactory rule by which to measure the worth of a man's life. Human life has no market value. It will hardly do to limit the value of a man's life by his probable accumulations, for many men make none, and many have arrived at an age when they no longer attempt to make any. In making the estimate of the value of life and the consequent damage by death, much must be left to the sound discretion of the jury. They must take the facts in proof, and connecting them with their own knowledge and experience, which they are supposed to possess in common with the generality of mankind, arrive at a rule that will be comparatively just between the parties. They must place this money value upon the life of a fellow-being very much as they would upon his health or reputation. No fixed or definite measure has been prescribed by the legislature, and we are unable to advance one that would adapt itself wisely or justly to the various causes which now exist, or which are likely to arise. Deprivation of parental care and support, ability to accumulate, to maintain those left behind, the loss

of physical and mental culture that the parent would afford, are circumstances that must enter into the estimate. *Tilly v. H. R. R. Co.*, 29 N. Y. 284. Whatever is susceptible of pecuniary computation enters into the rule, and what cannot be included must be left out. So, too, I apprehend, that when the injury is the result of wantonness, violence or gross negligence, it is competent for the jury to award punitive damages. *State v. Central R. R. Co.*, 60 Me. 492; *Penn. R. R. Co. v. Kelly*, 31 Penn. St. 378; *Penn. R. R. Co. v. Zebe*, 33 id. 328. The law governing the questions of gross negligence and punitive damages was fairly stated to the jury, provided the evidence warranted the instruction. The embankment was built some forty feet out into the bed of the stream. What efforts, if any, were made to ascertain the volume of water that was likely to flow in the channel, nowhere appears. Engineering skill certainly required that the locators of the bridge should have examined the character of the channel and the declivity of the circumjacent territory which forms the water-shed, to ascertain the quantity of water likely to pass. Some of the witnesses state that the channel was well defined for two or three miles; that it drained the waters from the divide, covering considerable scope of country. That no floods had theretofore recently happened cannot absolve the defendants, if any indications of high water existed at the time of location, showing that floods had occurred. Keating testifies that the material composing the embankment was poor, and that he informed the engineer that it would be liable to be washed out. Mooney swears that the soil was light and was affected by high winds. We cannot say that such material, carried out forty feet into the bed of a natural water-course, evinced the requisite degree of skill. The court instructed the jury that if, upon consideration of all the evidence, they were of the opinion that the defendant's employees, either at the time of the construction of the bridge or afterward, must have foreseen that such a flood as that which is said to have occurred would or might probably occur, and that the consequences

thereof might probably be the destruction of passing trains, then it was gross negligence not to provide against the casualty so foreseen as probably to occur; and in such case they would be warranted in allowing exemplary damages. They were cautioned to bear in mind, however, that exemplary damages could not be allowed for errors in judgment or for negligence merely, but that it must appear from the evidence that the defendant's engineers or employees were conscious such casualty and injury as complained of in this case might probably occur, and omitted to use the caution and effort which the law requires of them to prevent.

If any reliance is to be placed in the testimony of Burke, indications of high water were found in the immediate vicinity at the time the bridge was built, sufficient in character to call for the exercise of the highest prudence. There is another circumstance also entitled to weight. Coon creek afforded a drainage-way for the waters of the divide; Barrow testifies that it headed at the foot of the divide; in the afternoon preceding the accident, a heavy storm was observed at the head of Coon creek; the roaring of the water could be heard at Hugo. It seems to us that prudence enjoined upon the employees of the company an examination of the bridge after the storm and before the passage of trains. No such examination was made. The destructive character of such storms as this is a matter of common note, and experience teaches, and has taught, that storms along the divides in this country are not of unfrequent occurrence. There was, then, some evidence of gross negligence to be considered by the jury. Juries should, however, be careful in awarding punitive damages. The sympathies of fathers and brothers who compose them are always excited by the distressing circumstances attending such cases as this. Wild verdicts are returned, too often the product of passion instead of the result of calm and impartial judgment. The right to award them, however, exists in certain cases. If the right is abused, the courts will administer a corrective. Objection was taken to the admissibility of evidence showing that after the acci-

dent the company constructed a new bridge and afforded a larger space for the passage of water. The construction of the new bridge in a manner different from the old one is an admission that the first one was inadequate, but cannot be taken as an admission that its construction was attended with negligence. *Brehm v. Railroad*, 34 Barb. 276; *Westchester, etc., R. R. Co. v. McElroe*, 67 Penn. St. 314.

The evidence as to subsequent floods was, in the opinion of the majority of the court, improperly received. The instruction, however, cured the error. Another objection is taken to the question propounded to the witness Doll, as to whether any name was inscribed on the head-board of the buried man. Had the company fixed the name of Buger upon it, it would have been an admission that he was among the slain, and doubtless this was the ground for the inquiry. The objection is untenable.

There are some other minor and subsidiary objections, which it is not necessary to mention specially. It is claimed that the court committed a serious error in admitting the testimony of Burke; that this evidence was cumulative, and not rebuttal. The zeal with which the objection has been urged has led to a careful consideration of it, and to the conclusion that it is untenable. After the close of the case for the defendant, says Mr. Phillips, "The general rule is, that the evidence in reply must bear, directly or indirectly, upon the subject-matter of the defense, and ought not to consist of new matter disconnected with the defense and not tending to controvert or disprove it. This is the general rule, made for the purpose of preventing confusion, embarrassment and waste of time, but it rests entirely in the discretion of the court whether it ought to be strictly enforced or remitted, as he may think best for the discovery of truth and the administration of justice." Phillips' Ev., vol. 2, 912.

The evidence admitted was pertinent. It is not objected to because, from its nature, it cannot be heard, but because it was heard at an improper time. In matters of this kind, much is left to the discretion of the judge, and will rarely, if ever, be reviewed. *Williams v. Hays*, 20 N. Y. 58.

For the error in the measure of damages prescribed by the court the judgment must be reversed and the cause remanded; and it is so ordered.

WELLS, J. I dissent from so much of this opinion as declares that the beneficiaries in the action are not to be compensated for their mental suffering.

HALLETT, C. J. I concur in the result upon the ground that the court below erred as to the measure of damages. Upon other points discussed by the court I express no opinion.

Reversed.

ADMISSION OF TESTIMONY ON REBUTTAL discretionary: *Smith v. Myer*, 3 Colo. 210.
 ADMISSIONS BY CONDUCT.—Construction of a new bridge is admission that the former was improperly constructed: *St. Louis & S. F. Ry. v. Weaver*, 35 Kan. 433, citing the principal case.
 EXEMPLARY DAMAGES: *Kansas Pac. Ry. Co. v. Lundin*, 3 Colo. 101; *Murphy v. Hobbs*, 7 Colo. 582; *Kansas Pac. Ry. Co. v. Cutter*, 19 Kan. 90, 92.
 COMMON CARRIER BOUND TO EXERCISE the highest degree of care: *Kansas Pac. Ry. Co. v. Lundin*, 3 Colo. 98.

PURMORT v. TUCKER LUMBER Co.

STATUTE—*repeal by subsequent act on same subject.* Of two acts of the legislative assembly on the same subject, which are repugnant to each other, the last should be regarded as repealing the first, and this is especially so when the latter act contains a clause repealing all acts and parts of acts inconsistent with it.

The act of 1872 relating to mechanics' liens (9 Sess. 147), which differs in form and legal effect from that of 1868 on the same subject (R. S. 428), repealed the prior act.

MECHANICS' LIEN—*effect of repealing the law.* Liens existing under the act of 1868 fell upon the repeal of that act, there being no saving clause in the repealing act. *Woodbury v. Grimes*, 1 Col. 100.

Appeal from District Court, Gilpin County.

THE petition was filed on the 20th day of October, 1871, by the Tucker Lumber Company against Elizabeth Purmort. It alleges that the petitioner was, on the 14th May, 1870, engaged in the manufacture and sale of lumber, and that on that day it entered into a contract with the defendant to furnish lumber for a dwelling-house, to be erected by the defendant upon a lot therein described: that in pursuance of said contract, and prior to the 19th September, 1870, the petitioners furnished lumber and materials

over and above all payments made, of the value of \$369.60. For this amount, together with interest, the petitioner prayed the court to decree a lien upon the premises, and that the same might be sold to satisfy the demand. The defendant demurred to the petition, and the demurrer was overruled, and the petition taken as confessed; the cause was referred to a master, and upon his report a decree was entered declaring a lien, and requiring the defendant to pay the complainant within 180 days the sum of \$438.16, and in default thereof, that the premises be sold, etc.

The repealing clause in the act of 1872, mentioned in the opinion of the court, is as follows:

“All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.”

Mr. Justice WELLS dissented.

Mr. HUGH BUTLER, for appellant.

Messrs. POST & COULTER, *contra*.

HALLT, C. J. This was a bill to enforce a mechanics' lien under chapter 54 of the Revised Statutes. Pending the suit, the act of 1872, to secure a lien to mechanics and others, was passed, and a question is presented as to the effect of this act upon the prior law. Although the acts differ in form and substance, they refer to the same subject-matter, and there is every reason to believe that the act of 1872 was designed as a substitute for that of 1868. It is true that a lien is given by the new law, in the same class of cases as in the old law, and also in some additional cases, but under different limitations and restrictions, so that it is impossible to give effect to both acts. Upon the principle that where acts are clearly repugnant to each other, the latest shall prevail, it would be impossible now to sustain the act of 1868. Dwarris on Statutes, 154.

Moreover, it is declared in the act of 1872, that all acts inconsistent with its provisions are repealed, and this

appears to be expressly directed against the prior law on the same subject. It has been suggested that the act of 1872 is entirely prospective in its operation, and being applicable only to cases arising after it was passed, the legislature could not have intended to impair rights of action existing under the old law. And, certainly, it is hard to believe that the legislative assembly intended to withdraw from those who had already performed service, or furnished materials under the old law, the preference which was granted in the repealing act, to those who should thereafter perform the like service, or furnish the like materials. But this is not the question at issue. We are to determine whether the act of 1868 is now of force, not upon what we may suppose the legislature intended, but upon the language of the law. Upon well-established principles, recognized in all the authorities, it appears to be impossible to maintain a statute in opposition to a subsequent act, which is plainly and unmistakably repugnant to it. *U. S. v. Tynen*, 11 Wall. 88; *New London Northern R. R. Co. v. Boston & Albany R. R. Co.*, 102 Mass. 386; *Browne v. Lease*, 5 Hill, 221; *Board of Trustees v. City of Chicago*, 14 Ill. 334. The repealing clause in the act of 1872 is absolute and unconditional, and no reason is perceived for denying its force and effect. It has been held, in some cases, that by re-enacting the substantial provisions of a statute, the intention of the legislature not to impair rights of action, grounded upon it, is sufficiently manifested. *Steamship Co. v. Joliffe*, 2 Wall. 450; *Wright v. Oakley*, 5 Metc. 400; *Skyrme v. Occidental Mill Co.*, 8 Nev. 219.

I am unable to discover any reason for limiting the operation of the principle recognized in these authorities, to cases in which slight changes have been made in the statute, but the language used appears to establish such limitation. When a statute is invoked to support a right of action, a question is presented as to whether it is of force, and if it has been displaced by another statute, or otherwise repealed, whether the repealing act is slightly or greatly different from the other, the proposition can hardly be

resolved in the affirmative. It is believed, however, that the cases cited are not in point here, inasmuch as the statute of 1872 is very different, in form and legal effect, from that of 1868, and we are not disposed to extend the doctrine there announced, beyond the line of adjudged cases. The principle, that the language of an act shall be taken to express the sense of the legislative assembly, is of sufficient importance to control the equity of this case. We think that the act of 1868, so far as it relates to liens upon real property, was repealed by that of 1872, and we are unable to distinguish this cause from *Woodbury v. Grimes*, 1 Col. 100, in which it was determined that a lien of this kind must fall with the statute upon which it is founded. *Bailey v. Mason*, 1 Minn. 546; *Buller v. Palmer*, 1 Hill, 324.

It will not be necessary to refer to other points presented in the record, and the decree will be reversed and the cause remanded, with directions to the district court to dismiss the bill of complaint.

Reversed.

WILCOXEN v. MORGAN.

EVIDENCE — of admissions by grantor in a deed. Declarations of a grantor at the time of executing a deed for land may be received in evidence for the purpose of showing whether the conveyance was made with intent to defraud creditors.

Of intention to defraud creditors. These circumstances show that a deed was made with intent to defraud creditors.

1. That the grantor declared his purpose to put his property out of the reach of his creditors at the time of executing the deed.
2. That the grantor took from the grantee a power of attorney, authorizing him to lease, sell and dispose of the property in his discretion, and thereafter remained in the possession and enjoyment of the property in the same manner as before the conveyance.
3. That the deed was made to a brother of the grantor in the absence of the latter, and without his knowledge, and was not delivered otherwise than by putting it on record.
4. That the deed was without consideration.

DEED — voluntary, whether the grantee must have entertained a fraudulent intent. One who has paid nothing for land cannot defend his title upon

the ground that he did not participate in the fraudulent intent of his grantor.

DEED — *voluntary and fraudulent, void as to subsequent creditors.* A voluntary conveyance of land made with intent to defraud existing creditors of the grantors is void as to subsequent creditors also.

Purchaser with notice not protected. Where a voluntary conveyance of land is made with intent to defraud creditors of the grantor, one who purchases from the grantee with notice of such intent takes the title subject to all the infirmities with which it was affected in the hands of his grantor.

EVIDENCE — *of notice to purchaser of fraud in prior conveyance.* J. R. G., with intent to defraud his creditors, conveyed to D. G., his brother, certain lands. A purchaser from D. G. shall be charged with notice of such fraudulent intent upon the following circumstances:

1. That J. R. G. remained in possession of the land after the alleged sale to D. G., dealing with it as his own.
2. That after the alleged sale, M., the purchaser, occupied the premises with J. R. G., as his copartner, and paid no rent therefor, upon the ground that his services were of greater value than his copartner's in the common business.
3. J. R. G. assisted in negotiating the sale to M.
4. It was agreed that M. should apply a portion of the purchase-money to the payment of J. R. G.'s debts.
5. At the time of the purchase by M. he was informed that D. G. was acting for another and not for himself.

LIES v. WILCOXEN, *ante*, 85, decides that unlawful detainer lies at the suit of a purchaser at sheriff's sale against the judgment debtor and others holding in the same right to recover the possession of realty.

Error to District Court, Gilpin County.

THIS was an action of unlawful detainer in the district court of Gilpin county. The plaintiff alleged that Belle Cable, on the 18th of October, 1870, recovered in a justice's court a judgment against James R. Grant for the sum of \$170 and costs. That execution was issued and returned, no property found. That transcript of the judgment was filed in the clerk's office of the district court December 9, 1870, and that execution was issued out of the district court thereon, December 14, 1870. That the execution was levied on the property described, on the 19th of January, 1871, and that the same was sold to the plaintiff under said execution, February 11, 1871; that plaintiff obtained a sheriff's deed for the property, November 22, 1871. That plain-

tiff demanded the possession of the property on the 19th of March, 1872, and that since the execution of the sheriff's deed, and the service of notice, he, the plaintiff, had been entitled to the possession of the premises. The defendant answered and the cause was brought to trial before the court without a jury.

At the trial, the plaintiff gave evidence of the judgment, the execution and the sale of the property and the conveyance by sheriff's deed to him as mentioned in the complaint. He also proved the demand for possession, and the occupancy by defendant of the premises. The defendant put in evidence a warranty deed for the property in dispute, from James R. Grant to Daniel Grant, dated November 6, 1869, which, it will be observed, was nearly a year prior to the recovery of the Cable judgment. The defendant also produced a deed from Daniel Grant to himself, dated February 7, 1871, for the same property. The defendant testified in his own behalf that he obtained possession of the premises at the date of the purchase from Daniel Grant, and that he knew nothing of the deed from James to Daniel Grant being fraudulent. That he agreed to pay \$500 for the property, of which \$250 was to be applied in satisfaction of James Grant's debts to third parties. In rebuttal, the plaintiff called a witness, who stated that he drew the deed from James R. to Daniel Grant, at the request of James. Plaintiff's counsel then asked, "what was said at the time," and defendant objected to the question. The objection was overruled, and the witness answered:

"The deed was made in the evening; during the day James Grant asked me to make out a warranty deed for him; I asked him if he had been making a sale; he said no; said he had got in debt and was afraid they would take his property; he said he wanted to put his property in his brother's name; he wanted all his property embraced in the deed, including the blacksmith tools; all was put in; I drew up the deed and took the acknowledgment; he also wanted a power of attorney from his brother to him, so he could use and dispose of the property as if no conveyance had been

made; he did not want anybody to know of the sale unless they went to the record; I drew up the power of attorney, and gave directions about the acknowledgment of it; it was a general power, giving James right to lease or sell or do what he pleased with it; I gave the deed and power of attorney to James Grant, and he got the deed recorded; James said he made the deed for the purpose of putting his property out of the reach of his creditors; he mentioned Sarah J. Malloy as one; she had commenced suit when the deed was made; I know Robert Wilson had his note for about \$400; it was due; think he mentioned other creditors; don't remember their names; Dan. Grant was not present when the deed from James was made; he had never been in the Territory; he lived at Providence, R. I.; no one was present to represent Daniel Grant; no money was paid."

Plaintiff also called another witness, who testified that he had a conversation with the defendant about the Cable judgment the day before the defendant purchased of Daniel Grant; that in the conversation the defendant stated that he did not fear that judgment, for they could not sell the property under that. This witness also stated, that James R. Grant was in possession of the property from the fall of 1866, until, and at the time of the sale by Daniel to defendant; that the defendant occupied the property, with one Gilbert, and paid the rent therefor to James Grant; that James always claimed to own the property, until the sale to defendant. Plaintiff called another witness, who testified as follows: "That he was present at the sale, from Daniel Grant to defendant, and that he drew the papers to effect the transfer; mortgage given for part of the purchase-money; made the papers and did the business; I heard a conversation between defendant and Dan. Grant about the time to be given for paying the mortgage; it occurred when the note was being drawn; Morgan asked of Dan. more time for payment; Dan. objected to this, saying, if the business was for himself he would give more time, but it was for another person, and therefore he could not do so;

this is as near the language as I now remember ; in addition to the declaration of Dan. that he was selling the property for another person, I had reasons for believing he was acting for James R. Grant, who had owned the property ; James had left Colorado at the time of the sale ; I believed, from circumstances with which I was then familiar, that a conveyance had been made by James to Dan. Grant for the purpose of avoiding payment of debts."

The plaintiff, himself, testified in rebuttal :

"About February 1st, 1871, John Liss and Dan. Grant came to my office ; Dan was trying to sell the property described in the deed to him ; he was finding fault because I had said he had no title ; I said to him : ' James Grant conveyed that property to you to defraud his creditors ; ' Dan. said : ' Can you prove that ? ' I answered : ' I think I can ; ' he made no reply, and went out."

The defendant being recalled, testified that he occupied the premises with James Grant, and paid no rent therefor ; that James said that defendant was a better workman than he, and that he need not pay rent to him (James).

The defendant had judgment, and the plaintiff sued out this writ of error.

Mr. J. N. WILCOXEN, plaintiff in error, in person.

Mr. WILLARD TELLER and Mr. L. C. ROCKWELL, for defendant.

WELLS, J. 1st. The declarations of James R. Grant, made at the time of the preparation of the conveyance to Daniel Grant, were properly received upon the question, whether the conveyance was or was not with intent to defraud creditors. *Phillips v. James*, 1 Esp. 357 ; *Cook v. Swann*, 5 Conn. 141 ; *Wyckoff v. Carr*, 8 Mich. 44.

2d. These declarations and the attendant circumstances ; the relationship of the parties ; the fact that the conveyance was made without the knowledge of the grantee ; the absence of consideration, and the subsequent long-continued

possession and dominion of the premises by the grantor, sufficiently manifest that the purpose of James R. Grant, in this conveyance, was to put the estate beyond the reach of his creditors.

3d. It is to no purpose to say that Daniel Grant was ignorant of the fraudulent intent of his brother in this conveyance, for the evidence shows that he paid nothing. One who purchases in good faith, for a valuable consideration paid, is not, it is true, affected by a secret fraudulent intent on the part of the grantor. It is otherwise, however, as to a mere volunteer, or where the consideration is love and affection only.

4th. Conveyances, voluntary merely, are maintained as against subsequent creditors. A conveyance which is not only voluntary, but animated by a positive and active intent to defraud existing creditors, is void, not only as to these, but as to subsequent creditors as well. *Parkman v. Welch*, 19 Pick. 237; *Brown v. Niles*, 16 Ill. 386; *Winchester v. Charter*, 12 Allen, 610; *King v. Wilcox*, 11 Paige, 593; *Henry v. Fullerton*, 13 Sm. & M. 634; *Hutchinson v. Kelly*, 1 Rob. 128; *Parrish v. Murphy*, 13 How. 92; *Pennington v. Clifton*, 11 Ind. 165; *Marston v. Marston*, 54 Mo. 476; *Smith v. Carlisle*, 17 N. H. 417. The terms of our statute are quite as broad as those of 13 Elizabeth, c. 5, and this effect has almost everywhere been accorded to it. The authorities cited to the contrary doctrine seem to be opposed to the settled course.

5th. It must be conceded that one who, with notice of the prior fraud, purchases of the grantee in a conveyance fraudulent as to creditors, takes the title subject to all the infirmities with which it was affected in the hands of his grantor. To hold otherwise, is to say that *three* conspiring together may accomplish a fraud which is impossible to *two*. *Manhattan Co. v. Ewartson*, 6 Paige, 457.

6th. The evidence sufficiently manifests that the appellee, at the time of his purchase, had notice of the fraudulent character of the conveyance of James R. Grant to Daniel Grant. Long subsequent to this conveyance James R.

Grant was in possession of the property, dealing therewith as his own — the appellee was for a time his co-tenant and partner — free of rent ; this immunity being expressly upon the ground that the labor and services of the appellee about the common business were of greater value than those of his copartner. Both James R. Grant and Daniel Grant participated in the negotiation which was consummated in the conveyance to appellee. Daniel Grant agreed that a part of the purchase-money to be paid by appellee should be discharged by a payment of James R. Grant's debts, and distinctly informed appellee that in this sale and conveyance he was acting for another, and not for himself.

These circumstances seem to us sufficient beyond doubt to advise the defendant that Daniel Grant held the estate in some way for the benefit of his brother, to put him upon inquiry as to the nature of this relation, and to charge him with knowledge of every circumstance which such inquiry, pursued with reasonable patience and diligence, would have developed. No man, having knowledge of such circumstances of suspicion as these, is at liberty to close his eyes and, by his negligence, make himself the instrument of consummating a fraud against which the injured party might otherwise have relief.

The finding of the court below seems to us, therefore, unsustained by the evidence, and the foregoing resolutions bring the case within the principle of the determination in *Liss v. Wilcoxen*, decided at the term of 1873, *ante*, 85.

Upon the other questions presented in argument, no opinion is expressed.

The judgment is reversed and the cause will be remanded for further proceedings according to law.

Reversed.

FORCIBLE ENTRY AND DETAINER — FRAUD. — Question like fraud may be investigated in an action for forcible entry and detainer: *Knox v. McFerran*, 4 Colo. 596.

DEED — DECLARATIONS AS EVIDENCE — FRAUD. — To show that a conveyance is fraudulent, declarations of the grantor made before the conveyance are admissible, but not those made afterward: *Knox v. McFerran*, 4 Colo. 596.

IF ASSIGNMENT FOR CREDITORS IS FRAUDULENT It is immaterial that one party did not participate in the fraud, if it be shown that he paid nothing. To acquire any title, he must be a purchaser for a valuable consideration: *Knox v. McFerran*, 4 Colo. 596.

FREAS v. LAKE et al.

PRACTICE — *pleas and demurrer thereto abandoned by going to trial.* If issues of fact and of law are joined in an action of replevin and the parties proceed to trial upon the issues of fact without disposing of the issues of law, the latter are waived.

PREDICT — *what is sufficient in replevin.* In replevin tried to the court without a jury, a finding for defendants sufficiently determines issues joined upon *non cepit* and property in a stranger.

Error to District Court, Gilpin County.

PLAINTIFF IN ERROR, who was also plaintiff in the court below, alleged that the defendants took and detained certain goods of the plaintiff of the value of \$396. To this the defendants pleaded :

1. That they did not take or detain the said goods.
2. That the property in the said goods was at the time when, etc., in them the said defendants, etc.
3. That the property in the said goods was at the time when, etc., in Clinton M. Tyler, etc.
4. That the goods were delivered to Tyler to be transported for hire from a certain point therein named to a certain other point, and claiming a lien for freight money, etc.

The plaintiff demurred to the second and fourth pleas, but no action was taken upon the demurrer. Issue was joined upon the first and third pleas, and upon these issues the cause was tried to the court without a jury on the 5th day of May, 1873.

The record, after reciting that the cause was submitted to the court for trial, and that the court heard evidence and the arguments of counsel, contains the following: "And being sufficiently advised in the premises, finds for the defendants." To this was added the judgment.

Mr. J. N. WILCOXEN, for plaintiff in error.

Mr. WILLARD TELLER, for defendant in error.

WELLS, J. The parties proceeded to trial without insisting upon a disposition of the issue of law joined on the second and fourth pleas. The defendant, therefore, in effect abandoned those pleas, and the issue of law before joined thereon was no longer presented. The case stands precisely as if the defendants had formally withdrawn the pleas, or as if they had never been interposed. The evidence warrants the conclusion that the warehouseman, Loveland, had authority to deliver the plaintiff's freight to the carrier, Tyler, to be carried at reasonable freights; that the freights demanded by the carrier in this instance were reasonable; that for the refusal of plaintiff to pay these freights, the carrier detained the goods, and delivered them to the defendants to be stored, and that defendants held the goods solely as the bailee of the carrier. This maintained the issue tendered by the defendants in their third plea. The general finding of the issue for the defendants responds as well to the issue joined on the traverse of the plaintiff's property, as that joined on the plea of not guilty. The case is distinguishable from *Machette v. Wanless*, 1 Col. 225; the verdict there was not guilty, simply, which was properly held not to answer the traverse of the property to the plaintiff. This cannot be affirmed of the finding in the present case.

The judgment is affirmed with costs.

Affirmed.

CHASE v. THE PEOPLE.

RECOGNIZANCE — *whether judgment of forfeiture may be set aside.* The principal cognizor in a recognizance of bail should be relieved from a judgment of forfeiture declared against him, upon showing to the court, at the same term, that on the day the forfeiture was taken, he was sick and unable to attend upon the court.

But such relief will not be granted without costs.

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Appeal from District Court, Arapahoe County.

AT the October term, A. D. 1872, of the district court, appellant, with William Halliday as surety; entered into recognizance in the sum of \$2,500, conditioned for the appearance of appellant from day to day during that term, to answer to an indictment then pending against him for keeping a gambling establishment, and for exhibiting gambling devices. Afterward, and on the 20th day of December, during said term, appellant was called, and failing to appear, judgment of forfeiture was entered against him and his surety. Afterward, and on the 18th day of January, 1873, during said term, appellant, by his counsel, moved the court to set aside the judgment of forfeiture, and read affidavits in support of the motion as follows :

“Edward Chase, being duly sworn upon oath, says, that he is the defendant in the above-entitled cause; that during the 20th day of December, A. D. 1872, and each and every part thereof, he, this affiant, was sick and confined to his bed, and was wholly unable to be, or appear during any part of said day, at the court-house, in the city of Denver, in said county of Arapahoe, or to attend the said district court on said day, in person, owing to, and on account of, such sickness, and that he did not, knowingly or intentionally, take or make use of any medicine or other thing, or any other means use, knowingly, for the purpose of making himself sick, or less able to be in attendance on said court on said day, or any other day or time, and that said sickness was not the result of any means used by him for such purpose, wholly or in part.”

“A. L. Justice, being duly sworn upon oath, says, that he is, and has been for five years last past, a practicing physician in the city of Denver, in Arapahoe county, Colorado territory; that he is acquainted with Edward Chase, and, for a long time prior hereto, has been his attendant physician in his sickness; that on the 20th day of December, A. D. 1872, at or about the hour of 11 o'clock, A. M.,

this affiant was called as such physician to attend said Chase, and did call on him at his residence in the said city of Denver, and found him sick in bed; that this affiant from his professional knowledge is of the opinion and belief, that the said Edward Chase, on the 20th day of December, A. D. 1872, was wholly unable to attend the said district court in person, or to leave his bed a sufficient length of time to go or be taken to said court, at any time during said day."

The court denied the motion, and appellant excepted. Afterward a *scire facias* was sued out, to which many pleas were interposed, and these being adjudged insufficient upon demurrer, execution was awarded against appellant and his surety.

Mr. H. R. HUNT, for appellant.

Mr. M. A. Rogers, district attorney, *contra*.

BELFORD, J. During the same term of court that the judgment of forfeiture was entered, the plaintiff in error appeared and moved the court to vacate the same, on the ground that he was sick and unable to attend the court on the day the forfeiture was had. The affidavit of the plaintiff in error, read in support of the motion, recites that Chase, on the 20th of December, was sick and confined to his bed; was wholly unable to appear at court in person, owing to such sickness; that he did not intentionally take or use any medicine or other thing, or use other means to make himself sick or less able to attend court on that or any other day. This affidavit is strengthened by that of Dr. Justice, who states that, on the day above mentioned, he paid Chase a professional visit, that he found him sick in bed and that he believes, from his professional knowledge, that the plaintiff in error was wholly unable to attend said court, or to leave his bed a sufficient time to be taken there.

When it is made to appear to the court by competent evi-

dence that the recognizor was disabled from attending court by reason of sickness, and that such sickness was not the result of any fault or misconduct on his part, he should not be punished for his misfortune, especially as, by his appearance afterward, the ends of justice will be answered, and where the court is convinced of the existence of such an excuse, the judgment of forfeiture should be set aside.

There are a number of respectable authorities which hold that sickness, of a character to prevent attendance in court, and existing without fault on the part of the recognizor, is a good defense to a *scire facias* on a recognizance. *People v. Tubbs*, 37 N. Y. 586; *People v. Manning*, 8 Cow. 297; Co. Litt. 206, a; see also *Commonwealth v. Craig*, 6 Rand. 732.

It seems to us that the court should have set aside the forfeiture on the showing made and upon payment of costs.

Judgment reversed and cause remanded, with directions to set aside judgment of forfeiture upon the payment of costs by plaintiff in error.

Reversed.

SUMMERHAYS v. KANSAS PACIFIC RAILWAY COMPANY.

MASTER AND SERVANT — *whether master is liable for negligence of servant.* An employer is not liable to one in his service for injuries occasioned by the negligent act of another in the same service, unless the latter was incompetent, unskillful or habitually careless, and he had knowledge of the fact. Therefore, a railway company is not liable to a brakeman on one of its trains for injuries occasioned by the negligent act of the engineer in charge of the locomotive drawing the same train, there being nothing alleged as to the skill, competency or habitual negligence of the engineer.

EVIDENCE — *presumption as to competency, skill and fitness of servant; burden of proof.* In an action by an employee against a railway company to recover damages for injuries occasioned by the negligent act of another employee in the same service, a presumption will be indulged that the company exercised due care in the employment of the latter, and that he was a competent and fit person for the service assigned to him, which must be met by averment and proof.

Error to District Court, Arapahoe County.

CASE by plaintiff in error against defendant in error, to recover for injuries received by the former while engaged in the service of the latter as a brakeman on one of its trains. The declaration alleged that the plaintiff was employed as a brakeman upon a train which was in charge of Thomas Donaldson as conductor, and that, upon arriving at a station called Box-Elder, the conductor ordered that certain cars should be switched off and placed upon a side-track; that the conductor directed that such cars should not be uncoupled from the train until they had arrived at the end of the side-track; that the conductor further directed that the brakeman should give him a signal when the cars should be uncoupled, and he, the conductor, would thereupon give a signal to the engineer to put the train in motion. The averment as to the manner in which the injury was done is as follows: "Nevertheless, the said plaintiff avers that, before the said coupling-pin had been pulled out or uncoupled, as aforesaid, and before and without receiving any signal or warning to that effect, either from the said conductor or the plaintiff, or from the other said brakeman as aforesaid, and before or without giving any signal or warning itself to that effect, and without any knowledge, or negligence, or carelessness, or neglect of the said orders of said conductor, either on the part of the said plaintiff or the other said brakeman as aforesaid, the said defendant and its said engineer, as aforesaid, suddenly, prematurely, negligently, carelessly and unskillfully reversed and moved, and caused the said locomotive and other cars upon the side-track to be reversed and moved, and in such a manner as to cause the said coupling-pin to be suddenly, prematurely and violently wrenched, pulled out and uncoupled, so as thereby suddenly, negligently and unskillfully to separate the said coal-car, which had to be left, as aforesaid, on the side-track from the rest of the said cars on the side-track." Plaintiff then averred that, by reason of such movement of the cars, he was thrown

upon the draw-head of the coal-car and injured, and thereby sustained damages, etc. There was no averment in the declaration as to the competency, skill or fitness of the engineer, or that the company had any knowledge of unskillfulness, incompetency or unfitness in the engineer. The defendant demurred, and the demurrer was sustained. Thereupon plaintiff sued out this writ of error.

Mr. N. HARRISON, for plaintiff in error.

Mr. ALFRED SAYRE and Mr. CHARLES W. WRIGHT, for defendant in error.

BELFORD, J. The declaration presents the ordinary case of a co-employee suing his employer for injuries resulting to him from the negligence and unskillfulness of another employee while engaged in a common employment.

From a careful examination of the many authorities bearing on this subject, it would seem that a true statement of the rule as to the master's exemption from liability for the negligent conduct of a co-employee in the same service, would be as follows :

The employee, in entering the service of the principal, takes upon himself all such risks as fall within his contract of service, or such as the servant had reason to believe he would have to encounter in pursuit of his common employment, skillful and competent fellow-servants being provided by the master. The duty of the master to the servant is to the effect, that the servant shall be under no risks from imperfect or inadequate machinery, or other material means or appliances, or from unskillful or incompetent fellow-servants of any grade. This duty, on the part of the principal, is not discharged until there has been placed for the servant's use, perfect and adequate physical means, and for his helpmeets fit and competent fellow-servants, or due care used to that end. These being furnished, the servant takes upon himself the risk of the negligence, recklessness, or misconduct of his fellow in the use of the material and

implements. *Lanning v. N. Y. C. R. R. Co.*, 49 N. Y. 521; *Railroad Co. v. Fort*, 17 Wall. 557. There is no averment in the declaration that the engineer and conductor were unfit or improper persons to manage the train, and that this unfitness was known to the company. The plaintiff seeks to recover on the ground that, in this particular instance, there was a lack of care and skill. This clearly is not sufficient to create a liability, for the employee could not but anticipate that an occasional lack of care and skill would occur, and indeed its omission is one of those ordinary risks incident to all employments, and to which servants engaged in a common work are at all times exposed.

There would be some force in the plaintiff's claim, if the company sustained the same relation to the servant engaged in its work that it sustains to the stranger or passenger traveling in its cars. The company does not occupy the position of an insurer against the perils to which its employees may be exposed by reason of their employment. Its duty is discharged when competent fellow-servants are engaged. A single omission to exercise care by a fellow-servant (and that in the instance complained of), cannot be taken in an action brought by another against the company as proof of the latter's liability. To give the co-employee a status in court, he must aver that the company, whose liability he is seeking to establish, furnished incompetent fellow-servants, or continued such men in its service after having notice of the same. In other words, he must bring his case within the well-known exceptions which attach to the general rule, and which declares the master's exemption from liability for the negligent conduct of the co-employee in the same service. This the declaration fails to do. We take it to be the law that in a suit brought by a railroad employee against the company for damages caused by the alleged unskillfulness or negligence of another employee of the same company, the defendants are entitled to the benefit of the presumption that they exercised due care in the employment of the person charged with unskillfulness or negligence, and that they had no knowledge of the defects

of capacity or character imputed. *Davis v. Railroad Company*, 20 Mich. 105.

It is insisted that, inasmuch as the brakeman was inferior in position to the conductor, or engineer, he was bound to obey their directions, and that the injury having resulted from this obedience, changes the rule, and fixes the master's liability. From a careful examination of the declaration, we are of the opinion that the injury inflicted, arose out of the negligence of the engineer, who certainly was not of a superior grade to the brakeman, and who, in the strictest sense, must be regarded as a fellow-servant, engaged in a common employment. We, therefore, deem it unnecessary to determine the effect of a special direction given by the conductor, or to determine whether he is of a grade superior to that of other employees, in the management of a train.

Among the ordinary duties of a brakeman is that of coupling and uncoupling the cars at the different stations, where some are attached, and others detached. This was something, the doing of which was likely to occur every day, and at every station. If the engineer, negligently, or prematurely backed the train, and pressed the plaintiff between two cars, this was a risk which fell within his contract of service. I am aware that in some States — Wisconsin, Indiana, and Ohio — it was at one time held that the servant could not be presumed to contract with reference to injuries inflicted upon him by the negligence of another. See *Chamberlain v. Railroad*, 11 Wis. 238; *Gillenwater v. Railroad*, 5 Ind. 239; *Railroad v. Stearns*, 20 Ohio, 415. But the late decisions no longer adhere to that doctrine, as will be seen by examining the cases of *Mosely v. Chamberlain*, 18 Wis. 700; *Railroad v. Arnold*, 31 Ind. 182; *Railroad v. Devinney*, 17 Ohio St. 212. It is, then, the settled law of this country and England, that where one servant is injured through the negligence of another engaged in the common service of one master, and the person who occasioned the injury is a servant of ordinary skill and care, no action lies against the master for injuries so received. In view of these principles, and for the reason that the declaration fails to

disclose any knowledge on the part of the defendant, as to the incompetency of the engineer, we think the court committed no error in sustaining the demurrer. When no *scienter* of such servant's incompetency is alleged, the declaration must be held bad. 3 Ellis & Blackburn, 402.

The judgment of the district court is *Affirmed.*

NEGLIGENCE OF FELLOW-SERVANTS.—A railroad superintendent of construction having full charge of the work is not a fellow-servant with an ordinary laborer, so as to exempt the master from liability for the former's negligence: *Denver S. P. & P. Ry. Co. v. Driscoll*, 12 Colo. 324.

FREAS v. TRUITT et al.

RECORD—a bill of particulars attached to a declaration and inserted in the transcript of the record by the clerk is no part of the record.

BILL OF EXCEPTIONS—when necessary. Therefore a variance between an account given in evidence and that attached to the declaration cannot be alleged if the latter has not been set out in the bill of exceptions.

EVIDENCE—whether an account current must contain the items. An account for merchandise sold and delivered is sufficient, although it appears to be for a gross sum and does not specify the articles sold.

Presumption as to bill of exchange not in evidence. If plaintiffs count upon a bill of exchange, and for goods sold and delivered, and at the trial the bill is not offered, the court will presume that it was not made. It will not be assumed that the bill was given for the goods mentioned in another count, and that it is outstanding.

Failure to object to account rendered within reasonable time. A merchant having purchased goods and received an account thereof by mail, will be held to have admitted the correctness of such account if he does not, within several mails thereafter, notify his correspondents that he objects to the account.

Appeal from District Court, Gilpin County.

ASSUMPSIT by Robert W. Truitt and Thomas B. Watson against the appellant, Lorenzo M. Freas. The first count of the declaration was upon a draft for \$1,385.26, drawn by A. Bechtel, of Georgetown, Colorado, upon John Wiest, as treasurer of a mining company at Philadelphia, to the order of appellant, and by him indorsed to appellees. The common counts for goods sold and delivered, for work and materials, for money lent, etc., were also in the declaration.

A general account, corresponding in its specifications with the common counts, was attached to the declaration. The defendant filed the general issue upon which the cause was tried before a jury.

The plaintiffs gave in evidence their own depositions, as follows :

Deposition of Thomas D. Watson :

That he is one of the plaintiffs in the case, and that the firm do business under the name of Truitt, Watson & Co., in the city of Philadelphia ; that he knew the defendant ; first knew him by his purchasing goods at plaintiffs' store on May 3, 1866 ; that he had had dealings with the defendant from May 3, 1866, to March 31, 1869 ; that all the dealings were on orders from the defendant except the first purchase which was made by the defendant in person from him ; defendant purchased goods from plaintiff on credit, and that exhibit "A," attached to deposition, was a statement showing when purchases were made, and amount of purchases ; that such purchases were all made by letters ordering the same from the defendant, except that of May 3, 1866, which was made by defendant in person ; that on April 20, 1872, there was a balance due from defendant to plaintiff of \$2,821.55.

That witness attaches to his deposition an exhibit marked "A," showing the nature and amount of the indebtedness, and the date and dates when the same was contracted.

That an original bill of items was delivered or sent to defendant, and a statement of account showing the balance due from the defendant to plaintiff was sent to him on the maturity of each recurring account, and that subsequently, about June, 1870, witness sent him a statement of the balance due plaintiff in all. That defendant regularly remitted plaintiff money without finding any fault or raising any objection until the presentation of the final account, when he wrote plaintiff in answer that he would not pay the bill unless a large reduction was made on it, alleging shrinkage in the value of goods from alleged over-charge, and that on that account the greater portion of the goods were still on

his shelves. The prices for the goods were agreed upon at the first purchase, but subsequent orders were charged at the regular market rates, and are as low as similar goods could be purchased at the time; the prices are reasonable. That defendant never objected to the charges for a period of two years after such purchases, when he objected to paying final account.

Defendant objected to the answer to the seventh interrogatory, being the last above, because it referred to a bill of goods not in controversy; was purchased in 1866, and not in this case. Objection overruled by the court, and exception by the defendant.

In every case bills were made out and sent to the defendant, showing the prices charged. No objection was made at the time by the defendant.

That at the time the goods were sold to the defendant their values were based upon the premiums on gold, and were as low as similar classes of goods could be purchased at the time. No objection was raised to the prices for a period of two years, and during that time the premium on gold had fallen about 50 per cent; that the shrinkage of the value of goods of which defendant complained was something with which plaintiff had nothing to do, and over which he had no control. That from time to time during the reception of the goods defendant continued to order goods without any complaint.

Deposition of Robert W. Truitt:

He has known defendant since May 3, 1866, at which time defendant purchased a bill of goods at house in Philadelphia

The firm of witness dealt with the defendant from May 3, 1866, until March 31, A. D. 1869. All dealings were by order except the first sale to him of May 3, 1866.

Defendant purchased goods of plaintiff on credit, and witness annexes to his deposition, statement marked Exhibit "A," showing when such purchases were made, and the amount of the same. That such purchases were made entirely by letters, ordering same, except that of May 3d,

1866, which was made by defendant personally. That there was a balance due the plaintiff from the defendant on April 20th, 1872, of \$2,821.55.

Witness annexes to his deposition a statement marked Exhibit "A," showing the nature and amount of the indebtedness, and the dates when the same was contracted. An original bill of items for each purchase was delivered, or sent to defendant, and a statement of account showing the balance due from defendant to plaintiff, was sent to him upon the maturity of each recurring account. About June, 1870, there was sent to him a statement of the balance then owing plaintiff. Defendant regularly remitted money to plaintiff without objection or finding any fault with the goods, or prices, until the presentation of plaintiff's final account, when he wrote to plaintiff that he would not pay the bill unless a large deduction was made on it, alleging a shrinkage in value of goods from alleged overcharge, and that on that account the greater part of the goods was still on his shelves. At the time of the first purchase, the prices were agreed to by the defendant in person. His subsequent orders were charged at the regular market rates, and were as low as similar goods could be obtained at the time; the prices were reasonable. That defendant never objected to the charges during a period of two years after such purchases; he then objected to paying the last account.

The defendant objected to the answer to interrogatory last above, because it refers to a bill of goods not in controversy, purchased in 1866, and not in the case.

Objection overruled by the court, and exception by the defendant.

In every case bills were made out and sent to the defendant, showing the prices charged. No objections were ever raised by the defendant at the time.

(The balance of Truitt's evidence the same exactly as that of witness Watson, heretofore set out.)

EXHIBIT "A."

MR. L. M. FREAS,

1866.	To TRUITT & Co., Dr.	
May 3d, '66.	To mdse.....	\$1,348 43
April 15th, '67,	"	1,955 55
April 28th, '68,	"	1,304 08
June 3d, '68,	"	1,333 71
Sept. 28th, '68,	"	2,631 81
Mch 31st, '69,	"	40 00
Aug. 24th, '70,	To protest fees,.....	2 31
		\$8,615 89

Cr.

Dec. 1st, '66,	By cash and interest.....	\$1,354 33
April 16th, '68.	" " "	1,000 00
May 30th, '68,	" " "	1,100 00
July 18th, '69,	" " "	1,000 00
" 25th, '69,	" " "	1,000 00
May 1st, '70,	" " "	1,000 00
		\$6,254 33
Balance due.....		\$2,161 56
Add. interest to April 20th, '72,....		659 99
		\$2,821 55

Defendant objected to Exhibit "A," because it was an aggregated account, did not show the items, and it was not the account in controversy. The objection was overruled, and the defendant excepted.

This was all the evidence offered. The charge of the court was in these words ;

"First. If the jury believe from the evidence that the plaintiff and defendant were merchants, the plaintiff residing in Philadelphia and the defendant in Central City, Colorado ; and if you shall further find from the evidence that the defendant purchased of the plaintiff the goods described

in the declaration and has failed to pay for the same, then you will find for the plaintiff and assess their damages at what you find the goods are reasonably worth.

“Second. Although you may find from the evidence that the plaintiff is not entitled to recover in the last count of the declaration as on account stated, yet if you find that the plaintiff sold and delivered to the defendant the goods described in second count of declaration, and that the defendant has not paid for the same, but that the amount is still due and unpaid, then you may find for the plaintiff on the count for goods sold and delivered, and assess his damages at what you find due him, excluding, however, from your consideration, all items prior to April 28, 1868.

“Third. If the jury believe from the evidence that the defendant purchased merchandise of the plaintiff at different times, and that an original bill of items for such purchase was delivered or sent to defendant by plaintiff, and also a statement of account showing the balance due from the defendant to the plaintiff was sent to him upon the maturity of each account, and that defendant did not, within a reasonable time after he examined the same, make any objection thereto, his silence unexplained is an implied admission of the correctness of such account so sent him, though not conclusive evidence thereof, and if such accounts so sent by the plaintiff to the defendant constitute the account herein sued on, and there is no proof on the part of the defendant challenging the correctness of such accounts, then, upon the evidence adduced by the plaintiff, you will be warranted in finding a verdict for him for the amount you may find due.

“Fourth. If, after receiving such accounts, if you find they were so received by the defendant, he allowed several mails to pass after he examined the same without making any objection to the correctness of the same, then the plaintiff had a right to infer from the silence that the defendant admitted the correctness of the accounts so sent by him to the defendant.

“Fifth. The plaintiff is entitled to no interest unless you

find there was a final settlement of accounts between the plaintiff and defendant."

The court instructs the jury that there can be no account stated to be taken as a settled account until the final closing of the entire matter and the striking a balance, and if a final account is tendered and no objection is made within a reasonable time, it may be taken as correct and treated as an account stated.

The jury found for plaintiffs, and defendant appealed.

Mr. G. B. REED, for appellant.

Mr. HUGH BUTLER, for appellees.

WELLS, J. The objection taken on the trial to the admission of testimony, as to the statement of account which was attached to the deposition of the witnesses sworn for the plaintiffs, was based in part upon an alleged variance between this statement and the bill of particulars filed with the plaintiffs' declaration. But this latter paper is not incorporated into the bill of exceptions, and of itself is no part of the record. *Cook v. Hughes*, 1 Col. 51. We cannot, therefore, regard the alleged variance. The objection taken to the statement, as an aggregated and not an itemized account, is not well taken.

No evidence was given touching the drawing and acceptance of the bill of exchange mentioned in the first count of the declaration. The defendant's plea goes to the whole declaration; the allegation of the first count being, therefore, fully denied, and no evidence being produced by the plaintiffs to maintain the issues thus joined, it must be assumed that no such bill of exchange was ever made or accepted. What is said in argument as to the effect of the plaintiffs' omission to prosecute the acceptor must be disregarded.

No error is perceived in the instructions given by the court, nor in refusing those prayed by the defendant.

The judgment is affirmed, with costs.

Affirmed.

SOPRIS v. LILLEY.

DAMAGES — *evidence as to, in debt on replevin bond.* Upon the condition in a replevin bond to return the property replevied, if return thereof shall be awarded, in the absence of evidence showing the value of such property and the value of its use since judgment was given in the replevin suit, only nominal damages can be allowed.

When the bond recites the gross value of the property replevied, such recital may be evidence of the value of all the articles mentioned collectively.

But if a portion of the property has been returned to the sheriff, according to the condition of the bond, such recital affords no evidence of the value of the remainder which has not been returned.

Upon the condition in the bond to prosecute the suit to effect and without delay, damages for detention of the property, pending the replevin suit and before judgment for return was given, cannot be recovered unless they were awarded in the replevin suit. Overruling S. C., 1 Col. 286.

Error to District Court, Arapahoe County.

THE condition of the bond on which the action was brought was as follows:

“Whereas, the above bounden John G. Lilley, plaintiff, has on this day sued out a writ of replevin out of the district court of Colorado Territory, in and for the county of Arapahoe, against one Alonzo Booth, to recover the possession of one gray horse branded with the letters U. S. on the left shoulder, and L. C. on the left hip, about nine years old, and one gray horse with back a little swayed, about ten years old, and one Jackson wagon, which said property is of the value of five hundred dollars, and alleged to be in the possession of the said defendant, and which said writ has been placed in the hands of Richard Sopris, sheriff of said county.

“Now, therefore, the condition of this obligation is such that if the above bounden plaintiff shall prosecute his suit of replevin with effect and without delay, and make return of said property about to be replevied, if a return thereof shall be awarded, and shall pay all damages which may be adjudged against him for the detention thereof, and

save and keep harmless the said Richard Sopris, as aforesaid, in replevining said property, then this obligation to be void; otherwise to remain in full force and effect.

"For breach, the plaintiff alleged that the said defendant, John G. Lilley, did not prosecute his said suit with effect, and without delay, against the said Alonzo Booth, and did not, and has not made, return of the property so replevined as aforesaid, according to the form and effect of the condition of the said bond, or writing obligatory, but has hitherto wholly neglected," etc.

The defendant, Lilley (Hastings not having been served), pleaded that there was no record of judgment in the replevin suit, and issue being joined, the cause was tried to the court, who found the issue for plaintiff, and assessed his damages at one cent.

At the trial it appeared that the bond was given in a replevin suit brought by Lilley (defendant in error) against Booth, to recover the possession of two horses and one wagon, which suit was dismissed on motion of Booth, defendant therein, and judgment given for return of the property replevied. The return to the *retorno* in that suit, showed that the sheriff found the horses, and delivered them to Booth, but made no mention of the wagon, or stated that it had been eloiigned.

Plaintiff also introduced testimony to show the value of the use of the horses during the time they were in possession of Lilley (defendant in error), for which it will be observed the court declined to give judgment.

There was no evidence as to the value of any of the property, except the recital in the condition of the bond.

The defendant was allowed to give evidence as to the ownership of the property, to which the plaintiff strenuously objected, and much of the argument in this court was upon that point. This question is not noticed in the opinion.

Mr. ALFRED SAYRE and Mr. C. W. WRIGHT, for plaintiff in error.

Mr. T. G. PUTNAM, for defendant in error.

The chief justice dissented.

WELLS, J. The bond, which was the foundation of the plaintiff's action, contained four conditions, to-wit: 1. That the principal should prosecute his suit to effect and without delay. 2. That he should return the property, if return should be awarded. 3. That he should pay all damages which might be adjudged against him for the detention thereof. 4. That he should save and keep harmless the sheriff.

The declaration assigned breaches upon the first and second conditions.

The condition to make return of the property is performed if the plaintiff in replevin restore the goods seasonably after return awarded. If such return be not made, the obligors are liable for the value of the goods, with, in some cases, perhaps a further sum to compensate for the detention, intermediate the award of return and the date of recovery in the action upon the bond. As a matter of course, it devolves upon the plaintiff in the action upon the bond, to establish the measure of his damages. When the value of the goods is fixed by the recital of the bond, this may, it would seem, ordinarily suffice. But when, as in this case, several chattels are replevined and the condition of the bond sets forth only the aggregate value, and some are returned, and some are not, it is otherwise. In such case the recitals of the bond afford no information as to the value of either those returned or those retained. In the present case the evidence showed that the horses replevined were returned either on the same day upon which return was awarded, or upon the succeeding day; as to these, therefore, we are compelled to hold the condition performed. So far as appears, the wagon replevined never was returned; but the evidence is silent as to its value or the value of its use. As before said, it rested with the plaintiff in this action to show this. Upon this breach, therefore, he was entitled to nominal damages only.

It seems to be assumed by counsel that damages for the detention of the goods, between the day of the execution of the writ of replevin and the award of return, may be recovered under that assignment of breach which goes to the first condition of the bond. If the question were a new one, this condition might well be argued to be a mere alternative to what follows, thus importing that the plaintiff shall either prosecute his suit to a successful termination or, in default of so doing, perform the remaining conditions. The bond is given for the protection of the defendant, and certainly it appears absurd to say that the legislature has solemnly exacted of the plaintiff security to perform what must inevitably be to the defendant's injury.

This condition has, however, generally been regarded, not as a mere alternative to the residue, but as of itself a substantial condition; so that for the breach of this, though all the rest should be performed, an action may lie on the bond; and this view was adopted in the present case when here at a former term.* We are not at liberty to give to the words of the condition a contrary effect.

The question recurs, however, whether the damages occasioned by the detention of the chattels, pending the replevin suit, may be recovered under an assignment for breach of the bond that the principal did not prosecute with effect. The statute (section 12) provides that if the plaintiff in replevin fail in his suit, damages for the use of the property from the time it was taken until return awarded shall be adjudged against him.

It is these damages, manifestly, to which the third condition of the bond refers; it is this judgment which this clause of the condition was intended to secure. But by this condition the sureties undertake to be responsible for the payment by their principal of those damages, when judgment shall have been given therefor, and only in that event; and the general words of the first condition cannot be used to enlarge these particular words.

The sureties can be held liable for the damages occasioned

* 1 Col. 206.

by the detention of the goods prior to the award of return, only when those damages have been ascertained and adjudged against their principal, for this is the letter of their undertaking. *Clark v. Norton*, 16 Minn. 417; *Fullerton v. Miller*, 22 Md. 5; *Pettygrove v. Hoyt*, 2 Fairf. 68; *Strong v. Mason*; 3 Gilm. 56; *Bein v. Hath*, 12 How. 168.

An intimation to the contrary was given by the chief-justice when this case was here before, but the decision was expressly restricted to the sufficiency of the defendant's plea.

The judgment of the district court is affirmed, with costs.

Affirmed.

BUOK et al. v. SMITH, impleaded.

PLEADING — *in an action upon a promissory note*, executed in the firm name, a verified plea denying its execution, puts the partnership in issue.

PRACTICE — *introducing testimony*. And, in such case, the plaintiff may show distinct facts by different witnesses, to sustain his action — he cannot be required to make out his entire case by one witness.

EVIDENCE OF A PARTNERSHIP — *erroneously excluded*. The plaintiff had shown that Smith, as a member of a firm, executed, in the firm name, the note in suit, in settlement of an account due from the firm to the plaintiff; and then the plaintiff offered in evidence the testimony of B., to show that when the account was made Smith was a member of the firm, which testimony was excluded. *Held*, that the testimony of B. was material, and should have been permitted to go to the jury.

Error to District Court, Arapahoe County.

THIS cause was tried before a jury in the court below. The material facts are contained in the opinion.

MESSRS. BROWNE & PUTNAM, for plaintiffs in error.

MESSRS. SAYRE & WRIGHT, for defendant in error.

BELFORD, J. This was an action on a promissory note, executed by John A. Nye & Co., to the appellants; D. T.

Smith, who was sued as a member of the firm of Nye & Co., filed a plea of *non est factum* verified, which put in issue the partnership.

On the trial, the plaintiffs, to show that Smith was a member of the firm, offered in evidence the deposition of Henry F. Brinkencamp, which the defendant, Smith, objected to, because of irrelevance, and for the further reason, that the testimony of witness was mere hearsay. The court sustained these objections, and excluded the deposition, and this is assigned for error. We think the objections to the deposition not well taken. The evidence shows that the note sued on was given in settlement of account, which account was for stoves and hollow-ware, etc., sold by plaintiffs to Nye & Co. Brinkencamp, it is true, swears that he did not know what transpired at the time this note was executed, but he swears positively that at the time the goods were bought, which constituted the consideration for the note, Smith was a member of the firm of Nye & Co. A party is not required to make out his entire case by one witness. One fact may be established by one person, and another by a different witness.

Wright, one of the plaintiffs, testifies that he was on his way to John A. Nye's place of business, with a view to obtain payment of the account, or procure the note of the firm, and met Smith at Lawrence; Smith informed him that he would save him the trouble of calling on Nye, that he could give the note, and he accordingly executed the same. He further states, that Smith afterward promised to pay it if time was given. Now, coupling the fact that Smith was a member of the firm when the goods were bought, as Brinkencamp testifies, with the fact that he made the note in the firm name, and the evidence of Brinkencamp becomes quite material and important.

The court should have overruled the objections, and permitted the deposition to be read.

Judgment reversed and cause remanded.

Reversed.

HOYT v. MACON et al.

PLEADING AND EVIDENCE — *an immoral or illegal consideration as a defense to an action upon a promissory note.* Where G. had filed a *caveat* in the land office, charging fraud by M. in his application for a patent to certain lands and it was agreed by H. that if M. and one C. would execute to him their promissory note, he (H.) would influence G. not to appear at the land office as a witness upon the investigation of the alleged fraud; and the note was executed and delivered to H. in an action upon the note.

Held, first. That the consideration might be shown in defense of the action, and the plaintiff (H.) could not recover, because

The courts will not sanction such a contract, it being contrary to law and good morals.

Second. That the courts will place the same estimate upon the transaction as the parties themselves did by their own actions in admitting the existence of grounds for the charge and inquiry, and contracting to suppress the same.

In such a case the courts will leave the parties where they are found, no matter who brings the action.

An illegal consideration, when divisible, so that a part may be distinguished as untainted by the illegality, will not entirely prevent a recovery upon the contract; the good consideration will, in such cases, be sustained.

But, in this case, the abandonment of the *caveat* and the relinquishment of the improvements on the land by G. constitute one transaction in furtherance of the design to allow M. to fraudulently acquire the title to the land — so that the entire consideration is tainted with the fraud.

PRACTICE IN THE SUPREME COURT; ASSIGNMENT OF ERROR *upon the giving of instructions.* Where the charge contains several distinct propositions, and exception is taken to the charge generally, if any one proposition be sound and correct, the exception will be unavailing.

Error to District Court, Fremont County.

THIS was an action of assumpsit, upon the following promissory note:

\$900.00

CANON CITY, C. T., }
January 18, 1870. }

Sixty days after date, for value received, we or either of us promise to pay to S. N. Hoyt or bearer the sum of nine hundred dollars.

U. S. Rev. Stamp, }
W.A. canceled. }

AUGUSTUS MACON,
EDWARD CROUCH.

Non assumpsit was pleaded, and also a special plea that the said promissory note "was based upon an illegal and invalid consideration, in this, that before and at the time of the execution, making and delivery of said promissory note, the said plaintiff represented unto the defendant, Macon, that one John Griffin had filed a caveat in the United States Land Office, at Denver, Colorado Territory, alleging that said defendant, Macon, had fraudulently entered a certain tract of public land, to wit. : " * * * "and that he, the plaintiff, would influence the said John Griffin not to appear in the investigation of said fraud as a witness against the said defendant, Macon, if the defendant, Macon, would make the promissory note in said declaration mentioned, and obtain the signature of the defendant, Crouch, thereto, as surety, and knowing said John Griffin had filed said *caveat*, the defendant, Macon, did make the said promissory note, and procure the signature of the defendant, Crouch, thereto, as surety, and said note was executed for no other or further consideration whatsoever; this they are ready to verify," etc., to which plea the plaintiff demurred. Demurrer overruled, and plaintiff made replication "that the said promissory note in said declaration mentioned was not based upon the illegal and invalid consideration that he, the said plaintiff, would influence the said John Griffin not to appear as a witness against said defendant, Augustus Macon, in the investigation of the fraud of said Augustus Macon, in the entry of the land in said plea described, in the United States Land Office, at Denver, Colorado Territory, but on the contrary thereof, that the consideration of said note was valid and good, and other and different than that in said plea set forth and alleged, and this he prays may be inquired of by the country," and the defendants joined, *in similitur*, thereto.

The said promissory note was introduced in evidence before the jury, and the plaintiff rested. And the defendants, by their own testimony, and that of one other witness, sustained the special plea, no one contradicting their testimony.

Verdict, "We, the jury, find the issues for defendant." Motion for a new trial overruled; judgment for defendants on the verdict. Errors assigned: First, Overruling the motion for a new trial. Second, "The judgment of the court is erroneous in not following the verdict." Third, "The court erred in giving the following instruction to the jury, to wit:" Under this assignment all the propositions submitted to the jury are set out as one instruction.

Mr. L. B. FRANCE and Mr. M. A. ROGERS, for plaintiff in error.

Mr. ORRIS BLAKE and Mr. ALBERT S. BLAKE, for defendants in error.

BELFORD, J. Whether or not a party to a written instrument may go back of it to show that the consideration on which it rests is illegal, forms a subject on which the decisions of courts are far from uniform. The maxim *nemo allegans turpitudinem suam audiendus*, while regarded as inflexible between the parties, is nevertheless made to yield to the interests of public policy, and the duty of preventing the accomplishment of fraudulent and illegal designs. The test prescribed by some courts is, whether the plaintiff requires the aid of this illegal transaction to establish his case (*Swan v. Scott*, 11 S. & R. 164), and that, if he does not, the defendant cannot set up his own iniquity as a defense. *Stewart v. Cramer*, 6 Watta, 453. On the other hand, it is contended that the law ought not to interfere to further the ends of the guilty; that, if the contract is executed, it will not be enforced. *Smith v. Hubbs*, 1 Fairf. 71; *Nellis v. Clark*, 20 Wend. 24. Courts should be slow to help parties out of the mire who have voluntarily thrown themselves into it, or aid them to reap the wages of iniquity, when their enrichment would be at the expense of public morals. And this aid would be furnished if, after the law has pronounced a deed or contract void, the courts should withhold the power to take advantage of the invalidity, and

show in what it consists. We are, therefore, of the opinion that the admission of the evidence, showing the character of the consideration on which this note was founded, was entirely proper. In *Holman v. Johnson*, Cowp. 343, Lord MANSFIELD said: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds, at all times, very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this, *Ex dolo malo non oritur actio*. No court will lend its aid to a man upon an immoral or illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon this ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have advantage of it, for when both are equally in fault *potior est conditio defendentis*. Another learned writer, speaking to the same subject, says: "When an illegal contract or transaction cannot be enforced or allowed to stand without producing the evil which the law designs to prevent, the illegality may be pleaded or given in evidence as a bar to a suit brought to enforce the contract. For, under these circumstances, the welfare of society and the vindication of the laws are the chief objects, and the rights of parties but of secondary importance." *Collins v. Blantern*, Smith's Leading Cases, vol. 1, p. 700. These remarks clearly show the principle upon which the rule rests and commend its soundness to our approval. Does this case fall under the ban of the common law? We might answer that any case does, whose features are contrary to good morals, or the principle of which tends to corrupt or contaminate by improper influen-

ces the integrity of our social or political institutions. From the evidence, it appears that one Griffin had filed in the land office a *caveat* against the issuance of a patent to Macon, setting up that the latter had never been in possession of the land, and that his application for a patent was fraudulent and in violation of the law. It further appears that Hoyt, in consideration that Macon would execute this note and pay him the amount of money expressed in it, would procure Griffin to abandon the prosecution of the *caveat*, and relinquish to Macon the possession of the land, which Macon was seeking to have patented.

Pursuant to this agreement the note was executed, the proceedings on the *caveat* abandoned, and the land relinquished by Griffin. It is not difficult to perceive that this transaction was immoral and illegal. It was enabling Macon to procure this land through fraud and by an open violation of the law, which required him to reside on and improve the land. When the design is illegal, the law interferes and says: You shall not stipulate for iniquity, and the courts must drop the parties where it finds them. When Hoyt induced Griffin to abandon the contest, he put it in the power of Macon to perpetrate a fraud on the government, and now he cannot be heard when he claims the wages of his prostitution and depravity. It is claimed by the plaintiff in error that it is not shown that Macon was attempting to obtain the land illegally; that no presumptions as to illegal conduct on the part of Macon can be indulged, and that, before the note can be regarded as void, it must affirmatively appear that Macon was intent on the commission of an illegal act. When one charges another with the commission of a crime, or a violation of the law, and the latter performs an act having directly in view the stifling of the investigation or the withdrawal of the proceedings instituted for the purpose of determining the existence of the offense, this act must be regarded as an admission, on the part of the person doing the act, of the existence of certain grounds for the charge, and in such case the court will place the estimate upon the conduct of the parties that they themselves have placed upon

it. *Brown v. Burk*, 28 Vt. 312; *Gardener v. Maxcey*, 9 B. Monr. 93; *Coppock v. Bower*, 4 Mees. & Wels. 365.

If this were not true, courts would present the strange spectacle of trying a person for a misdemeanor or felony whenever it became necessary to show that a note sued on was given in composition of a crime, or to suppress a prosecution.

When Hoyt charged Macon with having made a fraudulent entry of the land, through perjury committed by him, and Macon executed the note to avoid an investigation then pending, and threatened to be pressed, he thereby indicated that there was something wrong in his proceedings which required to be covered up.

We think the case at bar is analogous to those cases where notes have been executed to suppress proceedings in courts of justice. A contract, the basis and purport of which is to secure title to land in a manner inhibited by an act of congress, and through the agency of perjury, and to which object the payee contributed by a suppression of the truth, has a tendency to debauch both private and public morals, and cannot receive the sanction of a court.

It cannot be said that this contract involved the compromise of a doubtful right which Griffin might have had to the land. The moving, paramount consideration was the suppression of the investigation of the charges which Hoyt was making, namely: that Macon was attempting to obtain title by perjury and fraud.

It is claimed, however, that the consideration of the note is divisible, and that, inasmuch as Griffin relinquished to Macon the improvements he had made on the land, this relinquishment was a good consideration, and that the action could be sustained. It might be sufficient to say that no evidence was offered showing that the improvements were separately valued, or the price fixed upon them, and the case as it is presented does not fall within the rule laid down in *Carlton v. Wood*, 28 N. H. 290, where the goods sold were valued separately from the liquors. In that case, however, the recovery was had on the common counts and

the note ruled out. See also *Ladd v. Dillingham*, 34 Me. 306. In *Robinson v. Bland*, 2 Barr, 1071, 1082, the action was on a bill of exchange for \$672, of which \$300 was for money lent, and \$372 for money won at play, and the action was sustained on the common count, and not on the bill. But it will be perceived that the amount of money lent was ascertained, and the good consideration readily distinguished from the bad. We admit that there are cases where recoveries have been sustained for the original consideration, although connected with illegal or forbidden transactions; but they are cases wherein the plaintiff was not considered a wrong-doer, or was the victim of the defendant, so that a denial of relief would be an encouragement to the wrong-doer, and thus the law be made to work its own defeat. *Lange v. Work*, 2 Ohio St. 526; *Saratoga County Bank v. King*, 44 N. Y. 91.

Mr. Justice WASHINGTON in *Toler v. Armstrong*, 4 Wash. C. C. R. 299, says:

"I understand the rule as now clearly settled to be, that where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it, and if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it." This same case is reported in 11 Wheat. 258; and MARSHALL, C. J., lays down the rule to be, that if the illegal act is not the consideration of the contract, and is entirely disconnected from it, the contract is valid, though the occasion for making the contract arose out of the existence of the illegal act. In the case at bar, the abandonment of the *caveat* and the relinquishment of the improvements on the land by Griffin constitute one transaction, and are in furtherance of one common design, pursued by Hoyt and Macon, namely, to enable the latter to fraudulently obtain the patent, and acquire the title to the property. Such being the case, we think the entire consideration on which the note rests is tainted. We have said this much as to the merits of the case, notwithstanding no

reference to the evidence has been made in the assignment of errors. We decline to consider the instructions, for the reason that the entire charge is embraced in a single assignment. In *Westcott v. Bock*, decided at the last term of this court, we used this language: "A charge is made up of a series of propositions interdependent in one sense, yet distinct in another. Some may be correct, others wrong. Where a party assigns error to an entire charge, we think each proposition announced by the court should be regarded as a separate instruction and should be specifically assigned. It is well settled that, if a series of propositions be embodied in instructions, and the instructions are excepted to in a mass, if any one of the propositions be correct, the exception must be overruled." *Johnston v. Jones*, 1 Black, 220.

The judgment of the district court is *Affirmed*.

GENERAL EXCEPTION TO MASS OF INSTRUCTIONS is unavailing if any instruction is correct; *Martin v. Hazard Powder Co.* 2 Colo. 602.

IMMORAL OR ILLEGAL CONTRACTS will not be enforced, but the court will leave the parties where they are found: *Wells v. Cawood*, 3 Colo. 496; *Brown v. Kennedy*, 12 Colo. 241.

CHASE v. THE PEOPLE.*

PRACTION—*objection to copias must be made before plea.* Upon a criminal information for misdemeanor, if the defendant proceed to trial without objection to the *copias* he cannot allege an exception thereto in this court.

MISDEMEANOR—*keeping gaming house.* To keep a gaming house contrary to R. S. 223, is a misdemeanor, which may be punished upon information filed by the district attorney, pursuant to R. S. 224.

CONSTITUTIONAL LAW—*of the proceeding, by information in case of misdemeanor.* There is nothing in the constitution, or in the organic act, which requires that a prosecution for misdemeanor shall be by indictment presented by a grand jury, and the statute (R. S. 224), which authorizes the district attorney to proceed by information for violation of the laws against gaming, is constitutional.

INFORMATION—*for keeping gaming house, whether the names of players must be given.* In an information under the statute (R. S. 223) for keeping a room to be used and occupied for gambling, it is not necessary to set forth the names of persons who played at games in such room.

Whether it is necessary to allege that gaming took place. Nor is it necessary to aver or prove that gaming actually took place in such room. It is enough that the defendant kept the room to be used for gambling.

* Another writ prosecuted by this plaintiff presented the same facts, and the judgment was affirmed upon the same grounds.

CONTINUANCE—*to obtain testimony of the sufficiency of the affidavit.* An affidavit in support of a motion for continuance, in which deponent states that he expects to prove by the absent witness that the room was not kept to be used, or occupied, for gaming, as alleged in the information, is not sufficient. The deponent should state facts which he will prove by the absent witness, rather than conclusions to be drawn from facts.

Whether an order continuing the cause may be set aside. And if, upon such affidavit, the cause be continued, the court may, in his discretion, afterward and on the same day, the defendant being still in court, and having notice thereof, vacate the order of continuance, and proceed to the trial of the cause.

EVIDENCE—*of the character of the house.* Upon an information for keeping a room to be used and occupied for gaming, evidence may be received to show that gaming was carried on in the room prior to the time alleged in the information, for the purpose of explaining the character of the house and the purpose for which it was kept.

Whether the defendant may show that he was an agent only.

Appeal from District Court, Arapahoe County.

THAT the defendant acted as agent for another in the keeping of such room is not a defense.

At the April term, 1873, of the district court, the district attorney obtained leave to file an information, which charged :

“That John Chase, late of the said county of Arapahoe, on the 27th day of October, in the year of our Lord 1872, at the said county of Arapahoe, in the Territory aforesaid, a certain room, building and tenement there situate, unlawfully and injuriously then and there did keep to be used and occupied for gambling, and the said John Chase did then and there unlawfully and knowingly permit the said room, building and tenement so kept by him as aforesaid to be used and occupied for gambling, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said people of the Territory of Colorado.”

A *capias* was issued and the defendant, being brought in, pleaded not guilty. It was objected in this court that there was no affidavit of probable cause in support of the *capias* and the information, but no such objection was made in the

district court. At the same term and on the 13th of May, the defendant moved the court for a continuance of the cause, and read an affidavit in support of his motion. A portion of the affidavit, relating to the testimony of the absent witness, was as follows:

"And affiant further says, that he expects to prove by said Albert Biddle that on the day mentioned in said information this affiant did not keep or occupy the room, building, tenement, or other place in said information alleged and charged against this affiant to be used or occupied for gambling, and that this affiant did not on said day knowingly permit said room or any other place to be used or occupied for gambling, as in said information charged against him."

Upon this the court allowed the motion and entered an order continuing the cause to a special term to be held in July following. On the same day two witnesses for the prosecution being required to give security for their appearance at said special term, declared that they were unable to do so, and it appearing to the court that the witnesses were about to go out of the territory, and the defendant being then in court, the order continuing the cause was vacated and the cause was set down for trial on the same day. This order was, however, subject to the condition that the defendant should decline to take the depositions of the witnesses to be used at the July term, and the defendant refusing to take such depositions, the cause was brought on for trial. Several witnesses on behalf of the government testified that gaming was carried on at and prior to the 27th of October, in a room kept by the defendant, and that he declared himself the proprietor thereof. The defendant objected to the evidence of gaming prior to the day laid in the information, but the evidence was received. A witness for the people, Edward Chase, brother to the accused, testified that he was proprietor of the room, and that his brother was in charge of it, and it was admitted by the counsel for the people that this witness was the owner of the premises.

Upon the point of proprietorship the court charged as follows:

"It is not necessary to a conviction, that the defendant should be shown to be the owner of the room, or the building wherein the room was situated, nor that he should be the proprietor of the establishment, if any, maintained there. If the defendant kept and managed and controlled the room, and had direction thereof, as the agent of another, this proof suffices, so far as this point of the case is concerned."

The court also charged, that it was not necessary to show that gaming was done in the room, but it was sufficient if the defendant kept the house with the intent, and for the purpose that gaming should be done there.

The prisoner was found guilty, and the court gave judgment that he be confined in the county jail for thirty (30) days, and pay a fine of \$500 and costs, and thereupon he sued out this writ of error.

Mr. H. R. HUNT, for plaintiff in error.

Mr. M. A. ROGERS, district attorney, *contra*.

BELFORD, J. In the view which we take of these cases, it is immaterial to inquire whether the warrant for the arrest of the defendant was issued on a proper showing or not. He submitted himself to the jurisdiction of the court, without interposing any objection, and having done so, he cannot now be heard to say that the warrant was void or irregular. The objection to the constitutionality of the act which authorizes the prosecution of this class of offenses by information, is not well taken. By the common law all offenses below the degree of felony are denominated misdemeanors, and might be prosecuted by information, filed *ex officio* by the attorney-general. A felony at common law embraced only such crimes as were punished capitally. *United States v. Sheppard*, Chicago Legal News, vol. 2 p. 317.

The constitution of the United States to which the territorial legislature must conform does not inhibit prosecution by information when the offense falls below the degree of capital or infamous.

It cannot be said that keeping a gambling-house, in the eye of the law, is infamous. It is neither a felony at common law, nor is it made so by statute. The great weight of authority sustains this mode of procedure. *State v. Dover*, 9 N. H. 469; *Commonwealth v. Waterborough*, 5 Mass. 259; *State v. Keys*, 8 Vt. 62; *Rowan v. The State*, 80 Wis. 130; *Ex parte Bergin*, 31 id. 383.

Nor do we apprehend that it is necessary for the information to specify the names of the persons engaged in play at the house complained of. *State v. Prescott*, 33 N. H. 212, and cases therein cited.

When a person is charged with keeping a house to be used or occupied for gambling, it is not necessary to show that gambling actually took place. The intention is a matter of proof, and if that can be established, it is immaterial whether the prohibited establishment shall find customers or not. *The State v. Miller*, 5 Blackf. 502.

We are further of the opinion that the affidavit filed by the defendant for a continuance was insufficient and should have been overruled in the first instance. It merely sets up a conclusion of law and not a fact, or a series of facts, which it was expected could or would be proven by the absent witness. It was tantamount to saying that defendant expected to prove by the witness that defendant was not guilty. Applications of this character should specify the precise matters which the applicant expects to establish by the witness, so that the court may judge of the materiality of the proposed evidence. When the order granting the continuance was vacated, the defendant was present in court, and of the power of the court to so vacate it there can be no question. We think it worked no hardship or inconvenience to the defendant, especially when it appears that the continuance was granted on an insufficient showing. Continuances should never be granted except in further-

ance of justice, and we cannot think that that end would have been reached by delaying the trial. The witnesses on behalf of the prosecution were about leaving the territory; they were unable to furnish sureties, and their attendance at another term could only have been secured by placing them in confinement. The prosecution must have been abandoned or the witnesses imprisoned. Such a course would have smacked rather of injustice than of justice.

The information charges the offense to have been committed on the 28th of October, and evidence was introduced, over defendant's objection, to show that gambling had been carried on in this building prior to that time. We think this evidence was admissible to explain the character of the house, and the purpose and intent with which it was kept. *People v. Jenners*, 5 Mich. 327, 328; *Armstrong v. The State*, 4 Blackf. 247; *People v. Hopson*, 1 Den. 574.

The instructions are unobjectionable. Chase certainly could not defend himself on the ground that he was agent for another. Wharton's Crim. Law, § 2365; *State v. Bell*, 5 Porter, 363.

The judgment must be

Affirmed.

HANAUER et al. v. BARTELS et al.

AGENT OF VENDOR — WHEN CARRIER IS. M. sold, and agreed to deliver to B. & Co., at D., so soon as it should be manufactured, certain flour for a fixed price — nothing being said in the contract as to the carrier. M. shipped the flour per a carrier to B. & Co., and the carrier delivered it to S. & Co., instead of to B. & Co., as he was directed. B. & Co., offering to pay the charges on the flour, demanded it from S. & Co., who refused to deliver it. *Held* (1), that the carrier was M.'s agent; and, also (2), that both the carrier and S. & Co., who had received the flour, were M.'s agents.

WHEN TITLE VESTED — in such case (1) the title could not vest in B. & Co., the vendees, until there was a delivery and acceptance by them; and (2) the vendees, B. & Co., accepted the delivery to S. & Co. as sufficient, by their unconditional demand of the flour and their offer to pay the charges due thereon, and the title at the time of acceptance vested in B. & Co., notwithstanding the agents (S. & Co.) of the vendor, M., refused to deliver the flour. And, also, in this action of

3. THE TENDER WAS SUFFICIENT.

INSTRUCTIONS — MISLEADING THE JURY — ERRONEOUS — *Vendor changing his vendee after shipment, and before delivery.* A sale by M. being claimed to have been made of the flour to Matzdorf (the carrier), the instructions given as to the sale were "calculated to mislead the jury, inasmuch as they seem to have limited the inquiry to a point of time anterior to the shipment," while the vendor had the right at any time before the acceptance of B. & Co. to have changed his mind as to the disposition of the flour; and if, between the shipment and the acceptance, M. made a valid sale to Matzdorf, the demand and acceptance while S. & Co. had the flour would be unavailing.

REPLEVIN — PROPER MEASURE OF DAMAGES *in detinet*. Interest on the value "from the time of the wrongful taking," is, where the property is merchandise kept for sale, or grain and other articles useful only for sale or consumption.

Appeal from District Court, Arapahoe County.

THIS is an action of replevin, in which the appellees filed their declaration, in one count only, claiming that the appellants unjustly detained two hundred and forty-six sacks of flour, valued at \$2,460, the goods and chattels of the appellees, to the damage of the appellees \$1,000. To which declaration appellants pleaded: First, *non detinet*; second, property in appellants; third, property in one Matzdorf.

Upon the trial below it was shown in evidence that McCormick had received from Bartels & Co. certain groceries, and was to pay for them in flour, which should be manufactured at Pueblo and shipped thence to Denver, where McCormick should deliver it to Bartels & Co. at the price of \$7.50 per sack; and that two hundred and fifty-two sacks were manufactured, put up, and by McCormick caused to be shipped by certain carriers, one Matzdorf being in charge of the flour at its shipment; and that the flour was conveyed to Denver and there delivered by Matzdorf to the defendants (appellants), Matzdorf having been directed by McCormick to deliver it to Bartels & Co.; and that, upon their ascertaining that the flour was in Denver in the possession of the appellants, one of the firm of Bartels & Co., for the firm, went, before this action was begun — the exact date is not given — with Moritz Barth to the appellants and demanded the flour

as the flour of Bartels & Co., and offered to pay the charges upon the same, and the appellants refused to deliver it without an order therefor from Matzdorf (as Barth and Julius Bartels testified), or without the surrender of the warehouse receipt issued for the flour to Matzdorf (as Fred. Salomon testified); and that \$826 had been paid as charges upon the flour by Salomon & Co.

McCormick testified as to a bill of sale given by him for the flour to Matzdorf. Had several conversations with Matzdorf while loading the train; made arrangements with him, in case Bartels & Co. did not want the flour, he was to sell it, take the money to St. Louis and buy goods with it, along with any other money I could raise. He was to get from \$30,000 to \$40,000 worth of goods; this was from the 10th to the 15th of April, while loading the train; he got the bill of sale on this agreement, to carry out these plans between us; think bill of sale was given afterward, about the 21st. I did tell Matzdorf to sell the flour if Bartels didn't want it, under the verbal agreement about purchasing goods; I was to furnish all the money I could raise, and he to let me have all the goods I wanted out of the \$30,000 or \$40,000 he was to buy; did not insert this in the bill of sale, because we were acting as the best of friends, in perfect good faith; if Bartels let us have the flour it was to be made good with other flour; if they would let him have the flour, why Matzdorf was to sell it to carry out our agreement about going to the States; the bill of sale was made by me to Matzdorf six or seven days after the shipment; the reason I gave it was to get the flour from Bartels & Co., under the agreement, and I promised to furnish flour to them in its place; Matzdorf represented that he could get the flour without trouble by having a bill of sale and by my making good the flour to them afterward, which I agreed to do if he could make the arrangement; I understood Matzdorf to say that he had seen Bartels & Co.; said he had been in Denver; the bill of sale was made on these representations, and dated back at the time it was given.

The court below gave, among other instructions, the following :

"If prior to the 1st of April, 1868, Streeter, acting for McCormick, and by authority of McCormick, had contracted with the plaintiffs that McCormick should take of plaintiffs a quantity of groceries and should pay for the same in flour at a price agreed upon, to be delivered at Denver or at Pueblo, as plaintiffs should elect, and if, in pursuance of this agreement, plaintiffs did deliver to Streeter for McCormick, or ship to McCormick, a quantity of groceries to the value of \$2,000 or more, and McCormick accepted the same in pursuance of the arrangement said to have been made by Streeter, and if, in March, 1868, the plaintiffs had instructed McCormick to ship the flour coming to them under the arrangement with Streeter to Denver, without designating the mode or method of transportation in particular, and if in April, 1868, McCormick, being the owner of the flour in question, acting in pursuance of the instructions before that time given by plaintiffs, delivered the flour in question to a Mexican carrier or carriers to be transported to Denver and there delivered to the plaintiffs, and without any authority in the carrier or carriers to make any other disposition thereof, then the delivery to such carrier or carriers was a delivery to plaintiffs, provided that the flour was of such quality as the plaintiffs had contracted for ; and if such carrier or carriers afterward, and in violation of their instructions or contract under which they received the flour from McCormick, deposited the flour with the defendants, to be stored and kept, or for any other purpose than the delivery thereof to the plaintiffs, the plaintiffs might, upon first making demand of the plaintiffs for the flour, maintain their action of replevin therefor ; so, if the delivery of the flour at Pueblo was to a carrier or carriers, McCormick contracting with such carrier or carriers that the carriers should deliver the flour for him to the plaintiffs in Denver, and if Matzdorf was employed by McCormick to see to the delivery of the flour by the carrier to the plaintiffs, but without authority to

make any other disposition thereof, unless by consent of the plaintiffs to be first by him obtained, such delivery to the carrier or carriers must be estimated to be a delivery to the plaintiffs (provided the flour was of such a quality as the plaintiffs had bargained for) and put such flour at plaintiffs' risk and invested plaintiffs with the title thereto from the time of such delivery, and if Matzdorf, in violation of his employment and authority from McCormick, caused the flour to be delivered to the defendants to hold and store for his use, the plaintiffs, upon first making demand upon the defendants for the flour, were entitled to their action of replevin therefor. If the plaintiffs made with Streeter, acting for McCormick, such contract for flour as above supposed, plaintiffs stipulating that the flour furnished by McCormick should be good flour, then McCormick was bound to deliver such flour as would be rated good flour in the Denver market, at which it was to be delivered, and plaintiffs were not bound to accept an article which would not pass as good flour in that market, and if the flour in question was not such quality, plaintiffs were not bound to accept the same, even though shipped by McCormick in pursuance of their order and consigned to them. Nor did the title and property in the flour pass to plaintiffs by such shipment; nor even though plaintiffs afterward, on finding the flour in possession of defendants, declared that the flour was theirs and demanded the same, or demanded that defendants should hold same to their use, does this alter the case or constitute such acceptance as to invest the property in plaintiffs unless plaintiffs then made examination of the flour or some portion of it, so as to know of its quality; for, though plaintiffs had actually taken the flour into possession, they might have afterward returned it if not of the quality for which they had bargained. If, before the shipment of the flour from Pueblo, McCormick had sold the flour to Matzdorf, or had placed the same in his custody to be disposed of by him for his own advantage, or for the advantage of McCormick, or of McCormick and himself, and not to be delivered to the

plaintiffs, and if the shipment thereof by the Mexican carriers was in pursuance of such arrangement, then, even though McCormick had before that promised the same flour to plaintiffs, the delivery to the carrier or to Matzdorf was not a delivery to plaintiffs, and plaintiffs at the bringing of this action had not, so far as appears by the evidence, any property in the flour, even though plaintiffs, on finding the flour in defendants' possession, claimed and accepted the same as their flour; in determining in what relation Matzdorf received the flour, if he did receive it, whether as the agent of McCormick with authority only to see to its delivery at Denver to plaintiffs, or as his own, or with authority to dispose of it for his own use or otherwise than to deliver it to plaintiffs, you should take into account the testimony of the witness McCormick in respect to this; what is said by this witness as to whether he or Matzdorf contracted with the carrier for the transportation of the flour and the rate to be charged therefor and what is said by him as to how and where he procured the sacks in which it was shipped; so, if the witness, Gustave Bartels, or any other witness, has said that Matzdorf procured these sacks, or any of them, you may take this into account; and if there is any testimony as to where Matzdorf procured the money to pay for the sacks, you may consider this; so if at the time of procuring these sacks, or at any other time, Matzdorf spoke of the flour in question as belonging to the plaintiffs, or asserted where any one else so spoke of it, you will consider this.

"So you will take into account the testimony of the witness Baxter, as to whether McCormick did or did not direct him to deliver flour to Matzdorf. So you will take into consideration the bill of sale alleged to have been executed by McCormick to Matzdorf, and in respect to which McCormick was interrogated, and in the letter of May 11, 1868, addressed by McCormick to Bartels, together with the testimony of McCormick in respect to the circumstances under which this bill of sale and letter were executed and written.

"You will bear in mind, however, that if the original delivery to Matzdorf, or to the carriers to whichsoever the delivery was, was solely for the purpose of transportation to Denver, there to be delivered to the plaintiffs, and if Matzdorf, after plaintiffs had demanded the flour of defendants, procured McCormick to execute the bill of sale of April 17, 1868, by falsely representing that thereupon the plaintiffs would be willing to surrender the flour to him, then Matzdorf took no title as against plaintiffs by the bill of sale, and in that case you will throw the bill of sale out of consideration.

"If, upon consideration of all these matters and circumstances above referred to, and all others in proof, which may appear to you to afford a fair inference upon this question, you are of opinion that the flour in question was, before its shipment at Pueblo, sold to Matzdorf, or was put in his custody or charge, or in the custody of the carriers spoken of in testimony, to be by Matzdorf appropriated to his own use, or to the use of McCormick, or both of them, or for any purpose other than its delivery to plaintiffs, you must find for the defendants, notwithstanding it shall appear from the evidence that McCormick had before that agreed to sell the same flour to plaintiffs, and that plaintiffs had paid for it and agreed to accept it, and that it was of such quality as plaintiffs had contracted for, and notwithstanding it shall appear by the evidence, that plaintiffs afterward, on finding the same in defendants' possession, accepted and claimed it as theirs."

The jury, in their verdict, found the property of 246 sacks of flour in the plaintiffs (appellees); and found the defendants (appellants) guilty, as complained of in the declaration, and found the value of the flour, \$1,845, and assessed the plaintiffs' damages (interest on \$1,845) at \$831.27.

Messrs. CHARLES & PHELPS, for appellants.

Messrs SAYRE & WRIGHT, for appellees.

BELFORD, J. The contract obligated McCormick to deliver the flour in controversy to Bartels & Co., at the city of Denver. The carrier was not the designated agent of the vendees, and consequently a delivery to him cannot be regarded as a delivery to them. The flour, at the time the contract was made, was yet to be manufactured and the title could not vest in the vendees until it was ground and until there was a delivery and acceptance by them. The rule applicable to the sale of a specific and ascertained article cannot obtain here. Something was to be done on the part of the seller, and until it was performed, and until there was a delivery and acceptance on behalf of vendees, the title remained in him. The carrier to whom the flour was committed for transportation, as well as the appellants who received it from them, must be regarded as the agents of the vendor, and the law perpetuates this agency until some act is performed by the vendees which passes the title to them. After the flour reached Denver, and after Matzdorf had delivered it to the Salomons, and taken their receipt therefor, Bartels made a demand of them for the flour. The learned judge who tried the case, when resolving the motion for a new trial, was of the opinion that this demand was tantamount to an acceptance of the flour, and from the date of the demand, title vested in the vendees so as to enable them to maintain this action. It is clear that the flour in question was appropriated by McCormick to Bartels. His intention to deliver it to them is manifested by the directions given the carrier. Now it would seem, this being so, that if the appellees at any time assented, under such circumstances as to be bound by that assent, to what had been done by McCormick, if there was a meeting of their minds, the wrongful act of the carrier, or of any third person, would not take away from the acts of the buyer and seller the consequence and effect which the law would otherwise ascribe to them. *Sewell v. Eaton*, 6 Wis. 479; Benjamin on Sales, 246 to 271.

The evidence is clear that the appellees did assent, for upon finding that the flour was in possession of the defendants, Julius Bartels, acting on behalf of the plaintiffs,

repaired to the store of Salomon's, was shown the flour, claimed and demanded it as the flour of the plaintiffs. So far as he could do so, he assented to every thing which McCormick had done, and this too, knowing the failure of McCormick to comply with the contract, knowing that the delivery had not been made at the place agreed upon, knowing also that McCormick had not paid the freight; so that every fact upon which depended the final and absolute effect of his acceptance, was within his knowledge at this time, saving only the correspondence or failure of the flour to correspond with the quality contracted for. But the jury have found that in fact the flour was of the quality contracted for, and this being so, it is immaterial that Bartels did not at the time know it, for they had not an arbitrary power to reject or to return it, if once accepted, but only in case it was inferior to that for which the plaintiff had bargained, and when the demand is unconditional, as in this case, the acceptance must be regarded as absolute. The stipulations of the contract of sale were inserted for the plaintiffs' benefit, and a compliance with them they were at liberty to waive. *Lewis v. Western Railroad Co.*, 11 Metc. 515.

They might have accepted the wheat elsewhere than at the place of delivery named, if they saw fit, and they were at liberty to accept it incumbered with a lien for the carriage, if it seemed to them to be for their interest, and if they did this with the assent of the vendor, they become invested with the property.

The only question, therefore, would seem to be whether or not the demand and avowed acceptance of Bartels while the flour was in Salomon's possession, could operate to vest the title in them, notwithstanding the bailee or agent of the vendor refused to deliver. The authorities on this subject are not uniform, and the English and American are in open conflict. In *Bentley v. Burn*, 3 B. & C. 423, the action was brought to recover £13 14s, the price of a hog's head of Sicilian wine. On the trial it appeared that the bankrupts had sold to the defendants a hog'shead of Sicilian wine, then lying in the London docks, and at the same time

a delivery order and invoice was made out and sent to the defendant, signed by the firm. There was no actual acceptance or delivery. Under these circumstances the court held that there could not have been any actual acceptance of the wine by the vendee until the Dock company accepted the order of delivery, and thereby assented to hold the wine as the agent of the vendee. In other words, that the Dock company refusing to deliver, there could be no actual acceptance of the goods by the vendee until he actually took possession of them. The principle here announced would seem applicable to the case at bar, and would be conclusive had not a different rule by a higher authority been prescribed. I refer to the case of *Tome v. Dubois*, 6 Wall. 548, where it is held that the conversion of personal property by a wrong-doer does not deprive the owner of the power of making a valid sale of it, and that a purchaser from the owner, upon giving the wrong-doer notice of the transfer, may demand the property, and in case of refusal, maintain an action for the wrongful retention of it. From this case it is apparent that when the vendor and vendee are of an agreeing mind, when the one intends to deliver, and the other to accept, that the object sought to be attained cannot be defeated by the wrongful act of a third person, who has no title except that arising from mere naked possession. It is further claimed, by the appellants, that before this suit could be instituted, it was the duty of the appellees to pay or tender to the Salomons the amount advanced by them to the carrier for freight. We think the Bartels did all they were required to do under the circumstances. They offered to pay the amount, which offer was not accepted. Besides, the Bartels could not pay until they knew the amount, and when the Salomons declined to give it, they absolved the Bartels from making an actual tender. The conduct of the appellants clearly shows that an actual tender would have been fruitless. Fred. Salomon informed Bartels when the demand was made that the flour would not be delivered up unless Bartels would return, or cause to be returned to him, the receipt that the Salomons had given Matzdorf for

the flour. The objection then to surrendering the flour was not that the money advanced to the carrier, as freight, had not been paid. It was that the receipt of the appellants was outstanding in the hands of Matzdorf. There is nothing in the evidence to show that at the time the demand was made the receipt had fallen into the hands of a *bona fide* holder for value, and the effect of such a receipt in the hands of such a holder it is not now necessary to determine. So far as it appears, it was at that time in the hands of Matzdorf, and may remain there to this day.

It is claimed, however, by appellants, that McCormick sold the flour to Matzdorf. Whether or not there was a sale to Matzdorf; whether or not Matzdorf had authority to divert the flour from its destination, were questions submitted to the jury, and they resolved them against Matzdorf. We think, however, that the instructions of the court on this subject were calculated to mislead the jury, inasmuch as they seem to have limited the inquiry to a point of time anterior to the shipment. According to the view we take of the case, it was competent for McCormick to have changed his mind as to the disposition of the flour any time after the shipment, and prior to the demand and acceptance by the Bartels. As we have said above, the delivery to the carrier was not a delivery to the vendees. The flour was at McCormick's risk, until acceptance by Bartels. If, during the time intervening between shipment and acceptance, McCormick made a valid sale to Matzdorf, then any demand or acceptance by the Bartels, while the flour was in the possession of the Salomons, would have been unavailing and nugatory. This view of the case was not clearly presented to the jury. The evidence on this whole subject of sale, and especially as to the time when the bill of sale was made out, is quite obscure. There is considerable room for doubt, upon the evidence in the record, whether the bill of sale ante-dated in point of actual execution, or post-dated the demand and acceptance of the Bartels. The instructions proceeded upon a false theory, as to the time when Bartel's rights vested, and as to the

effect of the delivery to the carrier, and being calculated to mislead the jury, the judgment must be reversed, and inasmuch as the case must be tried again, it is proper to allude to the measure of damages.

At the time this suit was brought, the statute allowed the defendant in replevin to retrieve the goods by executing a forthcoming bond. This course was pursued here. The rule of damages in actions of replevin is not uniform. It depends on the character of the property. In an action to recover a horse, or other property having a usable value, the value of the use during the detention has been regarded as the correct measure of damages. In many cases, interest on the value, from the time of the wrongful taking, would be a proper measure, and this seems to be the rule applied in all cases where the property detained is merchandise, kept for sale, grain and all other articles of property, useful only for sale or consumption. *Allen v. Fox*, 51 N. Y. 565; *Suydam v. Jenkins*, 8 Sand. S. C. R. 614; *Burgee v. Maybee*, 21 Wend. 144.

Judgment reversed, and case remanded for further proceedings. *Reversed.*

IN REPLEVIN, MEASURE OF DAMAGES is interest on the value of goods intended for consumption from the time of conversion, but the interest is allowed as damages, not as interest: *Tucker v. Purks*, 7 Colo. 70; *Omaha & G. S. & E. Co. v. Tabor*, 13 Colo. 86.

FISHER v. MARTIN.

NEW TRIAL — *will not be granted* upon conflicting evidence, where the jury have fairly passed upon the credibility of the witnesses.

Appeal from District Court, Arapahoe County.

THE facts are stated in the opinion.

MR. ALFRED SAYRE and **MR. CHAS. W. WRIGHT**, for appellant.

MR. T. G. PUTNAM, for appellee.

HALLETT, C. J. Assumpsit upon a promissory note, and plea the general issue, with notice that the defendant would

rely upon the statute of limitations, and upon payment made to the payee after maturity.

Appellant, who was defendant below, testified that the note was in the hands of the payee at maturity, and that he delivered to him certain wagons as security for the note, with the understanding that the value of the wagons was to be applied in satisfaction of the note, if the same should not be paid, and that the wagons were never returned. Another witness testified to the same facts. Opposed to this is the testimony of appellee as to admissions made in the year 1863, and other admissions made after the commencement of this suit. Two witnesses, who do not appear to have any interest in the controversy, testified to appellant's declarations, that he would have paid the note if suit had not been brought. Upon this evidence we are unable to say that the verdict of the jury is unsupported. It is the ordinary case of a conflict in the testimony, and a decision by the jury in favor of one party, which the court will not disturb. The judgment of the district court is affirmed, with costs.

Affirmed.

VERDICT WILL NOT BE DISTURBED where it is not manifestly wrong, and the evidence is conflicting: *Barker v. Hawley*, 4 Colo. 327.

KEATING v. PEDDEE.

NEW TRIAL — *verdict against evidence.* A verdict of a jury which is clearly against the evidence should be set aside.

Error to District Court, Arapahoe County.

THE declaration was in replevin to recover eight mules, alleged to be of the value of \$600. The defendant, Pedee, filed several pleas, claiming the property as administratrix of Andrew Pedee, deceased, and otherwise. The evidence, which was quite lengthy, is sufficiently stated in the opinion, except as to the following receipt, which was put in evidence by defendant:

“Office of F. E. Everett, Banker, Golden City, Colorado, February 21, 1873. Received of Mrs. R. P. Pedee, admin-

istratrix, \$516.16, being the second installment for the payment of nine head of mules sold Andrew Pedee, third and last installment of like amount remaining yet unpaid, due from March estimates.

(Signed)

"J. F. KEATING."

The only witnesses examined were the plaintiff and one Charles Donnelly, on behalf of the plaintiff, and the defendant in her own behalf. The defendant had judgment.

Mr. ALFRED SAYRE and Mr. C. W. WRIGHT, for plaintiff in error.

Mr. T. G. PUTNAM, for defendant in error.

HALLETT, C. J. The property in controversy was sold to defendant's intestate for the sum of \$1,550, payable in three monthly installments, and it was expressly understood, that the title should not pass until all the payments were made. If default should be made in either of the payments, the sum actually paid was to be applied to the hire of the animals at the rate of \$10 per day. The plaintiff and the witness Donnelly testify to these facts, and the defendant knew nothing of the agreement. The receipt dated February 21, 1873, may receive the construction that the last payment was to be made from the March estimates, which should become due from the railroad company. But the plaintiff testifies that he gave it reluctantly, and obviously it does not fully state the contract. By the testimony of the witnesses it appears that the title to the property was not to pass until all the payments were made, and we cannot say that the statement in the receipt, that the last installment was due from the March estimates, amounts to an agreement on the part of the vendor to wait until those estimates should be received by the defendant. The verdict is clearly and palpably against the evidence, and must be set aside.

Judgment of the district court is reversed, and the cause is remanded for a new trial.

Reversed.

WHERE VERDICT IS CLEARLY AGAINST EVIDENCE, a new trial will be granted: *Barker v. Hawley*, 4 Colo. 341.

CHASE v. THE PEOPLE.*

RECOGNIZANCE — *whether it must be returnable to the first day of term.* A recognizance, with condition that principal cognizor "shall personally be and appear at the district court, within and for the county of Arapahoe, at a term thereof, to be held at Denver, in the said county, on the first Monday of October next, A. D. 1872," binds the party to appear on the first and every other day of the term specified, and upon his failure to do so, the recognizance may be forfeited at the same term.

Whether scire facias may issue upon it. When certified into the district court, pursuant to the statute (R. S. 250), a recognizance taken by a justice of the peace becomes matter of record, and upon forfeiture, the proper remedy to obtain execution thereof is by *scire facias*.

Taken by two justices. That a recognizance was taken by two justices of the peace in a case where one may lawfully act, will not impair its force or validity.

What it should contain. All of the proceedings by which the justice acquired jurisdiction in the case need not appear in a recognizance of bail. The offense and the official character of the magistrate are enough.

How the offense should be described. Where the recognizance recites that the principal cognizor is held to appear "for the offense of being a common gambler," the nature and character of the offense is sufficiently described.

Whether execution may be awarded against one of several cognizors. Service upon one of several cognizors is sufficient to warrant award of execution as to him, although others are not found. †

Of the return to scire facias. As to those defendants who cannot be personally served with *scire facias* within the jurisdiction, the proper return to be made by the sheriff is "not found."

Error to District Court, Arapahoe County.

THE recognizance was of Charles Jennings as principal, and Edward Chase (plaintiff in error) as surety, dated June 21, 1872, taken by two justices, and returned into the district court, August 31, 1872. The condition was as follows:

"The condition of this recognizance is such that if the said Charles Jennings shall personally be and appear at the

* Two other cases removed into this court by the plaintiff in error, presented substantially the same facts, and were determined in the same way.

† 1.—The record shows two returns "not found" as to Jennings, and that execution was awarded against him, as well as the surety, but he did not join in the writ of error, and it was alleged on behalf of Chase, the present plaintiff in error, that he had not been served.

district court within and for the county of Arapahoe, at a term thereof, to be held at Denver, in said county, on the first Monday of October next, A. D. 1872, to answer any indictment that may be preferred against him for the offense of being a common gambler, and to do and receive what shall be by the court then and there enjoined upon him, and shall not depart the said court without leave, then this recognizance to be void, otherwise to remain in full force and effect."

At the October term, 1872, of the district court, an indictment was returned against Jennings, and afterward, and at the same term, his recognizance was forfeited. A *scire facias* was issued March 18, 1873, returnable to the April term of the district court, which was served upon Chase, and as to Jennings, the return was "not found." At the April term the cause was continued, and an alias *scire facias* sued out, returnable to the next term, which was also returned "not found" as to Jennings, and at the October term, 1873, execution was awarded against both Jennings and Chase. Thereupon, the said Chase sued out this writ of error, which was made a supersedeas.

Mr. H. R. HUNT, for plaintiff in error.

Mr. M. A. ROGERS, district attorney, *contra*.

BELFORD, J. *Scire facias* on a recognizance. The record shows a recognizance regularly taken by two justices of the peace, by which one Charles Jennings, the principal, bound himself to the people of the territory in the sum of \$200, and Edward Chase, the plaintiff in error, bound himself as surety in the same amount, and which is conditioned that the principal "shall be and personally appear at the district court within and for the county of Arapahoe, at a term thereof to be held at Denver in said county, on the first Monday of October next, A. D. 1872, to answer any indictment that may be preferred against him for the offense of being a common gambler, and to do and receive what shall be by the court

then and there enjoined upon him, and shall not depart the said court without leave, then this recognizance to be void," etc. It further appears that this recognizance was duly filed in the office of the clerk of said court on the 31st day of August, 1872, and attached to said recognizance was a certificate of said justices, stating that the bond had been approved on the 21st day of June, 1872.

It further appears that on the 28th day of October ensuing the execution of said bond, the district attorney had Jennings and Chase, the principal and surety in said recognizance, called and defaulted for want of appearance. Whereupon it was considered by the court that the said Charles Jennings and Edward Chase have broken the conditions of the said recognizance, and that the same be taken as forfeited, and that a *scire facias* issue returnable to the next term of the court. The *scire facias* was accordingly issued and returned by the sheriff served as to Chase and not found as to Jennings. At the September term, 1873, an alias writ of *scire facias* was issued against Jennings, and returned as before, not found. At the October term of the court, 1873, Chase and Jennings were defaulted, and execution was thereupon awarded against Chase, and Jennings was ruled to plead within four days. On the 15th day of October the default as to Chase was set aside, and he was permitted to interpose his demurrer to the *scire facias*, which, after being argued and duly considered, was overruled.

On the 12th day of December, 1873, it still being of the October term, Jennings having failed to plead, as previously ordered, and Chase abiding his demurrer, the court awarded execution against both Chase and Jennings.

The errors assigned in this case are numerous, and have all been patiently considered. It is contended that Jennings and Chase had all of the October term, 1872, in which to appear, and that the court had no power to enter a default during that term, or to award the writ of *scire facias*. We do not think that this construction of the recognizance is the proper one. The condition that the principal should appear at the next term of the district court, to be holden on the

first Monday of October, and to do and receive what shall be by the court then and there enjoined, and not depart the said court without leave, is tantamount to an undertaking to appear on the first and every other day of the term, unless sooner discharged. The conditions of all recognizances are fixed by law, and parties and their sureties understand perfectly what their liabilities are, and there can be neither hardship nor injustice in holding that a bond conditioned for the appearance of a party "at the next term of the district court to be holden on the first Monday of October," imposes upon the party executing such bond the duty of appearing on the precise day, to wit, the first Monday; and to this effect would seem to be the cases of *Wilson v. The State*, 6 Blackf. 212; *People v. Blankman*, 17 Wend. 252; *State v. Crowley*, 60 Me. 103; *State v. Eastman*, 42 N. H. 265; *State v. Davis*, 43 N. H. 600.

It is claimed that *scire facias* is not the proper remedy. We think differently. The recognizance, when filed with the clerk, becomes a matter of record. *Shattuck v. The People*, 4 Scam. 481; *Benedict v. Cutting*, 13 Metc. 181.

It is insisted that a recognizance, taken before a justice, must substantially set forth proceedings, which evidence the authority of the justice to require bail from the accused, or recognizance, is void. The better opinion seems to be otherwise. If the official character of the magistrate appear, and the offense for which bail is entered be bailable, by the statute, this would seem to suffice. The recognizance need not recite all the facts which show that the officer had jurisdiction to act in the particular case. *The People v. Kane*, 4 Den. 530; *McFarlan v. The People*, 18 Ill. 9.

Nor need the offense be described with the same particularity as in an indictment. The offense specified in the recognizance is that of being a common gambler. This is as specific as that mentioned in the case of the *United States v. Deins*, 1 Bond, 103, where the condition was to answer for the crime of stealing from the mail of the United States. See also *State v. Hamer*, 2 Ind. 371.

When a *scire facias* issues upon a joint and several

recognizance of this nature, and service is had upon one or more of the cognizors, execution may be awarded against those served with process, upon a return of *nihil* against such as are not found. *Sans v. The People*, 8 Gilm. 334; *Wheeler v. The People*, 39 Ill. 432.

It is insisted that a return of "not found" is not equivalent to a return "*nihil*," or "that he hath nothing in my bailiwick." The object in suing out the writ of *scire facias* is to compel the defendants to show cause, if any, why execution should not be awarded against them. The object of the writ is not to ascertain whether goods or chattels can be found in the bailiwick out of which to satisfy the penalty of the recognizance, but to reach the person and notify him that unless he show cause, an execution shall issue. It would seem that the proper return would be "not found."

We find no error in the rulings of the court, and accordingly affirm the judgment. *Affirmed.*

RECOGNIZANCE — CERTIFICATION BY JUSTICE OF THE PEACE renders recognizance matter of record, and no longer simple contract: *Haney v. People*, 12 Colo. 347.

SELLAR et al. v. CLELLAND et al.

EVIDENCE — *in action on the case for deceit.* Upon a false affirmation made by defendants as of their own knowledge, concerning a matter of which they had not actual knowledge, the circumstances showing that the matter spoken of was probably better known to defendants than to plaintiffs, the intention of defendants to deceive and defraud plaintiffs is sufficiently made out.

Where plaintiffs contracted with defendants to transport certain freight from Fort Harker in Kansas, to Fort Arbuckle in the Indian Territory, and it was alleged that certain false representations were made by defendants to plaintiffs, at and before the making of the contract, respecting the condition of the road or trail between said points, of which the defendants assumed to have knowledge and the plaintiffs knew nothing, an action may be maintained upon proof.

1. That defendants made the representations as of their own knowledge.
2. That such representations were made to induce plaintiffs to enter into the contract.
3. That relying upon the same, plaintiffs did enter into the contract.
4. That the representations were false.

5. That plaintiffs sustained damage, and that such damage was occasioned by reason of the falsity of the representations.

Where the representations relate to a road which is distant from the place where they are made, and therefore not open to inspection, the plaintiffs are not bound to inquire into the truth of the statements made by defendants.

Conversations between the parties prior to, and at the time of making the contract, may be received in evidence to prove the alleged representations.

Whether one who has destroyed a written contract may give secondary evidence of its contents. A party to a contract who procured it to be destroyed should not be allowed to prove its contents until he has repelled every inference of a fraudulent design in its destruction.

The rule on that point in the action of assumpsit. In an action based upon false representations, whereby the plaintiffs were induced to enter into the contract which has been destroyed, the gist of the action is the deceit, and it seems that less evidence will be required to repel the fraudulent intent than would be demanded if the action was upon the contract itself.

Where both parties assent to the destruction. And where, in such action, it appears that the contract being in possession of one of the defendants was destroyed, upon request of one of the plaintiffs, and by the concurrent act of both parties, there is no reason to suspect that a fraud was intended, and secondary evidence of the contents of the writing may be received.

Amendment of declaration at the trial. In such action an amendment to the declaration, whereby the number of defendants was reduced from ten to two, the cause of action remaining the same, may be made upon the trial.

Of the effect of the amendment upon the issue previously joined. When such amendment was made, the plea not guilty, previously filed, stood to the amended declaration, and the issue remained unchanged.

Whether plaintiffs were in fault is a question for the jury. Plaintiffs having made about one-third of the journey before they were advised of the peril to which their cattle was exposed, whether, in the exercise of ordinary prudence and care, they should have turned back to avoid the danger was properly submitted to the jury, and upon the evidence here, their finding will not be disturbed.

DAMAGES—value of cattle in nearest markets. To prove the value of cattle lost by disease in an uninhabited country, where there was no market for such animals, evidence of their value in the nearest markets may be received, although such markets are distant 225 miles or more from the place where the cattle were lost.

The rule as to time and place. And in such case the plaintiffs are not restricted to a single market, nor to the very time of the loss, but they may give evidence of value in several markets nearest the place where the cattle were lost, and before and after the date of the alleged loss, to enable the jury to determine the value at the time and place of the loss.

Other and extraordinary elements of damages. And where plaintiffs were delayed in their journey, and were compelled to purchase, at extraordinary cost, other cattle to supply the place of those which were lost through and by reason of, defendants' deceit, they may have as damages, not alone the value of cattle lost to them, but the expenses occasioned by the delay and the difference between the value of cattle purchased by them, and the price which they paid for them.

INSTRUCTION — *should be confined to matter in issue.* The court cannot be required to charge the jury upon matters which are not presented in the evidence.

PRACTICE — *of the order in which evidence shall be put in.* Whether evidence on behalf of plaintiffs, which should have been offered in the first instance, shall be received after defendants have closed their case, is ordinarily in the discretion of the court where the cause is tried, and not a ground for reversal in this court.

Of the assignment of error in this court. An objection which is not presented by the assignment of errors, nor in argument, will not be considered.

Appeal from District Court, Arapahoe County.

THE declaration was in case by Jas. Clelland and Chas. M. Stebbins (appellees), as partners, against John P. Sellar and Edward F. Kellog (appellants), and Manuel Otero, Charles R. Morehead, Eugene B. Allen, David W. Powers, James B. Powers, David B. Powers, Henry L. Newman and Percival G. Lowe, as partners. It alleged, that in the year 1869 the plaintiffs were engaged in the business of transporting freight for hire, and were possessed of a train consisting of sixty yoke of oxen and twenty freight wagons; that the defendants were engaged in the business of transporting government stores from Fort Harker, sometimes called Ellsworth, in Kansas, to Fort Arbuckle in the Indian Territory; that to induce the plaintiffs to transport such stores from the said Harker to the said Arbuckle, and contriving to deceive, defraud and injure the plaintiffs, the defendants at Sheridan, Kansas, falsely, fraudulently, and deceitfully, represented to the plaintiffs that the road sometimes called the "Chisholm Trail," leading from Fort Harker to Fort Arbuckle, was not a road over which Texas cattle, so called, or diseased cattle of any kind, had ever passed or been driven, and that, in fact, no Texas cattle had ever passed

over said road, and that said road was entirely free from any and all infectious diseases to cattle, and was then safe to the health and lives of cattle, which representations were false, and that the defendants, at the time of making such representations, knew them to be false; that the plaintiffs were thereby induced to enter into a contract with defendants to transport from Harker to Arbuckle, 140,000 lbs. of freight at a price named, and did in fact transport a portion thereof; that in consequence of diseased Texas cattle having been driven over said road, and because of the infection to cattle in said road, and in the air, and grass along the same, caused by driving Texas cattle and diseased Texas cattle along said road, 104 head of plaintiffs' cattle sickened and died, and were lost to plaintiffs. The plaintiffs alleged special damages on account of delay in prosecuting their journey, the expense of protecting the stores during the time for which they were detained in the Indian country, the extraordinary price paid for other cattle with which to remove their wagons from the place where the cattle died, to Fort Arbuckle, and other matters.

The defendants pleaded not guilty, and the cause was brought to trial at the May term, 1873.

At the trial the plaintiffs gave evidence of a bill of lading, which was signed by one of the plaintiffs in behalf of his firm, and by the defendant Kellog in behalf of a firm, the members of which were not named. It appeared that after the journey had been performed, Clelland, one of the plaintiffs, requested Kellog, one of the defendants, to destroy this instrument, and thereupon Kellog tore the instrument once, and threw it on the floor; that Clelland, who was present, then picked it up, and after tearing it again, threw it in the stove. As to the motive of the parties for this, Clelland testified that he requested Kellog to destroy it because he (Clelland) had no copy of it. Kellog testified that Clelland requested that it should be destroyed because he wished to be relieved from a second trip, to which he was therein bound. He afterward stated that Clelland claimed his sympathy on account of the losses he had sustained, and

in consideration thereof, asked him (Kellog) to release him (Clelland) from making a second trip. The evidence of Kellog as to the destruction of the bill of lading was not given until the evidence for defense was put in, and secondary evidence as to the contents of that instrument was received in evidence upon the testimony of plaintiff only.

It appeared in evidence on behalf of plaintiffs, that the contract was made at Sheridan, which is a considerable distance from Fort Harker, the point of departure; that at and before the time the contract was made, Kellog made representations concerning the condition of the road, substantially as charged in the declaration, and that plaintiffs would not have entered into the contract but for such representations. That plaintiffs loaded 70,000 lbs. of freight at Harker, and started on the journey to Arbuckle, about July 4, 1869. That upon arriving at the Arkansas river, a distance of about 100 miles from Harker, or Ellsworth, plaintiffs met a large herd of Texas cattle, and thereafter they met numerous herds of Texas cattle, some of which were diseased.

The symptoms of the disease were given, and witnesses testified that it was contagious; that many of the Texas cattle died of it.

Plaintiffs gave evidence tending to prove that 104 head of their cattle died of the same disease between the south fork of the Arkansas river and the north fork of the Canadian, and that such disease was communicated to their cattle by the Texas cattle passing on the road. This point was strongly contested in evidence by the defendants, who afterward introduced much testimony to prove that the disease was not due to the presence of Texas cattle. It further appeared that plaintiffs' cattle died in an uninhabited country, about 70 miles from Fort Sill, and 130 miles from Fort Arbuckle; that, leaving his wagons at that point, the plaintiff Clelland visited Fort Sill and Fort Arbuckle for the purpose of obtaining assistance; that he was unable to procure cattle with which to move his train except by exchanging wagons for cattle at the rate of one wagon for one yoke of cattle, which

was much more than the cattle were worth; that plaintiffs paid an extraordinary price for other cattle with which to move their train, and that they were detained at the place where the cattle died for a considerable time. The prices paid to laborers and the cost of provisions for their use was also given in evidence. It appeared that there was no market for cattle at the places where plaintiffs' cattle died, nor at Forts Sill and Arbuckle, which were the nearest points, and evidence was received of the value of cattle at Salina and Ellsworth, Kansas, which points were about 280 miles distant. At the points last named, sales of cattle were infrequent, and plaintiffs were not confined to the month of August, in which the cattle died, but were allowed to give evidence of the state of the market before and after that time, and in one instance prices early in October were named. The defendants objected to much of the evidence, and the objections were overruled. There was nothing in the evidence to connect any of the defendants, excepting Kellog and Sellar, with the transaction, and after plaintiffs' evidence was in, defendants moved for nonsuit upon that ground. Thereupon the court allowed plaintiffs to amend their declaration, as stated in the opinion, and the motion was denied. The defendants put in much evidence to contradict the evidence offered by plaintiffs, and especially as to the representations alleged to have been made by Kellog concerning the road or trail. After defendants had closed their evidence, plaintiffs were allowed to give further evidence of the value of the cattle lost by them, to which defendants objected that such evidence was not admissible at that time, and the objection was overruled. Defendants presented numerous prayers for instructions, which are sufficiently referred to in the opinion.

The charge of the court was as follows:

The burden of showing by a preponderance of evidence the existence of every material fact necessary to a recovery is upon the plaintiffs.

1. "Plaintiffs must show by a preponderance of evidence (1) that in June, 1869, the defendants were copartners in

the business of transporting government stores from Fort Harker to Fort Arbuckle. (2) That, in order to induce plaintiffs to enter into a contract for the transportation of freight from Fort Harker to Arbuckle, the defendants, or one of them, acting about a business wherein they were jointly interested as copartners, made the representations charged in the declaration, and spoke of the matter as within his own knowledge. (3) That the representations charged were made under such circumstances that the plaintiffs were entitled to and did accept and confide in them as true, and on the faith of them entered into such contract, and that they afterward proceeded to comply, or attempt to comply therewith. (4) That the representations complained of were false, and that injury and damage has occurred to the plaintiffs by reason of the falsity of such representations, and not by reason of the negligence of the plaintiffs or other causes.

2. "You will first consider whether defendants are or are not guilty of the deceit charged in the declaration.

3. "If, in June, 1869, the defendants were jointly interested as copartners in the transportation of government stores from Fort Harker to Fort Arbuckle, and in order to induce the plaintiffs to enter into a contract to transport such freight for the defendants from Fort Harker to Fort Arbuckle, the defendant, Kellog, represented to the plaintiffs, or one of them, that no Texas cattle had been driven over or upon the road, by which plaintiffs, if they should accept such contract, must travel; and that plaintiffs, if they should accept such contract, would not travel within twenty-five or thirty miles of the road by and over which Texas cattle were driven, and declares that he knew this of his own knowledge, or spoke of it as a matter within his own knowledge, and if in the same circumstances a man of ordinary prudence would have relied on the same representations, and if plaintiffs did rely thereon, and relying on these representations, entered into such contract in the faith thereof, and proceeded to perform the same; and if, in fact, the only road between Fort Harker and Fort Arbuckle was

one upon which Texas cattle were then being driven, and before had been driven, then the defendants are both liable to the plaintiffs for the damage, if any, shown to have resulted to plaintiffs by reason of the falsity of the representations made by defendant Kellog, even though the defendant Sellars had no actual knowledge of the alleged representations at the time, and though neither Sellars nor Kellog had actual knowledge of whether the facts were or not according to the alleged representations.

4. "In determining whether the alleged representations were or were not made, you are to consider what weight and credit is due to the witnesses who have spoken in relation thereto, on the part of the plaintiffs and defendants respectively. In considering this you are to take into account the manner and bearing of the several witnesses in testifying, the apparent probability or improbability of the matter related by them respectively, considering the testimony of each by itself and its apparent consistency or inconsistency with the other testimony in the case.

5. "If you are of the opinion, upon consideration of all the testimony, that the defendant Kellog never made the representations which the plaintiffs allege that he made, you will find the defendant not guilty.

6. "If you conclude, upon consideration of all the evidence, that the defendant Kellog, acting about the business of the defendants, did make the representations sought to be attributed to him as true, of his own knowledge; that the representations were such, and made under such circumstances, that a man of ordinary prudence would, in the same circumstances, have relied upon the same representations as true; and that plaintiffs did rely upon the truth thereof, and on the faith of these representations entered into the contract spoken of; and that in truth the representations said to have been made by Kellogg were false, you will then consider whether the injuries said to have been suffered by the plaintiffs are or are not attributable to the cause to which the plaintiffs have attempted to assign them, *i. e.*, to the fact that the road by which plaintiffs traveled

with their train was one over which Texas cattle had before been driven.

7. "If from the evidence you are of opinion that in many instances American cattle driven over the same road, or feeding upon the same range, over or upon which Texas cattle have before been driven or fed, have been affected with a disease, from which death usually ensues, you will consider the testimony touching this, and the symptoms usually manifested by cattle so affected, and the symptoms said to have been manifested by plaintiffs' cattle, and the result to plaintiffs' cattle of the disease said to have affected them upon the Chisholm trail, in determining whether the alleged sickness and death of plaintiffs' cattle is attributable to the former presence of Texas cattle upon the same road, or to some other cause. You will also consider what was the condition of plaintiffs' cattle prior to starting from Harker, if this appears in evidence, and whether, taking into account the time of their leaving Harker, the fact that plaintiffs' train was loaded, if this is so, the time at which the sickness is said to have first appeared among them, they were or were not up to that time apparently in good health. If, also, it appears from the testimony that in many instances American cattle have been driven or fed upon the same road or range upon which Texas cattle have before been driven, without apparent injury or disease resulting to them, you will also take this into account. If, on considering all the testimony to this point, you are of opinion that the sickness, if any, which affected plaintiffs' cattle, is not attributable to the former presence of Texas cattle upon that trail, you will find for the defendants.

8. "If, however, considering all the evidence upon this point, you are of opinion that the plaintiffs' cattle sickened and died while on the road to Arbuckle, in pursuance of the contract said to have been concluded between the plaintiffs and defendants, and that this sickness was due to the former presence of Texas cattle upon that road, you will then consider whether or not the plaintiffs might have avoided the injuries of which they complain by the exercise

of the same degree of caution, prudence and foresight which a man of ordinary prudence would have exercised if placed in the same circumstances as the plaintiffs were placed.

9. "If the plaintiffs, on reaching the Arkansas crossing, or at any other point of their route before having incurred risk of the injury and damage of which they complain, were informed that the road by which they must proceed to Arbuckle was then thronged with herds of Texas cattle, or that it was the trail or road by which such herds were usually driven, if they then knew the risk, if any, to be incurred by the taking their cattle upon that road, then, if a man of ordinary prudence would, in the like case, in the same circumstances in which plaintiffs were placed, have turned back, the plaintiffs were bound to do so, and proceeding upon this course they assumed the risk of all consequent injury themselves, and the defendants are not chargeable therewith, even though you should find for the plaintiffs upon every other point in the case.

10. "In considering what a man of ordinary prudence and circumspection would have done in the same circumstances, you will take into account the season of the year, the distance which plaintiffs had traveled when first informed that the road by which they must travel to Arbuckle was the trail usually traveled by Texas cattle, the distance they still had to go, the person from whom the information in question, if any, came, whether he was an acquaintance of the plaintiffs, or either of them, or not, whether he did or did not profess to have come over the road, whether the plaintiffs had or had not then incurred any risk of the injuries said to have resulted afterward, whether plaintiffs turning back to Harker must have traveled by a road usually pursued by Texas cattle, or might have avoided the trail of such cattle. If, upon considering the testimony touching these matters, and all other testimony touching this question, you are of opinion that a man of ordinary prudence and circumspection, placed in the same circumstances, would have turned back, then you should find the defendants not

guilty, otherwise you will find them guilty, provided you find for the plaintiffs upon other points in this case.

11. "If you find for the plaintiffs, you will assess and report to the court the amount of damages sustained by the plaintiffs by reason of the wrong complained of.

12. "If the plaintiffs' cattle sickened and died, and their sickness and death is attributable to the former presence of Texas cattle upon the same trail, you may allow to the plaintiffs the reasonable value of such cattle at the time of the loss. If the plaintiffs were from the same cause delayed and hindered in their journey and so were put to an expense in the employing and boarding of their servants which they would not otherwise have incurred, you may allow them for this. If, also, they expended money or transferred and exchanged other property for cattle in the Indian nation with which to continue their journey, and owing to the sparsity of settlements there, or the absence of a market, the plaintiffs were under necessity to pay for the cattle so bought, more than the same were worth, and if a man of ordinary prudence would have acted as plaintiffs did, if placed in the like circumstances, then you may allow the plaintiffs for the difference between the amounts so necessarily expended in the purchase of cattle and the reasonable value of such cattle at the time of the purchase thereof."

The jury returned a verdict for \$7,758, and a motion for a new trial having been denied, defendants appealed.

Messrs. CHARLES & PHELPS, for appellants.

Messrs. BELDEN & POWERS, for appellees.

BELFORD, J. A misrepresentation to be material must be in respect of an ascertainable fact, as distinguished from a mere matter of opinion. To be binding, it must not only be material, but it must be a determining ground of the transaction; both facts must concur, there must be false and material representations, and the party seeking relief should have acted upon the faith and credit of such repre-

sentations. It is not, however, necessary that the representation should have been the sole cause of the transaction. It is enough that it may have constituted a material inducement.

An intention to deceive being a necessary element or ingredient of fraud, a false representation does not amount to a fraud at law, unless it be with a fraudulent intent. If a man says what is false within his knowledge, or what he has no reasonable ground for believing to be true, and makes the representation with the view to induce another to act upon it, who does so accordingly to his prejudice, the law imputes to him a fraudulent intent, although he may not have been instigated by a morally bad motive. Kerr on Fraud and Mistakes, 54, 56. It is averred in the declaration, that to induce the appellees to enter into the contract for the conveyance of freight for the appellants, from Fort Harker, in the State of Kansas, to Fort Arbuckle, in the Indian territory, the appellants did falsely, fraudulently, and deceitfully represent that the road, sometimes called the Chisholm trail, leading from Fort Harker to Fort Arbuckle, and over which freight from one place to the other would naturally pass, was not a road over which "Texas cattle," or diseased cattle of any kind, had ever passed or been driven, and that the road was entirely free from all infectious disease to cattle, and was a good and safe road to the lives and health of cattle to travel upon, and transport freight upon, with ox teams. Whereas, in truth and fact, it was not so, etc. It is further averred, that the appellants, when making these representations, knew them to be false. That the appellees were ignorant, and had no means of ascertaining the fact, but relied wholly upon such representations, etc., whereby the damage complained of, occurred, etc.

The record shows that the facts represented to be as above set forth were claimed to be within the actual knowledge of the party making such representations. It is strenuously insisted upon, by the counsel for the appellant, that it is necessary to a recovery that the appellees should show

that the defendants, when making the representations, knew them to be false, or in other words, that an intent to deceive must be established by positive proof.

In regard to representations generally, I conceive it to be necessary for the party relying on the representations to show not only that they are false, but that the party making the same knew them to be false. But when one has made a representation positively, or professing to speak as of his own knowledge on the subject, the intentional falsehood is disclosed, and the intention to deceive is also inferred, or at all events, this is so when the matters falsely represented are peculiarly within the knowledge of the party making them, and are not known to the party to whom they are made. In such a case, the proof would seem to be complete when it was shown that the defendants made the representations; that they were made to induce plaintiffs to enter into the contract; that, relying upon the same, they did enter into the contract; that the representations were false; that the plaintiffs sustained damage, and that such damage was occasioned by reason of the falsity of such representations. *Shark v. Mayer, etc.*, 40 Barb. 256; *Hilliard on Rem. Torts*, 289; *Bennett v. Judson*, 21 N. Y. 238; *Marsh v. Falker*, 40 id. 562; *Meyer v. Amidon*, 45 id. 169; *Craig v. Ward*, 36 Barb. 378; *Hazard v. Irwin*, 18 Pick. 108; *Hammet v. Emerson*, 27 Me. 326; *Stone v. Dery*, 4 Metc. 156; *Lobdell v. Baker*, 1 id. 200.

It is further insisted that, by proper diligence, the appellees could have ascertained the truth or falsity of the representations, before entering upon the contract. When the means of knowledge are at hand, and equally available to both parties, and the subject about which the representations are made is open to their inspection, if the party to whom the representations are made does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the misrepresentations. If, having eyes, he will not see matters directly before them, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary

blindness, and been misled by overconfidence in the statements of another. But we do not think the case at bar is of such a character. The record shows that the representations were made at Sheridan, and that the Chisholm trail was a very considerable distance therefrom. Inspection of this road was not possible without a long journey being made for that purpose, and certainly the law would not devolve such a duty. Besides, this trail was through a wild and uninhabited tract. If the subject is a road not in the country where the representations are made, and such representations are made as within the knowledge of the party making them, such person should not be heard to say that another might have known the truth by proper inquiry, and under such circumstances, the argument is the stronger that reliance has been placed on the representations.

No man should be allowed to complain that another has relied too implicitly on the truth of what he himself stated. Kerr on Fraud and Mistakes, 79, 80, 81; *Boyce's Ex'r v. Grundy*, 3 Pet. 218; *Reynell v. Sprye*, 1 D., M. & G. 660. Indeed, it is laid down in all of the above authorities, that a man to whom a particular and distinct representation has been made is entitled to rely on the representation, and need not make any further inquiry. He is not bound to inquire, unless something has happened to excite suspicion, or unless there is something in the case, or in the terms of the representation, to put him on inquiry. Mr. Justice JOHNSON, in delivering the opinion of the supreme court in the case above cited, says: "It is said that it ought to have put him on inquiry, but he was in possession of Mr. Boyce's positive assurance to the contrary, and had a right to rely upon that assurance, without inquiry." And Mr. Kerr, speaking to the same point, says: "However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defense to the other." See *Reynell v. Sprye*, *supra*.

The court allowed the plaintiff to introduce in evidence the conversation which accompanied the making of the contract, and this is assigned for error. When the grava-

men of an action is fraud in inducing the plaintiff to enter into a contract, the rule does not apply that anterior and accompanying stipulations and representations are merged in the contract; but they may be proved by parol evidence. *Hilliard on Remedy for Torts*, 490; *Koop v. Horsley*, 41 Barb. 454; *Bank v. Kennedy*, 17 Wall. 24; *Eastman v. Bennett*, 6 Wis. 232. Objection is also taken to the admission of parol evidence to prove the contents of the written contract pertaining to the transportation of the freight. It appears that this contract was destroyed by the consent of Clelland and Kellog. It was a destruction effected by their joint labors.

It is insisted that a party seeking to make secondary proof of the contents of writing which he has voluntarily destroyed, or to the destruction of which he has assented, or in which he has participated, must first, by legal evidence, repel all inference of fraudulent purpose. Such, indeed, is the rule. We think, however, that the evidence repels such inference. While the rule is a salutary one, yet it should be so applied as to promote the ends of justice. When no suspicion attaches that the paper has been fraudulently destroyed, and the paper is of that description that no doubt can arise as to the proof of its contents, there can be no danger in admitting secondary evidence. The reasons which Lord COKE assigns for requiring the production of the original are—

1. To enable the court to give a right construction to it from the words.

2. To see that there are no material erasures or interlineations.

3. That any condition, limitation or power of revocation may be seen. *Renner v. Bank, etc.*, 9 Wheat. 597; *Blake v. Flash*, 44 Ill. 304. It is not the written contract to transport the freight which is the gist or gravamen of the action, but the representation as to the character of the road. Mr. Kerr, page 69 of the work above cited, says:

“A representation is not a part of the written instrument, but is collateral to it and entirely independent of it.” It

would, therefore, seem to me that, when the action rests on the false representation, the same strictures should not apply to the proof of the written contract as when the written contract is itself the foundation of the action. Be this as it may, we think the court, under the proof adduced as to the circumstances attending the destruction of the written instrument, committed no error in receiving parol evidence as to its contents. Clelland positively denies that any bad faith was used in procuring the destruction of the instrument, and Kellog discloses none. During the progress of the trial the plaintiffs were permitted by the court to file an amended declaration. The original declaration charged that John P. Sellar, Edward F. Kellog, Manuel Otero, Charles R. Morehead, Eugene B. Allen, David W. Powers, James Powers, David B. Powers, Henry L. Newman and Percival G. Lowe, were partners, and that Kellog, on behalf of them as well as of himself, made the representations complained of. The amended declaration omitted the names of all the defendants except Sellar and Kellog. The cause of action in the amended declaration was the same as that set forth in the original. The appellants insist that the court erred in permitting the amendment, and that, upon the failure to show that all the defendants named in the original declaration were partners, it should have sustained the motion made for a nonsuit. Our statute on the subject of variances and amendments is taken from the statutes of Indiana, and I have carefully examined the decisions of that court to ascertain what construction they have placed upon it, and with the following result: The granting of leave to amend the pleadings while a cause is on trial is a matter within the sound discretion of the court, and unless it appears that the discretion has been improperly exercised, the supreme court will not notice the ruling. *Volty v. Newfert*, 17 Ind. 187. Amendments may be made in the complaint with the leave of the court after trial begun, if the amendment does not add a new cause of action so as to injure the defendants. *Landig's Adm'r v. Durham*, 21 Ind. 232. An amendment of a complaint by leave of the court, pending

a trial, if the amendment added nothing to the material averments of the complaint, could not be a fatal error, nor in such case could the failure to reswear the jury after such amendment. *Crassen v. Sworeland*, 22 Ind. 427.

The great object of a trial is to secure justice to the parties engaged in the suit. Substantial rights should never be sacrificed to mere forms, and amendments should at all times be liberally allowed when they do not lead to surprise and injury. It is no uncommon thing in actions of tort to charge numerous persons with the commission of a wrong and then take judgment against one, or during the trial to enter a *nolle prosequi* as to some and proceed against the rest. The only substantial change made by the amended declaration is in the number of parties. The cause of action remains the same. In the original declaration Kellog is charged with having made the representations, and it is so charged in the amended declaration. The plea of not guilty, the only plea to the action, was filed, and it was not necessary to file it again. There it stood for the defendants' benefit, under which they could give any conceivable matter of defense, and which the record shows they did. *Eames v. Morgan*, 37 Ill. 272.

There is no pretense that the amendment in any manner prevented the defendant from making his defense, and when it appears that he suffered no injury, he should not be heard to complain. It is a well-settled rule in equity practice that when a suit has been instituted for the purpose of setting aside a transaction on the ground of fraud, the bill will not be suffered to fail because the complainant has incorrectly and untimely alleged a third person to have been a participator and joint actor in the fraud. *Kerr on Frauds*, etc., p. 382; *Reynell v. Sprye*, *supra*. The same just principle should find a lodgment and recognition in a court of law, especially when we have statutes so broad as those on the subject of amendments and practice. See acts of 1872, p. 118 and 99.

We are, therefore, of the opinion that the court committed no error in allowing the amendment.

It is claimed by the appellants that, had the appellees exercised reasonable care when they found that Texas cattle were traveling the Chisholm trail, the injury would not have happened; that it was the duty of the appellees to retrace their steps, etc.

Even when false representations have been made, the party to whom they are made is not justified in continuing his reliance upon them when the evidence of their falsity stares him in the face, unless it should appear that to retract is as dangerous as to advance. When it became known to appellees that the representations made by Kellog were false, they were fully one-third of the way on their journey to Fort Arbuckle. The distance from Fort Harker, the place of starting, to the Arkansas river, is one hundred miles. The Texas cattle were met while crossing this river, and at this point Clelland gained his knowledge that Kellog had misrepresented the fact, and misstated the true condition of the road. He was then in the midst of the peril, and in the exercise of due prudence he had a right to weigh the probable danger of moving forward or backward. He may have been at fault in his judgment when he concluded to go forward, but if he acted as an ordinary prudent man would act under such circumstances, his conduct must be regarded as blameless. The question was fairly left to the jury, by instructions which are not open to censure, and the jury having resolved the points against the appellants, we must abide their finding.

A more difficult question is presented on the subject of the true rule of damages in such cases. No uniform test or rigid rule fixes the extent of compensation in actions in the nature, either of trespass or case for injuries to property. Different measures of redress may be obtained for the same injury, under different circumstances. What is compensation to the defendant; what would make his loss good to him under the situation, under which he was placed at the time the injury occurred? is the inquiry; and in determining it, all material and relevant circumstances should be considered. Sedg. on Damages, 6th ed., n. 2, p. 553.

At the point where the cattle died, there was no market and their value at that point could not be determined. Fort Sill, distant some seventy miles, was the nearest point but it does not appear that there was any market for American cattle at that point. Ellsworth was distant two hundred and twenty-five miles from the point the cattle died and it appears, from the evidence, that no American cattle were being sold there in August. Some were sold in October. Salina is twenty miles east of Ellsworth, and this appears to be the only point where there was a market at the time the cattle died. The court allowed evidence as to the value of American cattle at this latter point, and this is complained of. We think the admission of this evidence was correct, and fully within the rule laid down in *Gregory v. McDorrell*, 8 Wend. 435; *Dana v. Felder*, 2 Kern. 40; *Berry v. Dwinal*, 44 Me. 267; *Dubois v. Gloub*, 5 Penn. St. 238; *Savercool v. Farwell*, 17 Mich. 308.

In *Durst v. Burton*, 47 N. Y. 175, it is held that a reasonable range of time is allowed, in which to average the price (3 Hill, 333), so the price at other places may be shown, under some circumstances, for the purpose of proving the value at the designated place. 22 Barb. 154. "And to some extent," the court says: "This class of evidence is within the discretion of the court."

The price at Salina was necessarily some guide to a determination of the value at the point where the cattle died and, therefore, receivable; so also, the price of cattle at Ellsworth in October and November.

On the subject of damages, the court gave the jury the following instruction: "If the plaintiffs' cattle sickened and died, and their sickness and death are attributable to the former presence of Texas cattle upon the same trail, you may allow to the plaintiffs the reasonable value of such cattle, at the time of the loss. If plaintiffs were, from the same cause, delayed and hindered in their journey, and were put to expense in employing and boarding of their servants, which they would not otherwise have incurred, you may allow them for this. If, also, they expended money

or transferred and exchanged other property for cattle in the Indian nation, with which to continue their journey, and owing to the sparsity of settlements there, or the absence of a market, the plaintiffs were under the necessity to pay for the cattle so bought, more than the same were worth, and if a man of ordinary prudence would have acted as plaintiffs did, if placed in the like circumstances, then you may allow the plaintiffs for the difference between the amount so necessarily expended in the purchase of cattle, and the reasonable value of such cattle at the time of the purchase thereof."

The recovery of consequential damages in actions for torts is not subject to the same limitations that are applied to actions of contract. In the former class of cases the question is, not whether the damage entered into the consideration of the parties in advance, but simply whether it is fairly and directly the result of the injurious act. The plaintiff would not only be entitled to recover the reasonable value of the cattle that died, but also the value of his care, attention, and expense in attempting to preserve them. If, in order to remove his wagons and freight from the place they were left, by reason of the death of the cattle, to Fort Arbuckle, the point of destination, or to Fort Harker, the point of starting, it was necessary to buy other cattle, and if, owing to the absence of a market, he was compelled to pay a higher price than would have been necessary at a marketable point, and these results sprung from the original illegal acts of the defendants, then the difference in value would seem to be a legitimate subject of damage. To lay down any other rule would deprive the plaintiffs of that measure of indemnity and compensation which the law constantly attempts to afford the injured. *Wentz v. Morrison*, 17 Tex. 372.

It would, therefore, seem that the instruction is not open to objection. After the defendants had closed their case, the court permitted the plaintiffs to introduce witnesses to establish the value of the cattle lost by the plaintiffs, and this is assigned for error. The objection is one as to time,

and not as to pertinency. The evidence would have been admissible if offered before plaintiffs closed their case. Its introduction afterward was a matter of discretion, and is not assignable for error. It is a practice, however, that should not be greatly encouraged. The defendants asked the court to instruct the jury that if, after the plaintiffs return from Fort Arbuckle, the contract mentioned in the declaration was destroyed, and the plaintiffs released from its further fulfillment, and that such destruction of said contract and release therefrom was so made in consideration of the losses sustained by the plaintiff, then the jury should find for the defendants.

This instruction the court declined to give. We have carefully examined the evidence on this subject of release and find nothing on which this instruction could rest. A question has suggested itself to us, as to the joint liability of the defendants, but inasmuch as it was not raised in the court below, nor included in the assignment of errors in this court, nor mentioned in the argument of appellants' counsel, we have declined to consider it. *Moril v. Derby*, 34 Vt. 449, 450; *Harris v. Plant & Co.*, 31 Ala. 644.

It appearing that the case has been fairly tried on its merits, that the law was fairly applied, and no cause appearing why the judgment should be disturbed, it is accordingly

Affirmed.

EVIDENCE—ORDER OF PUTTING IN.—It is a matter of discretion with the court whether evidence on part of the plaintiff which should have been put in in the first instance shall be received after the defendants have closed their case: *Wyatt v. Freeman*, 4 Colo. 16.

DANIELS et al. v. THE CITY OF DENVER.

PRACTICE—*of the manner of tendering exceptions.* It is not sufficient to file a bill of exceptions in the office of the clerk of the court, within the time allowed for tendering the same. It must be presented to the judge who presided at the trial.

Error to District Court, Arapahoe County.

THE issue joined in the court below was tried at the April term, 1874, and time was given to tender a bill of

exceptions. At the expiration of the time allowed for this purpose, and for some time previous, the judge of the court was in Park, holding the term of the district court of that county. On the day preceding the expiration of the rule, the plaintiff in error deposited the bill of exceptions in the office of the clerk of the court, and the bill was subsequently allowed and sealed.

PATTERSON, for defendant in error, now moves to strike the bill of exceptions from the record.

N. HARRISON and E. L. SMITH, *contra*.

WELLS, J. We are all agreed that the absence of the judge from the county was no excuse for the omission to under the bill of exceptions within the day limited.

Whatever rule shall be prescribed must be a general one. To allow the excuse which is set up here would, as to those counties in which the court sits but once, annually, have the effect to enable parties to defer the settlement of the bill of exceptions beyond all memory of the occurrence of the trial.

Motion sustained.

Ex parte: In the matter of SAMUEL E. BROWNE.

TORNEYS AT LAW — *of the remedy given by statute against them.* A proceeding against an attorney at law under R. S. 66, for failing or refusing to pay over money by him received in his office as an attorney, is designed to afford a remedy to the creditor to collect the money from the attorney.

who may relieve them from disability. The court has power to relieve from a judgment disbarring an attorney at law for failure to pay over money to the party entitled thereto, but will not do so until after payment has been made to the creditor of the money improperly withheld by the attorney.

the effect of pardon in such case. Under the organic act the power of the governor to grant pardons for offenses against the laws of the Territory does not extend to such case, for, although he may pardon a public offense, he cannot deprive a suitor of his remedy.

ON the 1st day of April, A. D. 1874, and at the February term in that year, Francis M. Piper preferred charge against Samuel E. Browne, Esq., an attorney of this court for a failure to pay over to him the sum of \$400, collected by said Browne as the attorney of said Piper, from the Kansas Pacific Railway Company. Other charges were embraced in the petition which it is unnecessary to notice. Upon this an order was entered requiring the respondent, at the July sitting of the court, to show cause why his name should not be stricken from the roll of attorneys, and upon a hearing in July the respondent was convicted of withholding money from said Piper, after demand therefor, contrary to R. S. 66, and the court ordered that his name be stricken from the roll of attorneys.

At this term Mr. Browne presented his petition to be restored to his privilege as an attorney, upon the ground that he had received unconditional pardon, as stated in the opinion of Mr. Justice WELLS. The instrument issued by the governor was in terms as alleged by the petitioner.

The chief-justice concurred in the result only.

Mr. Justice BELFORD concurred in the opinion of Justice WELLS.

WELLS, J. Samuel E. Browne was disbarred at the July sitting of the court, and now applies to be reinstated. His petition sets forth that on the 5th day of August, Edward M. McCook, then governor of the Territory, granted to him unconditional pardon, whereby, it is averred, "petitioner was restored to all civil rights forfeited by him in consequence of the judgment of this honorable court." The pardon, an exemplification of which is filed with the petition, recites that the petitioner was found guilty of misconduct in his office as an attorney. What particular misconduct was imputed is not set forth, and probably this ought to be shown. We conceive that there may be misconduct in the profession, for which an attorney may be expelled, and which, nevertheless, not being an offense against any public law, would not be relieved by pardon.

Inasmuch, however, as the judgment of expulsion was given in this court, and the whole record is before us, we will judicially notice that the misconduct alleged against the petitioner, to which the pardon refers, was the omission to pay over money collected by him as an attorney, after demand made therefor by his client; that the proceeding was at the instance of the injured party, and in pursuance of sec 6, chap. 7, Rev. Stat., hereafter quoted.

The misconduct imputed to the petitioner may, therefore, be considered in the light of a contempt, as tending to bring the courts themselves into public dishonor. 4 Bl. Com. 284. Considered solely in this light, the offense was clearly within the scope of executive clemency. What the result may be if we consider the conviction as exhibiting a moral delinquency, unfitting the offender from further exercising the functions of an attorney, I do not propose to consider.

But the petitioner's misconduct involved not only the public offense, but a private injury also, and in the view which the majority of the court have adopted, the proceeding in which the judgment of exclusion was given was in the nature of a remedy to the individual for the redress of this injury. The statute under which the proceeding was had is as follows:

"Sec. 6. In all cases where an attorney of any court of this Territory, or solicitor in chancery, shall have received, or may hereafter receive, in his said office of attorney or solicitor, in the course of collection or settlement of any claim left with him for collection or settlement, any money or other property belonging to any client, and shall, upon demand made, and a tender of his reasonable fees and expenses, refuse or neglect to pay over or deliver the same to the said client, or to any person duly authorized to receive the same, it shall be lawful for any person interested to apply to the supreme court of this Territory for a rule upon the said attorney or solicitor, to show cause, at a time fixed by the said court, why the name of said attorney or solicitor should not be stricken from the roll, a copy of which rule shall be duly served upon said attorney or solicitor at least ten days previous to the day upon which said rule shall be

made returnable ; and if, upon the return of said rule, it shall be made to appear to the said court that such attorney or solicitor has improperly neglected, or refused to pay over or deliver said money or property, so demanded as aforesaid, it shall be the duty of the said court to direct that the name of the said attorney or solicitor be stricken from the roll of attorneys in said court.

“Sec. 7. Every attorney, before his name is stricken off the roll, shall receive a written notice from the clerk of the supreme court, stating distinctly the grounds of complaint, or the charges exhibited against him, and he shall, after such notice, be heard in his own defense, and allowed reasonable time to collect and prepare testimony for his justification ; and any attorney whose name shall at any time be stricken from the roll, by order of the court in the manner aforesaid, shall be considered as though his name had never been written thereon, until such time as the said justice in open court shall authorize him to sign or subscribe the same.”

Now at common law for such misconduct as the petitioner was convicted of, the courts might proceed summarily to strike the attorney from the rolls even though the party injured did not complain. If the injured party complained of the wrong, it seems to have been customary to proceed by attachment. Doubtless the power existed to fine or imprison, or to administer both fine and imprisonment, or to add to these expulsion from the bar.

From the reported cases which I have seen, I infer, that the usage was to commit the attorney until restitution made ; but the courts were under no injunction of the law to proceed so far. They might impose a mere nominal fine or imprisonment for a trifling period, or they might probably dismiss the offender with a mere admonition, or the attachment might, we conceive, be denied in the first instance, the injured party being put to his action.

But by this statute an absolute duty is imposed to strike the name of the offending attorney from the roll, whenever the person aggrieved by his delinquency shall apply ; and

this, as it seems to me, is in the nature of a remedy for the private wrong, to enable the client thereby, so far as he may, to compel restitution. Doubtless the means has, in many cases, been found quite effectual to the end.

It may be objected that the proceeding authorized may fail to realize the client's demand; that it does not direct itself against the estate of the wrong-doer, like the process of *fi. fa.* most commonly in use with us; but neither did the attachment at common law in like cases, nor the writ of *capias ad satisfaciendum*. It may be further objected that the statute does not entitle the attorney to be reinstated upon restitution made, but the answer to this is, that the contempt, which is evidenced and established by the judgment of expulsion, still remains. It was evidently the purpose of the legislature to leave it in the discretion of the court to determine, upon consideration of the circumstances of each particular case, what should entitle the delinquent to restitution of his capacity and privilege, as I should infer it was supposed that this discretion might be safely reposed in, not to reinstate in any case until the private injury should be compensated, nor even then, if the offense should seem to demand further discipline.

The conclusive answer to all objections is, that the legislature has given to the injured party the right to have a particular judgment; its purpose, manifestly, was to enable him to redress his own injury, and not the public offense; else why should this severe sentence be exacted in every case without consideration of circumstances, and why, only, when the injured person invokes it?

The proceeding given by the statute is, therefore, a private remedy. The person aggrieved, to whom it is given, has a right in the judgment. He is entitled to have the offender excluded from the exercise of the function and privilege which he had before exercised, in accordance with the statute; that is to say, until *the court* reinstates him.

It remains to be seen whether the remedy so afforded is within the scope of pardon.

The pardoning power is conferred upon the executive of

this Territory in substantially the same words, as by the constitution, the same power is conferred upon the president. Organic Act, § 2; Const., art. 2, § 2.

The case of *Wells, ex parte*, 18 How. 307, seems to decide that this provision of the constitution was intended to confer the same power to be exercised in like manner, and in like cases, as exercised by the sovereigns of Great Britain.

The question whether it lies within the power of the executive to dispense with the judgment of expulsion from the bar, given under the statute before considered, depends, therefore, upon whether the pardoning power, as exercised by the English crown, extended to like cases, and the question must be resolved in the negative.

"The king cannot, by any dispensation, release, pardon, or grant whatsoever, bar any right, whether of entry or action, or any legal interest, benefit or advantage before vested in the subject. Hawk. P. C. Lib. 2, ch. 37, § 34; id., § 39; 17 Viner's Abr. 39, 40; 1 Salk. 388, 384.

The case of *Rex v. Davis*, 1 Bos. & Pul. 336, shows that the common-law process of attachment against the delinquent attorney in such case, although in form a proceeding for the contempt, is in effect but a civil execution, and read in connection with *Rex v. Myers*, 1 T. R. 265, and *Rex v. Stokes*, 1 Cowp. 136, seems to establish that the offender cannot be discharged of his imprisonment by the king's pardon.

In this view, the pardon which is pleaded has not the effect asserted for it, nor has the court a just power to restore the petitioner to the rolls, until it be shown that restitution has been made to the client of the moneys detained; for *Daniels v. Coper*, 4 McCord, 136, is authority to show that by proceeding by rule the client has waived his action at law, and if, therefore, the petitioner shall now be reinstated, he will have lost all remedy.

For the present, at least, therefore, the petition must be denied.

HALLETT, C. J. An attorney attached for failure to pay money to his client may purge himself by satisfying the

demand, but this statute is otherwise. By section 7 it is provided that the judgment of the court shall stand until the court shall authorize the attorney again to subscribe the roll, and I do not perceive that he may obtain such permission upon the payment of the money merely. His privilege as an attorney may be restored to him by the court in the exercise of a sound discretion, but he cannot demand it as a matter of right upon the payment of the money or the performance of any other condition. I think that the statute defines an act of professional delinquency which shall be regarded as sufficient cause for depriving an attorney of his privilege, and was not intended to give a remedy for the collection of money. *Garland's Case*, 4 Wall., which determines that a crime pardoned shall not be made a ground of exclusion, is not in point. In the case at bar there was no crime or offense against the criminal laws of the Territory committed, and, therefore, there is nothing upon which the pardon can take effect. The petitioner was adjudged to be deficient in probity of character, and it would be absurd to say that a pardon may supply a quality which is wanting. I concur in the judgment, but dissent from the opinion of the court.*

Petition denied.

ATTORNEYS, SUSPENSION OF. — The statute providing for the suspension of attorneys for failure to account for moneys collected was not adopted to afford a private remedy for the collection of such moneys, but to give to the court additional power to purge the profession of unworthy members, and to that extent the principal case is modified: *People v. Ryalls*, 8 Colo. 394.

KANSAS PACIFIC RAILWAY CO. v. TWOMBLY'S ADM'X.

PRACTICE—*whether a motion for new trial may be continued over the term.*

A motion for new trial may be heard and determined at a term of court subsequent to that in which the trial occurred.

What is presented in a motion for new trial. Upon overruling a motion for new trial and exception thereto, the evidence given at the trial and the instructions to the jury are necessary to a correct understanding of the ruling of the court, and may be incorporated in the bill of exceptions.

But prayers for instructions which were denied by the court at the trial do not tend to explain the verdict of the jury, and are not embraced in an exception alleged to the ruling of the court upon a motion for new trial.

* Afterward and on the 2d day of April, 1875, it appearing that the money had been paid, upon the recommendation of many members of the bar Mr. Browne was again enrolled as an attorney of the court.

Bill of exceptions—when necessary. The rulings of the court at the trial in receiving and rejecting testimony, giving and refusing instructions, and the like, although they may and should be considered in the court where the cause was tried, upon a motion for new trial, will not be reviewed in this court upon such motion.

To entitle the defeated party to review in this court errors committed at the trial, an exception must be reserved at the time and brought into the record by bill of exceptions, settled and sealed, either at the time of trial or afterward, and within a day allowed for that purpose under the statute. R. S. 508.*

Appeal from District Court, Arapahoe County.

THE cause was tried at the April term, 1874, of the district court, and a motion for new trial interposed by appellant. This motion was not heard until the September term in that year, and was then denied, and appellant excepted to the ruling of the court.

The bill of exceptions embraced the evidence, the charge of the court to the jury, and certain prayers for instructions which were denied, all of which appellee now moved to strike out.

In support of the motion it was contended that proceedings in the cause at the April term of court could not be properly entered of record at the September term, and as no bill of exceptions was taken at the former term, neither the evidence nor the instructions, nor any matter which occurred at that term, could have been properly incorporated in the present bill of exceptions, and that every thing, excepting the motion for new trial, and the ruling of the court thereon, should be excluded.

Messrs. CHARLES & PHELPS, in support of motion.

Messrs. SAYRE, WRIGHT & BUTLER, *contra*.

WELLS, J. Convenience often requires that the consideration of a motion for new trial should be deferred from the term at which the trial occurs to a succeeding term. The

* *Smith v. The People*, 1 Col. 121.

age of our courts sanction such continuances, and this age is not without the support of authority. *Riddlesberger v. McDaniel*, 38 Mo. 140; *Laird v. Ashley*, 1 Clark, 571; *Walker v. Hale*, 16 Ala. 27.

The power to grant or deny such motion at a succeeding term, even before a different judge than the one who presided at the trial, has been recognized. *Ott v. McHenry*, 2 Va. 77; *United States v. Harding*, 1 Wall., Jr., 127. What means, in the case last suggested, the occurrence of the trial shall be presented upon the determination of the motion, is not material to the present inquiry.

When the motion comes on at a subsequent term, before a judge who presided upon the trial, the same consideration must, it would seem, control as if the determination were made at the time of the trial.

If a bill of exceptions shall have been settled, embodying the evidence, reference may of course be had to this. In the absence of such bill of exceptions, it would seem to be proper to refer to the judge's notes of the trial, or to those of counsel, or the judge may refer to his own recollection solely.

In many cases the issue is altogether one of fact, no question of law being controverted, and no exception reserved as to the admission or exclusion of testimony, or to any part of the charge. In such case, manifestly, no bill of exceptions whatever can be settled or allowed in advance of the determination of the motion for a new trial. If, out of abundant caution and diligence, one is prepared, it is not a bill of exceptions, nor in any way effectual, to authenticate the evidence. In such case the law affords no memorial by which the court may inform itself of what evidence was heard by the jury. Unless, therefore, the judge may refer to his notes, or to his memory of the evidence, confessedly he may do, at the trial term, there is nothing which he may advise himself as to whether the verdict might or ought not to stand; the result is, that the motion must, at every term subsequent to that of the trial, be overruled, as of course; or in other words, that it shall not then

be considered, which is to deny the power to continue such motions ; and this, as before seen, is opposed to authority. Conceding, then, that the motion for a new trial may be continued and determined at a term succeeding that at which the trial occurred, and that at such subsequent term the judge presiding may determine what the evidence given to the jury was, by such sources of information as above suggested, it follows, that, if an exception be reserved to the denial of the motion, the party excepting must be at liberty to insert in his bill of exceptions, not only the motion, but the testimony heard by the jury. For the statute which gives the right of exception must be held to apply indiscriminately, whether the motion be denied at the term of the trial, or subsequently, and this manifestly implies that the party aggrieved shall be at liberty to bring the whole matter before the court as fully as it was presented to the mind of the judge presiding below, otherwise the right to except, given in the statute, is without value, and the statute itself nugatory. All the evidence heard at the trial may, therefore, properly be embodied in the bill of the exception reserved to the overruling of the motion for a new trial, and so as it would seem may the instructions given to the jury, at least, in many cases, for when, as in the present action, the pleadings on the part of the defendant consist of a general denial of what is alleged by the plaintiff, reference to the charge of the court is often necessary to determine what precise issue was submitted to the jury. Steph. Pl. App. I, (n) 15. The motion to strike out of the bill of exceptions the evidence, and the instructions given will, therefore, be denied.

So much of the motion as goes to the instructions prayed by the appellant, and refused by the court below, depends upon different considerations.

It is every-day practice to assign as ground of a motion for new trial, errors alleged to have intervened in the admission and exclusion of testimony, the charge to the jury, and like matters. Due regard to the rights of litigants, requires that suggestions of this character should be entertained upon the determination of the motion, rather than that the

error being passed by, the party aggrieved should be put to his appeal, or other process of review.

It has sometimes, indeed, been deemed requisite that, to give advantage of such errors in the court of final resort, a motion for new trial should be interposed, assigning for cause the error complained of. *Tolland v. Wellington*, 26 Mo. 58; *Hoersh v. The Bank*, 10 id. 516.

These cases seem to proceed upon the idea that opportunity ought to be afforded to the court in which the trial occurs, to correct its own errors; and failing to present such opportunity, the party complaining ought not to be heard. It is conceived that a different rule prevails with us.

At the common law, no method was provided, by which the opinion of the court expressed upon questions of law, during the trial, could be brought in review upon writ of error, or other subsequent occasion.

The statute of 13 Edward I, chap. 13, allowed the bill of exceptions for this purpose. This enactment, adopted with us by the act of October 11, 1861 (R. S., ch. 16), gave the means of preserving a memorial of the errors committed upon the trial, and bringing them to the view of this court.

But even after this statute, it could not be assigned for error that the verdict was contrary to evidence. If the jury found upon insufficient evidence, and judgment was given thereon, no means were afforded by which relief could be obtained. And so is the law at this day in the courts of the United States.

The statute allowing an exception to the overruling of motions for new trial was, it is conceived, intended to meet this defect, and not to give an additional means of relief for errors intervening in the course of the trial, and for which a sufficient remedy was before provided. *Hill v. Ward*, 2 Gilm. 293; *Sullivan v. Dollins*, 13 Ill. 88; *Howe v. Tims*, 16 Mo. 431; *Dozier v. Jernean*, 30 id. 220; *Devlin v. Clark*, 31 id. 22.

Therefore, to entitle the defeated party to a review in this court, of errors committed upon the trial, an exception must be reserved at the time, and brought into the record by bill

of exceptions, settled and sealed, either at the time of the trial, or afterward, and within a day allowed for that purpose, under the statute (R. S., chap. 70, § 21), and while the court below may, in its discretion, award a new trial for errors to which no exception was taken or preserved, yet, if it refuse so to do, an exception to the denial of the motion will not suffice to present the matter for review in this court. *Farrar v. Fuller*, 8 Clarke (La.), 848.

So far as the revisory power of this court is concerned, the only question presented to the court below, upon the motion for new trial, was the sufficiency of the evidence to maintain the verdict. While that court might, in its discretion, have gone beyond this, it was not required to do so; nor are we permitted to entertain any other question.

Now, upon this question, the instructions which were prayed by the appellants, and refused by the district court, in no manner came into view, on the hearing of the motion for new trial, and are not to be considered here.

As to these, therefore, the motion will be sustained.

It was suggested upon the argument of this motion, that certain exceptions to the admission and exclusion of evidence were set forth in this bill of exceptions. If the bill does contain such exceptions, they are improperly there, and might be made the subject of further motion. Inasmuch, however, as counsel for the appellant has denied the existence of such exceptions, and distinctly disclaimed all reliance thereon, it may be proper to say, in order to avoid further delay, that all such exceptions, if any, will be disregarded.

Motion allowed in part.

MOTION FOR NEW TRIAL—CONTINUANCE OVER TERM.—Under the rule prior to the code, a motion for a new trial might be continued, but must be heard and determined at the term subsequent to that in which the trial occurred (*Fulley v. Cody*, 4 Colo. 111; *Stocking v. Morey*, 14 Colo. 320); and if denied, judgment might then be rendered on the verdict: *Fulley v. Cody*, 4 Colo. 111. But under the code a more liberal rule is adopted, and the hearing of the motion may be continued at the discretion of the court: *Stocking v. Morey*, 14 Colo. 320.

BILL OF EXCEPTIONS—TIME FOR PERFECTING.—Although it is proper to set down the rulings and exceptions of each term in a separate bill, if they are included in one bill, and perfected within the time allowed by the court, the bill will be allowed to stand. This is clearly distinguished from the principal case: *Packard v. Spellings*, 3 Colo. 112.

NEW TRIAL—EFFECT OF MOTION.—In cases tried by the jury, if the aggrieved party fails to move for a new trial, he is not held thereby to acquiesce in any of the errors committed at the trial to which he may have excepted, but may have all such errors considered by the appellate court: *Patton v. Cuen & Ten Broeke C. M. Co.*, 3 Colo. 267.

UNION GOLD MINING CO. v. ROCKY MOUNTAIN NATIONAL BANK.

The doctrine of this case, as reported *ante*, p. 248, approved.

CORPORATIONS — officers. The superintendent of a mining company has no authority, by virtue of his office merely, to borrow money on the credit of the corporation. The president of the corporation has no authority, as such, to undertake, in the corporate name, for the repayment of such an unauthorized loan. .

Stockholders — powers of. Where the corporate powers are vested in a board of directors or trustees, the proceedings of a stockholders' meeting cannot be shown to establish a disavowal, by the corporation, of the acts of one who, without authority, has assumed to contract for it. The delegation of power to the trustees is exclusive.

EVIDENCE — corporate record. Oral evidence of the proceedings of a corporate meeting, of which a record is shown to be in existence, is inadmissible.

To the introduction of such record, it must be shown that the entries were made by the proper officer; and generally speaking, this officer must himself be produced, or if he be dead, his handwriting must be proven. Testimony of a stockholder that he was present at the meeting and that the paper produced is a correct record of the proceedings, does not render the paper admissible.

When a corporation relies upon its own record, strict proof of its authenticity is required.

Declarations of agent are not admissible to establish the agency; but the agency being otherwise shown, or testimony sufficient to warrant the jury in finding either an original agency, or subsequent ratification, being produced, the declarations of the alleged agent made during and within the scope of his authority then become admissible to establish other facts in issue in the same case.

PRINCIPAL AND AGENT — evidence. The habit and course of dealing between the parties is admissible to establish the relation of principal and agent.

Ratification by silence. One for whom another has, without authority, assumed to act, must not only disavow and repudiate what has been done but must also give notice of such repudiation to those to be affected thereby, if he would avoid the inference of assent, which the jury are otherwise at liberty to indulge.

In order to raise the inference of acquiescence from the silence of the alleged principal, it is necessary that he should be fully informed of the unauthorized transaction; but notice thereof to another agent, where the matter is within the scope of his agency, affects the principal though not in fact communicated.

In this case S., assuming to be the agent of a mining corporation, borrowed money in its name without authority, and expended it, partly in mining

upon the property of the company, and partly in developing and mining upon adjoining premises, belonging in part to B., the president and general manager of the company, and in part to S. himself. It was sought to charge the company with the loan, upon the ground that having been informed of the acts of S. it had omitted to repudiate them. No officer or member of the company except B. was informed of the expenditure of a portion of the moneys upon the property of B. and S. The notice to B. was held notice to the company itself.

In the same case, the total loan amounted to \$20,000 and more, and was obtained by successive overdrafts at the plaintiff's bank; when the overdraft amounted to something over \$10,000, S. gave promissory notes in the corporate name for that sum, and this was credited to the defendant in the account. The notes were not, however, accepted as payment and this action was brought as for money lent for the whole sum. At a previous trial the notes were surrendered and canceled; prior to such surrender no member of the defendant corporation had notice of the execution of the notes, and there was evidence tending to show that the bank and S. had deliberately concealed the fact from the officers of the mining company. *Held*, that the ignorance of the corporation as to this was not material, as to the question of ratification.

INSTRUCTIONS. Each separate proposition is to be read and construed in connection with the whole of the charge.

JURORS — *challenge for favor.* The determination of the lower court upon the question of fact, not subject to review.

Propter affectum. *Semble*, if the juror has formed and expressed a fixed and determinate opinion as to the matters in issue, the challenge is of this character.

An opinion formed on mere rumor or uncertain report, and which has not taken firm hold upon the mind, shall not disqualify.

THIS case was twice before in this court, and is reported in 1 Col. 533, and *ante*, p. 248.

The judgment last before given, in the district court, having been reversed at the term of 1873, the cause was remanded, and at the November term following of the Jefferson district court, was tried before the chief-justice and a jury.

One Perrin, called as a juror and examined by counsel as to his competency, deposed that he had, some three weeks previously, received from one E., who sat as a juror at the former trial, a detail of what E. alleged to be the facts in the case, and upon this had formed an opinion as to the merits of the controversy; that he had also expressed this opinion; that he still entertained it, and thought it would require

evidence to remove it. Examined by the court, the juror deposed that his conversation with E. occurred as they were going home together, and occupied about an hour; that E. made no comment upon the testimony, and expressed no opinion as to the credibility of witnesses; that he had had no conversation with any officer of either corporation, and had no acquaintance with any of them; that his conversation with E. was not characterized by any warmth of discussion; that he still recollected and could recount the substance of what E. had told him, and thought it would have some influence upon his mind; the question being repeated, he expressed himself as uncertain whether it would balance any thing in the evidence or not; that if he should be called as a juror he would endeavor to do justice between the parties; that he understood the duty of a juror to be to try the issue impartially upon the evidence, though what he had heard had created a prejudice in his mind.

The defendant's challenge to the juror for cause was overruled by the court, and an exception being reserved, this opinion of the court was assigned for error.

The testimony given in behalf of both plaintiff and defendant in great part the same as at the previous trial.

It was shown, however, that the work done by Sabin upon the premises belonging to Mr. Becker consisted of two levels ninety or ninety-five feet in length, which were stoped out overhead, sixty to eighty feet in height; the expense of this work Sabin estimated to be one-half as much as that of the work done upon defendant's property in the same time, and the production of ore in the same proportion. The work done by S. upon his own premises consisted of a level fifty feet in length. The expense of all this work, and of operating the mill, were carried to one account.

The alleged agent, Sabin, was examined in vacation before a commissioner selected by the parties.

In the course of his examination the witness deposed that the gold obtained by his mining was placed to the credit of the defendant in plaintiff's bank, and that he drew checks against it, subscribed in defendant's name by himself as

agent. A motion to suppress this part of the deposition as secondary was overruled. Another witness, who had at one time kept the books in which Sabin's accounts were entered, was permitted to testify, against plaintiff's objection, that the vouchers taken by S. in his business were expressed to be for money received from defendant. Others who had receipted to S. for money paid by him on account of mining operations, were permitted to give like testimony against defendant's objection.

The same witness was permitted to testify as to a certain account therein, entitled "Bates' Lode"; that every thing paid out for this mine and for the milling of the ore was placed to the debit of the account, and that the proceeds of the gold obtained were placed to its credit. All these rulings were assigned for error.

Defendant proved that when the overdraft amounted to something over \$10,000, Sabin gave two promissory notes for so much of the amount, and this sum was credited to the account.

The officers of the bank swore, however, that they were not regarded as valid at the time of accepting them, and there was no evidence that they were received in payment absolute.

The credit given for the notes was finally erased, and in the account rendered prior to the institution of this suit no mention was made of the notes, nor was the fact of their existence ever communicated to any officer of the defendant before the last trial. The evidence tended to show that this omission to inform the officers of the mining company was by preconcert between Sabin and the bank officers.

Defendant offered to read from a book, which was spoken of as the corporate records of the mining company, what purported to be the record of proceedings had at a called meeting of the trustees in 1865, at which Sabin was appointed superintendent, and resolutions adopted defining his duties. The record was not authenticated, however, otherwise than by the testimony of Mr. Becker, who deposed that he was present at the meeting, and that the record offered was a

correct record of the proceedings had. The book also contained what purported to be the record of proceedings of the trustees, by which Sabin's resignation was accepted, and the record of proceedings had at a stockholders' meeting, held in 1869, by which the act of Sabin in contracting the indebtedness in question was repudiated. These entries were also offered authenticated solely by the testimony of Mr Becker; the officer who made the entries not being called, and the testimony being rejected, the defendant reserved an exception. The jury found the issues for the plaintiff, and assessed its damages in \$30,358.22; and judgment having been given upon this verdict, the defendant prayed this appeal.

Mr. HUGH BUTLER, Mr. G. B. REED, Mr. E. WAKELY, for appellant.

Mr. W. R. GORSLINE, Mr. H. M. TELLER, Mr. J. Q. CHARLES, for appellee.

Mr. Justice WELLS dissented.

HALLETT, C. J. Three trials, resulting in the same verdict, have been had in this cause, and the facts, so often determined upon substantially the same evidence, may now be accepted as well established. We have also considered the rules of law which should govern the action, and have now to ascertain whether those rules were correctly applied at the last trial. Certain questions, considered and determined at former hearings, may be laid out of view, as they are not now, in any manner, open to investigation in this court. Such is the corporate existence of appellee, and its right to maintain an action for money loaned, exceeding, in amount, ten per cent of its capital stock. Such, also, is the alleged misappropriation of the funds of the bank by its officers, which, it was supposed, would render the transactions between the parties fraudulent, and thus defeat the action. The authority of appellant to borrow money, not

being expressed in its charter, was also denied, but we were of the opinion that, as debts might be created in prosecuting its enterprises, which the corporation would be legally bound to pay, money might be borrowed for the same purpose, if the corporation was not expressly prohibited from doing so. We further declared that the fact of Sabin's agency was material to be shown, in order that it might appear whether he had authority to borrow money, and, if he had no such authority, then as affecting the ratification of his acts by appellant. Objections to the evidence offered to prove the fact, now again earnestly urged, were then discussed, and our conclusion was that, in the absence of better evidence to prove an agency, resort may be had to facts which tend to show recognition, by the principal, of the alleged agent's authority. That an agency may be proved by the habit and course of dealing between the parties, is clear upon principle and authority. *Franklin v. The Globe Insurance Company*, 52 Mo. 461.

The circumstance that Sabin was in possession of appellant's mine, carrying on business in its name, and was in communication with its president, most certainly tends to prove the agency. In addition to this, he testified that he was agent to appellant, and, if his declarations during the continuance of the agency were drawn out, it was not for the purpose of establishing that fact, but to explain his dealings with the bank. It is not contended that an agency may be proved by the declarations of the alleged agent, but the fact being otherwise established, his declarations, made during the continuance of the agency, may be given in evidence to prove other facts. *Rowell v. Kline*, 44 Ind. 291. The theory advanced in the opinions heretofore pronounced, that appellant must be liable upon its ratification of Sabin's acts, if at all, was adopted upon the trial below.

It has never been claimed that, in virtue of his authority as superintendent of the mine, Sabin could borrow money in appellant's name, or that the promise of its president to pay the money obtained by Sabin would be binding upon

appellant. But it was supposed that appellant, being advised of what had been done by its agent, in its name, and failing to disavow his authority within a reasonable time thereafter, might thereby manifest its assent to the transaction. It was not, however, contended that appellant would be estopped to deny its liability upon any equitable principle, but, merely, that its failure to respond to appellee's importunate demand would be evidence of assent for the consideration of the jury. To repeat the arguments and again refer to the authorities upon which this conclusion was founded, would serve no useful purpose. But it is said that the law was not thus stated to the jury, inasmuch as they were told that, if the defendant did disavow the acts of Sabin in borrowing the money from the plaintiff, it was incumbent on the defendant to notify the plaintiff of such disavowal, and, to prove the giving of such notice. This part of the charge should be read in connection with another, in which the jury were advised to find as matter of fact, whether, by its failure to disavow the agency, appellant assented to the act of borrowing the money. So read, it means only, that to make its disavowal effectual, and prevent the inference which the jury were at liberty to draw from its silence, appellant must not only deny the authority of the agent, within a reasonable time, but notify appellee of the fact. It was not said that appellant would be concluded by omitting to disavow Sabin's agency, within a reasonable time after notice, or to give notice of its disavowal, but that such omission was evidence of acquiescence and assent, upon which the jury might determine the fact. The authorities cited in our former opinion abundantly support this as the correct principle, and, in addition thereto, reference may be made to *Kelsey v. The National Bank of Crawford County*, 69 Penn. St. 426. That was a case in which the cashier of a bank, with the knowledge and approval of the directors, but without express authority for that purpose, had offered a large reward for the detection of thieves, who had stolen money from the bank. The plaintiff, having acted upon the proclamation of the cashier, sought

to recover the reward, and was resisted upon the ground that the cashier had no authority from the bank to make the offer. But it was held, that, if the bank had notice of the offer, and did not dissent from it, ratification and assent must be presumed. It was also held, that it was not necessary to give notice to the directors, when sitting in their official capacity. If they were personally cognizant of the offer made by the cashier, it was their duty to call a meeting of the board, and disavow the act if they were unwilling that the bank should be bound by it. It is true that the plaintiff had acted upon the proclamation of the cashier, and, therefore, the bank could not deny his authority without injustice. But the rule laid down is quite as applicable to the case in which the silence of the principal is regarded as evidence of his assent to the act of the agent, which the jury may or may not accept as sufficient to prove the fact as to that in which the principal is estopped to deny the authority of the agent, upon the ground that, in so doing, he would perpetrate a fraud upon him, or upon a third party. In both cases, the principal must disavow the unauthorized act of his agent, within a reasonable time, but the consequence of his not doing so is not the same in each. In one case the conduct of the principal may be interpreted by the jury as evidence of his assent to what has been done in his name, and, in the other, he is estopped to deny the authority of the agent. In either case his conduct affords evidence of an intention to ratify, but it differs in degree and in the principle of law by which it is tested. If, therefore, in the case cited, it was necessary that the bank should disavow the act of its cashier, in order to avoid liability, in the case at bar it was equally necessary that appellant should repudiate the debt created by its agent in order to avoid the inference which might be drawn from its silence. Notice, to appellee, of the disavowal was a necessary part of the act itself. In no other way could appellant break the silence which the law regards as affording evidence of an intention to ratify. No error appears in this part of the charge, and other portions of it appear to be in harmony with the principles

heretofore announced as governing the action. Further support to our conclusion, that notice to the president of appellant, and his undertaking to bring the matter before the board of directors, was sufficient to charge the corporation with notice of Sabin's dealings with the bank, may be found in the case last cited. In that case, it was said, that, if the directors were personally cognizant of the offer made by the cashier, it was their duty to call a meeting of the board and disavow the act. So here, the officers of the bank were seeking to obtain satisfaction of their demand against appellant, through its president, and, as we have repeatedly declared, it was the duty of appellant to act upon the information thus obtained, if it desired to repel any presumption that might be drawn from its silence. A kindred principle controls the objection, that a portion of the work at the mine was upon property owned by Sabin and Becker, adjacent to appellants. The president of the corporation had full knowledge of the character of the work, and much of it was done by his direction. It is said that notice to an agent of a corporation, of any matter under his management and control, will affect the corporation, although not actually communicated to the latter. *The Pittsburg Railway Company v. Ruby*, 38 Ind. 322. The president was allowed to exercise general authority respecting the operations at the mine, and, according to what we have heretofore said in this case, the company must be responsible for his management.

The pretense that this work was done for the purpose of improving the property owned by Sabin and Becker is not supported by the evidence. In one of his letters to Sabin, Becker, who was then president of appellant, directed him to extend his adits, so that more ore could be reached, and this was done quite successfully, half the valuable ore being obtained from No. 3, west. Upon that claim the vein was stoped out from sixty to eighty feet in height, a circumstance which is altogether inconsistent with the theory that the level was run for development only. In the west half of Discovery claim but little was done, probably for the

reason that it was unproductive; and, as to the whole, we were entirely correct in our last opinion in saying that the mining done upon the property of the president and agent of the company was quite as much the act of the company as that done upon its own property. Reconsideration of the authorities, upon which we determined that proof might be offered to show that the money obtained from the bank was expended in the mine, and that it was beneficial to appellant, as affecting the question of ratification, has not shaken our conclusion, and we have nothing to add to what was said upon that point, when the case was last before the court.

Two promissory notes, made by Sabin, in appellant's name, and payable to appellee, were offered in evidence by appellant for the purpose of showing payment of the amount therein specified, and also as a material part of Sabin's dealings with the bank; and it is urged that the court should have received them. That no portion of the debt was discharged by them is a proposition that it is not necessary to discuss, for it is well settled, "that nothing can be justly considered as payment in fact but that which is in truth such, unless something else is expressly agreed to be received in its place." *The Kimball*, 3 Wall. 37. Here there was no agreement that the notes should be accepted in payment of the sum for which they were given, or of any sum; and, whether Sabin had or had not authority to execute them, the rule is the same. Nor is it perceived that they were necessary to explain the position of the parties. Appellee was not seeking to charge appellant upon these notes, and they had been canceled in open court, at a previous term. If, in giving them, Sabin assumed to act as appellant's agent, he had already done so in creating the indebtedness to the bank; and this, at the utmost, was a promise, in another form, to pay an indebtedness which then existed. As appellee was not relying upon the notes, it is difficult to perceive how they could affect the questions at issue.

The minutes of proceedings of two meetings of the board of directors, and one meeting of the stockholders of appel-

lant, offered in evidence upon the trial below, and excluded by the court, were not shown to have been made by the proper officer of the company. The president of the corporation testified that he was present at the meetings and that the record was correct, but the secretary, by whom the minutes were kept, was not called, nor was his absence explained. Whether all of the facts recited in the minutes might be proved by the books of the corporation, is a question of some difficulty, which it is not necessary to discuss. The most important of those facts was the rejection of appellee's demand and the disavowal of Sabin's agency, which is alleged to have occurred at a meeting of the stockholders, held April 5, 1869; that such rejection and disavowal is a corporate act, of which the record would be the best memorial, is plain enough; and, therefore, oral evidence as to the proceedings of that meeting was properly excluded. *Angell & Ames on Corporations*, § 679. But proof that the book was kept by the corporation as a record of its proceedings, was not a sufficient authentication without further evidence to show that the entries were made by the proper officer. *Whilman v. Granite Church*, 24 Me. 236. Generally, it appears to be necessary to call the clerk or officer who made the entries, if he is living, and, if he is dead, to prove his handwriting. *Stebbins v. Merrill*, 10 Cush. 27, and *Union Bank v. Knapp*, 3 Pick. 196. Obviously a corporation, relying upon its own record to establish its acts, with all the evidence of correctness at its command, should be held to strict proof, and that offered by appellant was clearly insufficient. Another reason for rejecting the proceedings of April 5, 1869, is that the affairs of the corporation were in the hands of trustees, or directors, and the stockholders had no authority in the premises. *Gashwiler v. Willis*, 33 Cal. 12. Doubtless the stockholders might instruct the trustees as to the course to be pursued, but the power of the corporation was vested in the trustees, and they only could express its will. In conclusion upon this point, it should be observed that all evidence tending to prove repudiation of the debt, or disavowal of

Sabin's authority, by appellant or its officers, communicated to appellee or its officers, was before the jury, and, if it was not accepted by them, it was probably because it was strongly controverted by other testimony.

Examination of the jurors Nutt and Perrin disclosed pretty nearly the same facts, and we shall necessarily determine the competency of both of them, in considering the objection to Mr. Perrin, who sat at the trial. The record does not state whether the challenge was for principal cause or to the favor, but, as the ground of objection was that the juror had formed and expressed a disqualifying opinion upon the merits of the case, we may assume that it was for principal cause. If we should regard the challenge as made to the favor, the decision of the court upon the evidence as to the supposed bias or partiality of the juror, would not be open to review in this court. *Solander v. The People*, February term, 1873, and *Sanchez v. The People*, 22 N. Y. 147. Considered as a challenge *propter affectum*, the question is, whether the juror had formed and expressed a fixed and determinate opinion as to the matter in issue, for, if his opinion was conditional only, it was ground for challenge to the favor. *Pringle v. Huse*, 1 Cow. 436, note. And, upon this point, it is to be observed, that the juror obtained his information mainly from one Evans, who sat as a juror at a former trial, and, when asked by the court whether Mr. Evans' statement would have any influence upon his mind in the trial of the cause, he answered, "I think it would." The question was then repeated in another form: "You think you would be governed, to some extent, by what he said?" To which the juror replied, "If he related to me the facts as he considered." From this it is apparent that the juror had no opinion, or only such opinion as one gets from the casual statement of another, as to the truth of what he had heard, but, if such statement of facts was correct, he then had an opinion as to the justice of the case. This is a hypothetical or conditional opinion, such as any one will form when the facts out of which a controversy has arisen are stated in his hearing. Formerly it was supposed

that almost any report of the facts in the case would so affect the mind of one who heard it that he would be incompetent to sit at the trial of the same case, but since newspapers and telegraphs have come into use, as a means of spreading intelligence of all events, it has been found necessary to adopt a different rule. Of that necessity the case at bar affords an excellent illustration. Twice tried in a small community, it is doubtful whether so many as twelve men, who had never heard of the case, could have been found in the county at the time of the third trial, and, if they could have been found, it is more doubtful whether they would have been fit persons to decide the issue. We now say that an opinion, founded upon rumor or uncertain report, which has not taken firm hold of the mind, shall not disqualify, and our legislative assembly has said that, in criminal cases, no opinion whatever shall disqualify, if the court shall be satisfied that the juror will render an impartial verdict. 9 Sess. 94.

This rule relates more to the quality of the opinion than to the evidence upon which it is based, for the real question is, whether the juror stands indifferent between the parties. The general rule, that he who has heard rumors and reports only, is competent, and he who has had a full relation of the facts from witnesses, or parties, is disqualified, is intended as a guide to general results, and is not without exceptions. One man may form a fixed and decided opinion upon vague rumor, while another remains quite indifferent, after hearing all the evidence. Much depends upon the intelligence, candor and mental constitution of the juror, his associations with, and relations to, the parties, and, therefore, the court, where the cause is tried, having an opportunity to observe his manner; and hear his answers to questions, can judge more correctly as to his fitness than any appellate tribunal. Much reliance is put upon his own estimate of his ability to resist any impressions that he may have received, and, although it is entitled to great consideration, it is not always controlling. One who confidently asserts that he can disregard all that he has heard respecting a case,

may be no better able to do so than another, who is more regardful of his duty, or less confident of his strength in resisting impressions which he has received. It is urged that Mr. Perrin was of the opinion that what he had heard from Mr. Evans would affect his conclusions in the case, but, evidently, these expressions fell out of a scrupulous and tender care for the duty which he was called to perform. He was not acquainted with any of the officers of either corporation, and he felt no interest in the result of the controversy. He had not talked with any witness, nor had the credit of any of them been discussed in his presence. It does not appear that he was acquainted with any of the witnesses, and all the information that he had respecting the matters in issue, was the gossip of social life concerning a notable cause. He was willing to discharge his duty as a juror, and he perfectly understood what that duty was. But for his fear as to the effect of the report which he had heard, upon his mind, no one would doubt his competency, and, considering all the circumstances, it is impossible to believe that such report would create in his mind a fixed and determinate opinion, dangerous to the rights of the parties. For an elaborate discussion of the views here suggested on this point, counsel are referred to *Jackson v. Com.*, 23 Gratt. 919.

Other questions presented in the briefs of counsel have been discussed in the first and second opinions filed in this cause, and, as we now find no error in the record, the judgment must be

Affirmed.

NATIONAL BANK, LOAN BY: *Gold Mining Co. v. National Bank*, 96 U. S. 640, affirming the judgment in the principal case.

AGENCY — RATIFICATION BY SILENCE: *Higgins v. Armstrong*, 9 Colo. 45, 54, and *Gold Mining Co. v. National Bank*, 96 U. S. 640, affirming the judgment therein.

NOTICE OF FACTS TO AGENT: *Higgins v. Armstrong*, 9 Colo. 52.

JUROR — PRECONCEIVED OPINION: *Gold Mining Co. v. National Bank*, 96 U. S. 640; *Babcock v. People*, 13 Colo. 519.

EACH SEPARATE INSTRUCTION SHOULD BE CONSTRUED IN CONNECTION WITH THE WHOLE CHARGE: *Thatcher v. Rockwell*, 4 Colo. 408; *Behrner v. Cook*, 5 Colo. 395; *Finerty v. Price*, 6 Colo. 137.

JENNESS et al. v. CITY OF BLACK HAWK.

PLEADING — *Nil debet* is no plea in debt on bond, where the declaration shows the condition, and assigns breaches.

In an action upon the official bond of a city marshal, the ordinance under which he gave bond was pleaded, and the plea averred that there was named in the supposed bond, no obligee known to the law of the land, and

also that there was no right in the obligee named therein, to take the same, and also that it was wholly void. *Held*,—

1st. That the plea presents an immaterial issue.

2d. Otherwise, it amounts to *non est factum*.

3d. And upon replication thereto, in either case, judgment cannot be taken for want of an answer to the plea.

The error in concluding by certification, a plea traversing the breach of condition assigned in a declaration upon a bond, may be waived by replying thereto.

And where the replication to such a plea assumed to answer the plea "of Walter B. Jenness, sixthly above pleaded," while, in fact, Jenness had pleaded only five pleas, and the only sixth plea was that of his co-defendants.

Held, that such an uncertainty was *falsa demonstratio*, and the name of Jenness might be rejected.

EVIDENCE—DECLARATIONS OF PRINCIPAL in an official bond are evidence against the sureties when they are made in the performance of some official act or duty, and in reference thereto

And, where the undertaking of the sureties was that their principal should duly account for and pay over all moneys which should come to his hands by virtue of his office, and the principal rendered his written account forty-one days after his term of office expired.

Held, that, under the circumstances of this case, the court could not say that the admissions made in the account rendered were not made in time to charge the sureties.

INSTRUCTIONS were properly refused where they assumed that a defalcation by the principal in a bond occurred during his former term of office, and that this was known to the city council when they appointed him to the term for which his sureties, defendants herein, became responsible; and the evidence showed the defalcation, but failed to show that the council had knowledge of it.

Even if the facts were as supposed, the principle is of doubtful application to a municipal corporation.

SURETIES LIABLE FOR INTEREST AS DAMAGES in an action upon an official bond. Interest upon the balance due from the principal was properly allowed, from the date when he rendered his account.

Appeal from District Court, Gilpin County.

THIS was an action of debt upon the official bond of Walter B. Jenness, city marshal of the appellee, which bond was executed by Jenness as principal, and Woodbury, Cowenhoven and Myers as sureties, and bound them "unto the plaintiff, by the name and description of the mayor and city council of the city of Black Hawk, in the county of Gilpin, Colorado Territory, for the use of the people of the

city of Black Hawk aforesaid," in the penal sum of \$5,000, for the year following April 1, A. D. 1871.

In the declaration the breach of conditions is thus assigned: "Yet the said plaintiff in fact saith that Jenness did not well and truly pay over and account for all moneys which came into his hands by virtue of his said office of city marshal, as aforesaid, nor did he well and faithfully discharge the duties of his said office as, by the said writing, obligatory, intended and required. But, on the contrary thereof, divers sums of money which came into his hands as city marshal during his said term, for taxes from divers and sundry citizens, tax payers of the city of Black Hawk, and by virtue of his said office, as aforesaid, amounting in all to a large sum of money, to-wit, the sum of fifteen hundred dollars, the said defendant, Jenness, failed to pay over and account for to said plaintiff, but appropriated the same to his own use and benefit, whereof defendants had notice, whereby an action hath accrued to the plaintiff to have and demand of and from the said defendants herein, the said sum of \$5,000. Yet the said defendants have not, nor either of them, paid the same, or any part thereof, though often requested, to the damage of the said plaintiff of \$1,500, and therefore it sues," etc.

Jenness filed five pleas—the sureties, six. All, firstly, pleaded *nil debet*; also all, secondly, pleaded *non est factum*, concluding to the country; also all, thirdly, cravedoyer of the bond and its conditions, and pleaded *non est factum*, uponoyer had, concluding to the country; and also all, fourthly, pleaded a special plea, which, after the formal commencement, avers that the city council of the city of Black Hawk, on the 19th day of April, 1864, passed and approved an ordinance entitled, "An ordinance regulating officers' bonds," which ordinance is in words and figures following, to-wit: "An ordinance regulating officers' bonds. Be it ordained by the city council of the city of Black Hawk, that the treasurer elected for said city shall file a good and sufficient bond, with one or more sureties, in the sum of \$5,000, for the faithful performance of his duties. The city

clerk shall file a good and sufficient bond with one or more sureties, in the sum of \$500, for the faithful performance of his duties. The police judge shall file a good and sufficient bond, with one or more sureties, in the sum of \$2,000, for the faithful performance of his duties. The marshal shall file a good and sufficient bond, with one or more sureties, in the sum of \$5,000, for the faithful performance of his duties. The assessor shall file a good and sufficient bond, with one or more sureties, in the sum of \$1,000, for the faithful performance of his duties; and the city surveyor shall file a good and sufficient bond, with one or more sureties, in the sum of \$2,000, for the faithful performance of his duties. Passed April 19th, 1864." And this defendant avers that, under and in pursuance of the above and foregoing ordinance, this said writing obligatory is void, because the said ordinance is the only one under and in pursuance of which the said writing obligatory was given and taken, and that there is no obligee in the said supposed writing obligatory known to the law of the land. That the mayor and city council in the county of Gilpin, Colorado Territory, for the use of the city of Black Hawk, had no right or authority to take the said writing obligatory from defendant and his sureties, and that the same is wholly void, and this he is ready to verify, wherefore he prays judgment, etc., if he ought to be charged with said debt by virtue of the said supposed writing obligatory.

Jenness, fifthly, craves oyer, and pleads general performance. The sureties crave oyer, and aver a general performance by Jenness. The sureties, sixthly, by leave of the court, pleaded that "they are each surety for Walter B. Jenness, principal in the said writing obligatory, and that said Jenness was elected city marshal of the city of Black Hawk, for the municipal year extending from the first day of April, 1871, to the 31st day of March, 1872, and no longer, and that at the time the municipal year expired, to-wit, March 31, 1872, the said Jenness had well and truly paid over and accounted for all the moneys which had come to his hands, as city marshal aforesaid, and if he failed to

pay over and account for any money which came into his hands as city marshal of the city of Black Hawk, that such money was received by him after the said 31st day of March, 1872, and by him appropriated thereafter. And that said Jenness, during the said municipal year aforesaid, did in all things well and truly discharge the duties of the said office, and this the said defendants are ready to verify, wherefore they pray judgment if they ought to be charged with the said debt by virtue of the said writing obligatory," etc.

A demurrer to the pleas of *nil debet* was sustained, and the defendants stood by their pleas. Replications were filed by plaintiff to the fourth, fifth and sixth pleas, thus :

And the plaintiff by way of replication to the plea of Walter B. Jenness, one of the above-named defendants, and to the plea of Henry P. Cowenhoven, Benjamin W. Woodbury and Zephaniah Meyers, the other of the said defendants, by them and each and every one of them fourthly above pleaded, says *precludi non*, because it says that the mayor and city council of Black Hawk had good right and authority so to take and become the obligees in the manner and form, as in and by its declaration is alleged, and that said writing obligatory is in all respects good and valid in law, and of this it puts itself upon the country.

And the said plaintiff by way of replication to the plea of said defendant Walter B. Jenness, one of the said defendants, and to the plea of the other of the said defendants, viz. : Henry P. Cowenhoven, Benjamin W. Woodbury and Zephaniah Meyers, by them and each of them fifthly above pleaded, says *precludi non*, because it says that the said writing obligatory and the conditions thereof were not truly kept and performed to the true intent and meaning thereof, as in and by said plea is alleged, and of this the said plaintiff puts itself upon the country.

And the said plaintiff by way of replication to the plea of Walter B. Jenness sixthly above pleaded, one of the said defendants, says *precludi non*, because it says that the said defendant Jenness did not well and truly pay over and

account for the moneys which came into his hands as city marshal, according to the conditions, tenor and effect of the said writing obligatory, nor did he well and truly discharge the duties of the said office of city marshal, as in and by said plea is alleged, and this plaintiff prays may be inquired of by the country.

The sureties, then, and before the jury was called, moved for judgment on their fourth and sixth pleas; and Jenness then, also, moved for judgment on his fourth plea, because of no sufficient replication to the fourth, and none at all to the sixth plea. Motion overruled. Jury trial: verdict, debt, \$5,000, damages, \$909.74, and judgment on verdict. The opinion contains all other facts material to a complete understanding of the case.

Mr. L. C. ROCKWELL, for appellants.

Mr. ALVIN MARSH, for appellee.

WELLS, J. I. In debt on bond the declaration showing the condition and assigning breaches, *nil debet* is no plea. *Parish v. State*, 3 Ind. 209; *Jensen v. Ostrander*, 1 Cow. 670; *Parks v. State*, 7 Mo. 379; *Brents v. Sthal*, 3 Bibb, 482; *Crigler v. Quarles*, 10 Mo. 320.

II. The ordinance set up in the fourth plea had no bearing upon the question presented by the residue of the plea. The averments as to this bring into the record no new element of fact material to the issue, and in considering the effect of this plea, may be disregarded. The averment that no obligee known to the law is named in the bond, is also beside the matter. If an obligation be executed to one by an impossible or fictitious designation, or the name of a person never in being, it is still a good obligation, and the person in fact intended may sue thereon in his own name, averring that the deed was made to him by the name therein mentioned. This averment may, therefore, be rejected as senseless. The remaining allegation of the plea, that the mayor and council had no authority to take the said writing

obligatory, and that the same is wholly void, is contradictory of that which precedes, for herein it is implied that there are such persons in being as the mayor and common council, which is before denied. Moreover, whether the mayor and council might lawfully become the obligees in such an obligation as set forth in the *narr.*, for the benefit of the city, is a pure question of law. It may be said, therefore, that the plea can only operate as a demurrer, the replication as a joinder in demurrer; in which view the issue of law joined must be treated as waived by the pleas to the merits which had been interposed therewith. Waiving these considerations, however, if the mayor and council had no lawful authority to become obligees in such a bond as mentioned in the declaration, to the use of the city, then the bond never was of effect, either as the deed of the defendants, or anybody else, as, indeed, the plea further on asserts. This averment, therefore, amounts to *non est factum*. The replication, though possibly informal, sufficiently answers it. There was no error, therefore, in denying the defendant's motion for judgment upon the fourth plea.

III. The sixth plea of the sureties is a traverse of the breach assigned in the bond, and should have concluded to the country. The plaintiff was at liberty, however, to pass by this error and reply. The replication re-asserts, in general terms, that the conditions of the defendants' obligation had not been kept and performed. More than this was not required. The breaches set forth in the declaration were then sufficiently answered. *Morris Canal Co. v. Van Vorst*, 3 Zab. 98; *Treasurer v. Oswald*, 2 McM. 98; Steph. Pl. 355. It was unnecessary to again or more fully particularize them. The replication, it is true, assumes to answer the plea of "Walter B. Jenness, sixthly, above pleaded;" whereas Jenness plead but five times, and the sixth plea was that of his co-defendants. The replication, however, clearly answers this plea; it is expressed to be interposed to the plea sixthly before pleaded; there was no plea sixthly pleaded except that of the sureties, and, as we think, the

name of the defendant Jenness, by the insertion of which the uncertainty arises, is false demonstration and may be rejected, according to the maxim. The prayer for judgment upon this plea, also, was, therefore, well denied.

IV. The error assigned upon the admission of the bond in evidence is answered by what has been before said. The declaration properly counted upon it as executed to the corporation. Ang. & Ames on Corp., § 647.

V. It has sometimes been held that the declarations of the principal in an official bond are evidence against the sureties without reference to the time when, or the circumstances under which, they were made. *Treasurer v. Bates*, 2 Bailey, 362. The better doctrine appears to limit the operation of such declarations, against the sureties, to the case in which they are made, in the performance of some official act or duty and in reference thereto. 1 Phill. Ev. 525, * 526.* That in such case they are part of the *res gestæ*, and at least *prima facie* evidence as to the sureties, is abundantly maintained by authority. *United States v. Gaussen*, 19 How. 213; *United States v. Boyd*, 5 id. 50; *Stephens v. Crawford*, 1 Kelly, 574; *Dumas v. Patterson*, 9 Ala. 484; *State v. McKee*, 1 Gill & Johns. 378; *Graham v. County Commissioners*, 9 Dana, 182; *Dobbs v. Justice*, 17 Ga. 624; *Sumter v. Lewis*, 10 Rich. L. 171.

We have seen no case, however, in which the statements of the principal were received, to charge the sureties, when made after the expiration of his official term. The reports or statement of account of Jenness, which was received against his sureties, and which was, indeed, the only evidence of his defalcation, was given the 11th of May, and his official term seems to have terminated early in the previous month. Nothing appearing in evidence upon the point, we, perhaps, ought not to infer a holding over beyond the term of his appointment; and even if we should infer that his successor delayed in qualifying, and that so Jenness held over, until the date of his report, it is, perhaps, doubtful, whether the state of the question is changed; for many authorities are to the effect that the sureties are

not liable for the acts of the principal during such holding over. The reasoning upon which such statements of the officer, when made during the official term, have been received against his sureties, would seem, however, to render them admissible in some cases, even though made after its expiration. The sureties obligate themselves to be answerable for what the principal does in his office; his official acts may, therefore, be shown to charge them; every declaration, accompanying and explanatory of the act, is part of it.

In the present case the undertaking of the sureties was that their principal should duly account for and pay over all moneys which should come to his hands by virtue of his office. The nature of the official duty, and the character and purpose of the suretyship, imply, if the words of the condition do not, indeed, import, that a full and formal statement of all moneys received should be rendered in writing.

But in the nature of things, it cannot have been intended by the parties that such account should necessarily, and at all events, be rendered before the qualification of the officer's successor.

The marshal was, it appears, charged with the collection of municipal taxes. These and other public dues may be, as in point of fact is frequently the case, in arrears, and the marshal bound to receive them down to the last moment of his official term. Having the probability of such payment in view, it would seem that the marshal might, unless a contrary requirement were imposed by the city council, lawfully defer his account until he should have completed his term; and that an account rendered seasonably after his outgoing might be held to perform the condition of the bond. It follows that an account rendered in a reasonable time after the expiration of the office would be in the performance of the duty imposed by the law, and contemplated by the condition of the bond, and would as fully affect the sureties as one rendered before that. The case of *Blken v. The People*, 3 Scam. 208, seems to furnish a satisfactory

analogy. The admissibility of this account, therefore, depends upon whether it was rendered in reasonable time after the expiration of the officer's term; and upon the evidence contained in the record, we cannot say it was not. As to this question, every case must be governed by its own circumstances. For any thing which appears to us, the account may have been rendered at the first meeting at which the council were prepared to receive or act upon it; if so, it would seem clearly to be in fit time. We ought not to indulge in presumptions to render this evidence incompetent.

VI. The instructions prayed by the defendants assume that not only had a defalcation occurred in the former official term of Jenness, but that this was also known to the city council at the time of the second appointment, upon which defendants became his sureties. Even if the facts were as supposed, the principle of the instructions is of doubtful application to a municipal corporation. But, while the evidence sufficiently exhibits that such defalcation did occur in the former term, evidence that it was known to the council is entirely wanting.

VII. The jury were charged to compute interest on the amount which Jenness had received, and had failed to pay over; they were not informed as to the time during which such allowance should be made, but gave interest only from the date of the report rendered by Jenness on the eleventh of May. This computation was at least sufficiently favorable to the defendants. The allowance of interest was proper. The damages against the sureties are measured by the same rule as against their principal; as against the principal the demand had been liquidated by the account or report of May 11; and so from that date, at least, interest was given by statute. The judgment is

Affirmed.

CITY OF CENTRAL v. SEARS.

CITY ORDINANCE—*a mere resolution of the council is not.* A resolution adopted by a city council, not approved by the mayor, and not published in the manner required by the charter, has not the effect of an ordinance.

CITY CHARTER—*legislative powers of council under,* as in fixing the compensation of city officers, must be exercised by ordinance, when such fixing is intended to be permanent.

Compensation of a city officer, fixed only by such a resolution of the council a year previous to the appointment of the officer, was not paid. He brought suit therefor.

Held, that the officer could not recover.

CITY TREASURER—**ELECTED**—**REMOVAL OF.** Where a city charter provided for the election of a treasurer, N. was accordingly elected; the council assumed to declare the office vacant, because, as they said, N. failed to give bond and qualify, under the law; the council thereupon appointed one H. treasurer; the city ordinances required the city collector to pay to the city treasurer all city moneys collected by him; S., acting as city collector, received moneys belonging to the city, and paid over a part of the same to H. as treasurer, and paid a portion thereof to one A., who was president of the city school board; and the city failed to pay S. for his services as such collector.

Held, 1. That under the general rule of law relating to officers of this kind, the former treasurer held over until his successor was elected and qualified.

2. That the council had no power to declare the office vacant, or to appoint H. treasurer.

3. That payment by S. to H., as treasurer, as also the payment to A., was not such as the law required.

4. That S. had not paid the moneys to the treasurer, and until he did so, he could not recover for his services as such collector.

Appeal from District Court, Gilpin County.

THE charter referred to in the opinion may be found in the laws of the third session (1864), at page 244, *et seq.* The resolution of May 3, 1866, to which the opinion refers, is as follows, viz.: "On motion of Alderman Bedell, the report of the finance committee in regard to police regulations was adopted. On motion, above report was amended so as to affect only the city marshal, who was allowed fifty dollars per month, said salary to commence May 1, 1866."

Mr. CLINTON REED, for appellants.

Mr. L. C. ROCKWELL, for appellee.

HALLETT, C. J. This action was brought to recover for services rendered by appellee as marshal of the city of Central. At the time appellee was appointed to that office two sets of aldermen were claiming to represent the city, and a question is presented as to the validity of the appointment, which it will not be necessary to determine at this time. The claim for salary is based upon a resolution of council adopted May 3, 1866, by which \$50 per month was allowed to the marshal, to commence on the first of May in that year. The resolution does not appear to have been approved by the mayor, or published in the manner required by the charter, and therefore it cannot have effect as an ordinance of the city. Whether it should be regarded as fixing the salary of the marshal throughout the year 1867-8, for which appellee claims the right to recover, is the question to be determined. That some of the powers conferred by the charter may be exercised by resolution of council, or in any other manner which may indicate the will of that body, is not and cannot be denied, and it is equally plain that other powers are of a legislative character, and can only be carried into effect by ordinance. In the 38th section, power to enact ordinances for purpose of carrying into effect provisions of the charter is expressly conferred, and generally the authority conferred upon the council is to be performed in that way. Express authority is given in the 35th section to fix the compensation of city officers, and it is desirable that this should be done by ordinance so that both the officers and the public may know what is to be paid. *Smith v. Com., etc.*, 41 Penn. St. 335.

The resolution adopted in the year 1866 may, perhaps, be regarded as fixing the compensation of the marshal then in office, but cannot have the effect to fix the salary of that officer for all time. For that purpose an ordinance adopted and published with the forms prescribed by the charter was

necessary, and as it does not appear that any such existed, the right of appellee to recover such compensation cannot be sustained. 1 Dillon on Municipal Corp., § 169.

Another claim asserted by appellee was for services rendered as collector of city taxes in the years 1867 and 1868, which by an ordinance of the city he was required to pay over to the treasurer. The council by which appellee was appointed, in June, 1867, declared the office of city treasurer vacant, upon the ground that Nuckolls, who was elected to that office in the April preceding, had failed to qualify, and appointed one Harker to be treasurer of the city. It appears that Nuckolls had filed his bond and obtained the approval of the other council, and that he was exercising the functions of the office. And this was probably sufficient to invest him with its powers and duties *de facto*. But if this were not so, and Nuckolls did in fact fail to qualify, there can be no doubt that the treasurer of the preceding year held over until his successor should be elected and qualified. There is no provision in the charter to this effect, but such is the general rule of law in relation to officers of this kind. 1 Dillon on Municipal Corp., § 158.

The language of sections 2 and 34 of the charter plainly shows that the city council had power to remove officers appointed by them, but no such power is conferred as to officers elected by the people. Conceding that the council was properly constituted, the attempt to remove the treasurer of the city and appoint Harker to his place was unwarranted by the charter, and entirely ineffectual to confer upon Harker authority to receive the funds of the city. Unless appellee has paid over the funds collected by him to the treasurer of the city, as required by the ordinance, he cannot recover compensation for his services, and we have no hesitancy in saying that payment to Harker was not such as the law required. An officer is responsible for public funds which he has received unless discharged by law. *Morbeck v. The State*, 28 Ind. 86; *U. S. v. Prescott*, 3 How. 578. So, also, it appears that a portion of the money collected was paid to Arnold, president of the school board,

without authority of law. The ordinance required the collector to pay to the city treasurer all moneys collected by him, and payment to another was unauthorized. Upon the evidence in this record we are unable to perceive any ground upon which appellee may have judgment, and therefore the judgment will be reversed, with costs, and the cause remanded.

Reversed.

McKAY v. BATCHELLOR.

Distrain for school tax — whether it must be made in the school district. The act of 1870 to provide for common schools (8 Sess. 181) confers no authority upon the secretary of a school district, proceeding to collect a tax regularly levied in his district, to distrain property outside of the district.

The district having been divided, and the *locus in quo* set off into another district after the tax was levied and before the property was seized by the secretary, the rule is the same.

Tax — whether it is a lien upon personal property before seizure. A tax levied for school purposes does not become a lien upon personal property in virtue of the assessment merely, but only upon seizure, there being nothing in the statute upon the subject.

REPLEVIN — whether it lies for property seized without the school district. Property distrained without the district is not taken for a tax assessment or fine within the meaning of the act regulating the action of replevin (R. S. 588), and that action may be maintained to recover possession of it.

Error to District Court, Arapahoe County.

THE action was replevin to recover possession of a wagon, and plaintiff in error, who was defendant in the court below, pleaded, 1, *non detinet*; and 2, substantially as follows :

That at the time when, etc., defendant was secretary of School District No. Three (3), in Arapahoe county, Colorado, that a special school meeting was regularly called to meet October 21, 1871, for purpose of levying special school tax; that said meeting was held and a special tax of ten mills on the dollar was duly voted; that on November 15, 1871, defendant, still being secretary, posted up a list of the

persons taxed as aforesaid, at three places in said school district, with the amount of tax due from each person; that on February 6, 1872, a warrant of that date to collect said tax came into defendant's hands, as secretary aforesaid, signed by the president of said school district, and countersigned by the secretary, authorizing defendant to demand and receive of every person named in said list so posted up, the sum taxed against such person, and if any person neglected or refused to pay the same when called on, to collect the same by distress and sale of the goods and chattels of such person found within said school district; that plaintiff's name was on said list so posted up, and he was at the time of the voting of said tax, and at the time of posting of said notices, the owner of taxable property, real and personal, within said school district, of the value of \$3,400, and a resident of said district, and was charged on said list with the sum of \$34, tax levied upon his said property, which said tax was due and unpaid; that defendant demanded of plaintiff the payment of said tax, which plaintiff refused, and afterward, in the life-time of said warrant, and by virtue of the laws of Colorado Territory and by authority of said warrant, within said school district, defendant did take and distrain the said goods and chattels of plaintiff, for the tax so due as aforesaid.

To this the plaintiff replied, amongst other things, that the said goods were not taken within the said school district, and hereon issue was joined, and also upon the plea *non delinet*. The plaintiff further replied *de injuria*, upon which issue was joined.

At the trial it appeared that a special school tax was levied on the 21st October, 1871, in school district No. 3, Arapahoe county, and that plaintiff (Batchellor), at that time, and subsequently, until the day of trial, resided on section 36, Town. 2 S., R. 68 W., which was then a part of said district. That the sum of \$34 was assessed against plaintiff upon property by him then held within the district. That December 13, 1871, a new district was organized by the county superintendent of schools, designated as No. 16, of which the

said section 36 was a part. That defendant McKay, being secretary of district No. 3, on the 29th of March, 1872, seized the wagon in controversy, to satisfy the said tax levied in district No. 3, the said wagon being, at the time of seizure, on the premises of said Batchellor, and within the new district No. 16. Upon such evidence, the court before whom the cause was tried without a jury, gave judgment for the plaintiff, and the defendant sued out this writ of error.

The statute regulating the manner of collecting taxes for school purposes (8 Sess. 144) contains the following :

“Should any one, when called on, neglect or refuse to pay such tax, the secretary shall proceed to collect the same by distress and sale of goods and chattels found within the district, having first posted up, at least ten days previous, notice of such sale, in three or more public places in the district.”

Chapter 74, R. S., entitled “Replevin,” requires the plaintiff in replevin, or some one in his behalf, to make oath that the goods have “not been taken for any tax, assessment or fine levied by virtue of any law of this Territory.”

Mr. J. W. HORNER, for plaintiff in error.

Mr. ALFRED SAYRE, for defendant in error.

HALLETT, C. J. Plaintiff in error, as secretary of school district No. 3, in Arapahoe county, distrained the wagon in controversy to satisfy a tax levied against the defendant in error in that district, pursuant to the statute of 1870. 8 Sess. 131. To a plea setting up these facts defendant in error replied *de injuria*, and that the goods were not taken within the district. It appears that after the tax was levied and before the wagon was distrained the district was divided by the county superintendent of schools, and that part in which defendant in error resides was set off into a district by itself. By the 11th section of the act above mentioned, power is conferred upon the county superintendent to divide the

county into school districts, and to alter and change the boundaries of districts from time to time as the convenience of the inhabitants may require, and this power having been exercised, it appears to be impossible to say that the original boundaries of the district may be maintained for the purpose of collecting a tax levied before the change was made. The 31st section confers authority to collect the tax by distress and sale of goods and chattels found within the district, and the secretary has no other authority in that behalf. Although the tax may have been regularly assessed, the secretary has no authority to go out of his district to enforce payment of it. The rule may be otherwise as to a tax against real estate, which is a lien upon the property from the date of the levy. *Moss v. Shear*, 25 Cal. 38.

As to personal property, however, there can be no lien until seizure, unless it is given by statute. 2 Dill. Corp., § 659. The tax assessed generally against defendant in error did not become a lien upon his personal property, and no right was acquired by the assessment, merely, to seize the wagon wherever it should be found. We have no difficulty in saying that the seizure without the district was unauthorized, but it is not so clear that the question may be raised in this form of action. The statute relating to replevin (R. S. 533) plainly prohibits this remedy in every case where property has been seized for a tax, assessment or fine levied under a law of the Territory. *Styles v. Griffith*, 3 Yates, 82; *People v. Albany*, 7 Wend. 484; *Mt. Carbon Co. v. Andrews*, 53 Ill. 176. That the principle extends to the seizure as well as the assessment, and equally forbids all questions respecting the validity and regularity of the warrant and of the assessment, we freely concede, but obviously there must be some color of authority for making the seizure. For instance, it has been held that where the warrant was issued without jurisdiction, and where the statute under which the assessment was made, was unconstitutional, replevin would lie. *Morford v. Unger*, 8 Iowa, 82; *Wright v. Briggs*, 2 Hill, 77; *Hudler v. Golden*, 36 N. Y. 446. If this were not the rule, a defendant in replevin

might always defeat the action by pretending that the property had been taken to satisfy a tax. An officer without his bailiwick is utterly without authority, and cannot, therefore, justify under process. Although professing to act in virtue of the assessment, it cannot be truly said that plaintiff in error, when without his district, could seize property under the authority of the law, and, therefore, his plea was well answered by the replication that the property was taken without the district. Perhaps this replication amounts to no more than the other, for plaintiff in error could not be required to show more than that the property was taken under color of authority for the purpose of collecting a tax, and if the seizure had been made within the district, this result would have been accomplished. But the evidence was clear to the point that the property was in fact taken without the district, as established at the time of the taking, and this, we think, is enough to support the judgment of the court.

The judgment is affirmed, with costs.

Affirmed.

DANIELS et al. v. THE CITY OF DENVER.

PRACTICE — *objections to the record must be made in apt time.* By moving to strike out a bill of exceptions, other objections to the record which are not then assigned are waived.

JUDGMENT — *in arrest — whether it is final.* A judgment upon a motion in arrest that defendant go without day is final, and the writ of error lies to remove the record into this court.

Error to District Court, Arapahoe County.

AFTER verdict for plaintiff in the court below, judgment was arrested. Defendant moved to quash the writ, for that no final judgment was ever given.

Per CURIAM. Defendant in error at a former day moved to quash the bill of exceptions, which was allowed below

and thereby admitted that, saving this objection, the record was properly here. Moreover, judgment was given in the court below that defendant go without day; this was a final judgment, and the writ of error well lies. *Faver v. Philbrick*, 5 N. H. 358; *Powell v. Kinsey*, 6 Blackf. 359.

Motion denied.

MARTIN v. THE HAZZARD POWDER CO.

CONTRACT OF GUARANTY — *meaning of the words "value received."* In a guaranty written on the back of a promissory note the words *value received* import a consideration which is *prima facie* sufficient to support the contract.

PLEADING — *denying signature to written instrument.* In an action upon a written guaranty the execution of the instrument cannot be put in issue except by plea verified by affidavit, as provided in section 14 of the Practice Act (R. S. 105).

PRACTICE — *when objection should be made.* An objection that evidence was given in rebuttal which should have been given at the opening of the case, not having been urged at the trial, will not be considered in this court.

NEW TRIAL — *of newly-discovered evidence.* That evidence has been discovered since the trial is not a ground for new trial.

1 If diligence was not used before the first trial to ascertain whether such evidence existed.

2. Or if such evidence is cumulative merely.

Upon conflicting evidence. A new trial will not be granted where the evidence is conflicting, and the verdict is substantially right.

INTEREST — *whether it is embraced in contract of guaranty.* Upon a guaranty indorsed on a promissory note, the interest specified in the note, as well as the principal sum, may be recovered.

PRESUMPTION — *as to law of another Territory.* In the absence of evidence as to the law of another Territory, the presumption is that it is the same as our own.

GUARANTY — *of its nature.* *Semble*, that a guaranty is an original undertaking upon which the guarantor is liable in the absence of proof that the maker of the note is insolvent, or that diligence was used to collect from him.

PRACTICE — *of instructions to the jury.* The court is not required to charge the jury in the exact language of the prayer. It is enough that the substance of the prayer was given.

Of the assignment of error in this court. An assignment of error covering the entire charge to the jury is in violation of the 12th rule of this court, and will not be considered as to any of the propositions embraced in the charge.

Appeal from District Court, Arapahoe County.

THE guaranty upon which the action was founded is quoted in the opinion, and the issues are there stated. The pleas were not under oath. After putting in the note and guaranty, plaintiff (appellee) rested, and defendant (appellant) moved for judgment of nonsuit, which was denied. Appellant then testified that the guaranty was given by him some time after the note was made, and that it was without consideration.

Appellee then called one Reynolds, who was appellee's agent, to prove the circumstances attending the making of the guaranty, and he testified in substance that appellant agreed to guarantee the note before it was made by Cornforth, and that witness paid to appellant one dollar in consideration of the execution of the guaranty. A general objection to this evidence was noted, but the ground thereof was not stated. Appellee also called one Fredendall, who related a conversation between Reynolds and appellant, to the effect that the latter promised to become security upon the note when it should be obtained from Cornforth, who was indebted to appellee.

Upon this evidence the jury found for plaintiff, and appellant moved for a new trial, and in support thereof filed several affidavits respecting newly discovered evidence. In his own affidavit he deposed that he was surprised at the trial, by the testimony of Reynolds touching the payment of one dollar upon the execution of the guaranty; that Reynolds had frequently admitted to him that the guaranty was without consideration; that at the time of trial he was ignorant of facts set forth in the affidavits of James and Mary Martin, which latter affidavits were filed with his own; that he had then forgotten that James Martin was present at the execution of the guaranty, and did not become aware of it until the day following the trial, when the said James informed him of the fact; that he was also informed after the trial that one William J. Baker was present at the

execution of the guaranty, but that the said William was not a resident of the Territory, and therefore he could not obtain the affidavit of him, the said William.

James Martin deposed that he was present at the execution of the guaranty, and that nothing was then paid by Reynolds to appellant; that he did not communicate his knowledge of the matter to appellant until after the trial.

Mary Martin deposed to a conversation with Reynolds in May or June, 1873, in which the latter admitted that the guaranty was without consideration.

It was admitted at the hearing of the motion that this witness was appellant's wife.

The motion for new trial was denied, and appellant excepted.

The eighth assignment of error was as follows:

"The court erred in its instruction on the question of interest, there being no evidence in the case as to the rate of interest allowable by the laws of Wyoming Territory, or that said laws allowed the rate of interest stipulated for in said note."

Following this was the charge of the court, embracing several propositions.

The ninth assignment was upon the prayer for instruction, which is given in the opinion.

In argument it was contended that the guaranty was a collateral undertaking, upon which appellee could not recover without proof of diligence against the maker. This point is not noticed in the opinion.

Mr. T. G. PUTNAM, for appellant.

Mr. J. Q. CHARLES and Mr. A. O. PHELPS, for appellee.

STONE, J. This was an action of assumpsit, brought by the appellee against the appellant, to recover from the appellant the amount of a promissory note made by one J. T. Cornforth, payable to the appellee, for the sum of seventeen hundred and fifty-nine dollars and seven cents

(\$1,759.07) with interest at the rate of ten per cent per annum, dated Cheyenne, Wyoming Territory, February 8th, 1870, upon a written guaranty, indorsed upon the back of said note, in the following words:

"For value received, I hereby guarantee full payment of the within note, eighteen months from this date. Denver, February 28, 1870."

To this action, the defendant (appellant) pleaded, 1st, the general issue. 2d, want of consideration for the guaranty.

There was a verdict for the plaintiff, for the principal of the note and interest.

A motion was made for a new trial, which was overruled, and judgment entered upon the verdict, and the defendant appeals to this court. The errors assigned, which will be considered by this court, are—

First. That the court erred in overruling the motion for a nonsuit.

Second. That the court erred in admitting improper testimony in behalf of the appellee in rebuttal.

Third. That the court erred in overruling the motion for a new trial.

Fourth. That the verdict was contrary to evidence, against the weight of evidence and against the law.

Fifth. That the damages assessed were excessive, and not supported by the evidence.

It is contended by counsel for appellant, that the motion for nonsuit should have been granted, for two reasons:

First. Because there was no consideration for the guaranty of Martin; and,

Second. Because there was no evidence that Martin ever executed the guaranty.

We are of the opinion that the words "for value received" contained in the contract of guaranty, import a consideration, sufficient to establish, on the part of the plaintiff, a *prima facie* case. Edwards on Bills and Prom. Notes, 233; Parsons on Bills, vol. 2, p. 130. The second reason urged in the motion for nonsuit was, that there was no evidence

that Martin ever executed the guaranty. This action is brought upon the guaranty; the guaranty is the foundation of the suit; the guaranty was in writing, and proof of its execution unnecessary, unless its execution was denied by the defendant, by a plea verified by his affidavit. Rev. Stat., tit. "Practice," p. 506, § 14. It is insisted that the testimony of Reynolds and Fredendall was improperly received in rebuttal. We do not find in the record before us, that any exception was taken to the testimony of these two witnesses on the trial, in the court below, on this point, and for that reason cannot be considered here.

But it is insisted that a new trial should have been granted on the ground of surprise and newly-discovered evidence.

This claimed, newly-discovered evidence, seems to have been exclusively confined to the Martin family, and one of the witnesses; the wife of the appellant, and it is quite apparent to us, that, with reasonable diligence, this evidence could have been procured at the trial of the cause in the court below. And if, by the use of reasonable diligence, the appellant might have obtained this newly-discovered evidence for the first trial, the court was right in refusing the motion for a new trial.

But for another reason the motion was properly overruled. The character of the newly-discovered evidence is cumulative merely. And it is well settled by authority, that a new trial will not be granted upon cumulative evidence merely, or upon evidence to impeach or contradict a witness.

But it is insisted that the appellant was surprised at the testimony of Reynolds, and, for that reason, a new trial should have been granted.

What we have said upon the question of reasonable diligence in the procuring of testimony to meet the issue in this cause is equally applicable to the question of surprise.

Due diligence must appear to have been used by the party complaining of surprise, and we think due diligence was not used in this case.

We are not able to see wherein the verdict is contrary to law and evidence. A new trial should only be granted when it is in furtherance of substantial justice, and the motion is addressed to the sound discretion of the court; and if, upon the whole case, justice has been done between the parties, and the verdict is substantially right, a new trial should not be granted.

It is claimed that the damages assessed were excessive.

The promise in the note is to pay a named sum, with *interest* at the rate of ten per cent per annum until paid. The guarantee is, *full payment* of the note, and we think the interest was properly added to the principal in the assessment of the damages.

But it is insisted that, as this note was executed in Wyoming Territory, the court must be governed as to the rate of interest by the law of that place; and there being no evidence showing that any rate of interest was allowable by the law of Wyoming; it was, therefore, error to allow interest.

It must be remembered that the rate of interest in this case was specified in the note, and the law presumes that the execution of the note was legally done until the contrary is made to appear, and, in the absence of evidence showing what the laws of Wyoming Territory were as to the rate of interest, it will be presumed that they were the same as our own.

The court was requested to give the following instruction to the jury: "That if the defendant guaranteed the payment of said note without the knowledge or request of the maker, J. T. Cornforth, and that he never received any consideration for such guaranty, then they must find for the defendant."

The court did not give the instruction in the exact language of the request, but instructed the jury as follows: "If you believe, from the evidence, that the defendant, at the request of the plaintiff, through its agent, guaranteed the payment of the note which was read in evidence, with-

out receiving any consideration therefor, then they must find for defendant."

The instruction given is substantially the same as that requested. If any thing, it is more favorable to the appellant, and he has no cause for complaint. We decline to consider the other instructions given by the court, for the reason that they are not brought before the court in the manner prescribed by a rule of this court.

The 12th rule of this court, adopted September 28, 1872, directs that * * * "When the error alleged is to the charge of the court, the part of the charge referred to shall be quoted *totidem verbis* in the specifications." * *

This rule is substantially the same as the 38th rule of the supreme court of the United States. Justice SWAYNE, in the case of *Johnston v. Jones*, 1 Black, 220, says: "It is well settled that if a series of propositions be embodied in instructions, and the instructions are excepted to in a mass, if any one of the propositions be correct, the exception must be overruled."

In this case the entire charge is embraced in a single assignment, and, therefore, will not be considered by this court. See *Wescott v. Bock*, decided at the last term of this court, and *Hoyt v. Macon*, at this term.

The judgment of the district court is

Affirmed.

SUPERSEDEAS BOND. — An appeal to the United States supreme court was taken in this case, and appellant's bond being insufficient, he moved for leave to file a new *supersedeas* bond, which motion was denied on authority of *Jerome v. McCarter*, 21 Wall. 17. See *Martin v. Hazzard Powder Co.* 93 U. S. 202.

NEW TRIAL WILL NOT BE GRANTED where the evidence is conflicting and the verdict substantially right (*Barker v. Hawley*, 4 Colo. 327, 341); but where the verdict is manifestly wrong, a new trial will be allowed: *Barker v. Hawley*, 4 Colo. 327, 341.

MARLOW v. KUHLENBECK.

OFFICER'S RETURN *as to time of service.* A return to a summons in the following form sufficiently shows the date of service: "February 19, 1874. I have duly executed the within by reading the same to the within named J. U. M., as I am therein commanded."

STATUTE—*construction of.* Where an act approved February 13, 1874, took effect upon its passage, and provided for six terms of court "during each year, commencing on the first Monday of the months of January, March, June, July, September and December," authority was given for holding a term in the month of March in that year.

BILL OF EXCEPTIONS — *when necessary.* Whether damages awarded in the judgment are excessive will not be considered in this court, if the evidence at the trial is not set out in the record.

Error to Probate Court, Arapahoe County.

THE declaration was upon a promissory note, and the judgment was by default. Upon the return to the summons, which is given in the syllabus, it was contended that service of process was not had ten days before the term. The court convened on the first Monday of March, which was the second day of that month, and judgment was entered on the third day of that month. It was also contended that the act of 1874 (10 Sess. 218) gave no authority for holding a term at that time. Plaintiff in error also contended that the damages were excessive. There was no bill of exceptions in the record.

Mr. T. G. PUTNAM, for plaintiff in error.

Mr. J. W. BLACKBURN, for defendant in error.

PER CURIAM. If the date in the officer's return to the summons shall be regarded as that on which the return was made, the service must have been made before that day, and, therefore, ten days before the term. So, if that is the date of service, it was ten days prior to the term; and, in either case, plaintiff in error had timely notice. The act of 1874 (10th Sess. 218) took effect upon its passage, and as it provided for a term in March, the court had authority to sit at that time. The evidence given upon the assessment of damages is not preserved in the record, and we will assume that the judgment of the court is correct. *Cook v. Hughes*, 1 Col. 51. There is no merit in any of the assignments of error, and the judgment of the probate court will be affirmed, with costs.

Affirmed.

BECKWITH v. TALBOT.

AMENDMENT— *of bill of exceptions.* A mistake in recording testimony in a bill of exceptions, which is shown by the notes of the judge who sat at the trial, and by the affidavit of counsel who took minutes of the testimony, may be corrected by amendment at a subsequent term.

PRACTICE— *when objection to notice should be made.* Notice of motion to amend having been given, and counsel having appeared upon such notice, if no objection to its sufficiency was made in the district court, none will be heard in this court.

Appeal from District Court, Pueblo County.

THIS cause having been continued at the last term to enable appellee to move the district court for leave to amend the record of the bill of exceptions, Mr. Butler now, at this term, filed a transcript of such amendment made at the June term, A. D. 1874, of the district court. Thereupon, Mr. Phelps, of counsel for appellant, moved to strike the transcript of such amendment from the files upon the ground that the district court had no authority to allow such amendment at a term subsequent to that in which the cause was tried, there being nothing in that court by or from which the amendment could be made. The transcript of the amendment did not show an exception to the ruling of the district court in allowing the amendment, but counsel stipulated that such exception was taken, and that the action of the court was based upon certain affidavits found in the transcript. The court, however, ordered a *certiorari* to the district court to bring up the record of that exception, which being now returned into this court with that record.

PER CURIAM. We find, upon examining the record of the exception taken to the ruling of the court below, that the amendment was allowed upon minutes of the trial kept by the judge of that court, and, therefore, it is not true, as alleged by counsel, that there was no memorandum in writ-

ing upon which the amendment could be made. Mr. Stone, who took minutes of the testimony upon the trial below, testifies that by a slip of the pen he recorded the testimony as it is given in the original bill of exceptions, but that the witness did in fact testify as stated in the amendment, and his testimony was supported by the notes of the judge who sat at the trial. It is very clear that a mistake was made in preparing the bill of exceptions, and, as the evidence of the fact was still in existence, we think the court might well allow the amendment to be made. *Doane v. Glenn*, 1 Col. 454. As to the notice of the application for leave to amend, no objection to the sufficiency of it was made in the court below, and therefore none should be heard in this court.

The motion to strike from the files will be denied.

Motion denied.

BYERS v. MARTIN.

LIBEL — *words published of jurors.* Words published in a newspaper, which tend to impeach the honesty and integrity of jurors in their office, are libelous.

A publication which denounces a verdict as infamous, and declares that "we cannot express the contempt which should be felt for these twelve men who have thus not only offended public opinion, but have done injustice to their own oaths," is directed against the jurors individually.

It cannot be claimed that such publication affects only the verdict of the jury, or that it is directed against the jury as a body or class of men.

Error to District Court, Arapahoe County.

DEFENDANT IN ERROR was the publisher and proprietor of the *Rocky Mountain News*, a newspaper published in Denver. The publication of which, defendant in error complained, is sufficiently set out in the opinion.

In concluding the argument for plaintiff in error, counsel used the following language:

1. We have said that the publication was directed against the jury and its verdict.

2. A verdict is the unanimous decision of a *jury*.
3. A jury is a *body* of men.
4. A verdict of itself, having no rights and owing no duties, is incapable of being libeled.
5. An action on the case will not lie for libeling a *body* of men. Upon this last point the decisions seem to be uniform.

There are no special damages alleged in the *narr.*, and if the rule be true, as laid down in *Palmer v. Concord*, that the libel must tend to *private injury*, and that the plaintiff has sustained damage, then an allegation of special damage is necessary, and one that must be proved.

The words must be actionable *per se*, to avoid the necessity of such allegation; and, unless the language holds Mr. Martin, *individually*, up to public hatred, contempt or ridicule, according to the definition already referred to, the language cannot be actionable *per se*. Therefore, taking this declaration into consideration in the light of those rules which seem to apply to this particular case, and as disclosed by this declaration, rules which are settled, we have no hesitation in saying that there is not a case in all the books in which a private action for libel has been sustained under like circumstances, and that no authority from any respectable court can be produced to support it.

Mr. L. B. FRANCE and Mr. M. A. ROGERS, for plaintiff in error.

No appearance for defendant.

BRAZEE, J. This is an action of trespass on the case for libel.

The first count of the declaration alleges, in substance, that Charles R. Ward was indicted for robbery in the first district court of this Territory, and the plaintiff, Martin, and eleven others were impaneled and sworn as jurors to try the issues upon that indictment, and a true verdict to give according to the evidence; that, after hearing the evidence,

arguments of counsel and instructions of the court, Martin, as one of the jurors, rendered a verdict of not guilty; that defendant, Byers, well knew these facts, and published of and concerning the plaintiff, Martin, in a newspaper, the following: "We are not a little surprised at Judge Wells' lenient charge in the case. We are still more so at the infamous verdict of this jury. * * * We cannot express the contempt which should be felt for these twelve men, who have thus not only offended public opinion, but have done injustice to their own oaths."

The second count is upon the whole article containing the libelous words contained in the first count. The defendant below plead the general issue. There is no question made in regard to the publication of the alleged libelous words. The jury found a verdict of one cent damages, upon which judgment was entered, and the case comes before us upon writ of error. It is alleged in the assignment of errors that the court below erred:

First. In overruling a motion for nonsuit.

Second. In overruling a motion in arrest of judgment.

The defendant in error does not appear in this court.

It is not contended by the learned counsel for plaintiff in error that the words in question are not actionable. We think they are clearly so under the statute defining libel in this Territory, as well as upon general principles, as words spoken of one in the execution of his office. 1 Lord Raymond's Rep. 1369. The counsel for the plaintiff in error, however, maintains that the words complained of are not actionable, because, as he contends, they were not published of, and concerning the defendant in error, but of and concerning a body or class of men, and therefore do not constitute a cause of action against the defendant in error, nor any individual, and cites cases in which the rule he contends for has been recognized and applied.

The difficulty in applying this rule of law to this case is quite apparent. In the first place, the allegation is, that the words in question were published of, and concerning the plaintiff below. The publication complained of character-

izes the verdict of acquittal as "infamous," and "the contempt which should be felt for these twelve men" * * * "who have done injustice to their own oaths," as beyond expression, and holds up "the men," composing the jury, as individuals to a superlative contempt. As matter of fact, the jury have found that the libelous words were published of and concerning the plaintiff below. As matter of law, we think this case is within the principles applied by the court in 1 Pick. 132; 25 Wend. 186; 42 N. H. 137; 11 Johns. 54, and Hobart, 89.

The judgment of the court below is therefore

Affirmed.

CHAPIN v. GOODELL.

PRACTICE, REMITTITUR—*judgment for balance of verdict sustained.* Illegal evidence was admitted at the trial; the jury returned a verdict in the plaintiff's favor for \$1,400; the plaintiff remitted \$800 of the verdict; there was legal evidence adduced sufficient to show the plaintiff's right to recover the balance (\$600). *Held*, that, after the remittitur was entered, the verdict was correct.

A NEW TRIAL—*because of newly-discovered evidence* when the affidavit of the party applying therefor contradicts the record as to his knowledge or recent discovery of the evidence set up in his affidavit, will not be granted. In such case, sufficient as to the existence of the new evidence was shown on the trial to have put the party upon notice thereof.

Appeal from District Court, Arapahoe County.

ONE count of the declaration in this action was for the use and occupation of certain premises held by the appellant from the appellee. The evidence showed that the appellant owed the appellee, on account of the use, etc., of the premises, for one month, \$600. There was illegal evidence admitted to the jury showing a further indebtedness to the appellee. A verdict for \$1,400 for the appellee (plaintiff) was returned by the jury, October 23, 1874. The appellee (plaintiff) remitted all but \$600, and judgment was

entered for that sum. The appellant moved for a new trial, and in support of the motion, filed his own affidavit, setting up a release in the words and figures following, to-wit:

Know all men by these presents that I, Milton B. Goodell, to whom the following described property was leased heretofore by Barney L. Ford, that is to say, the building and premises known as the Inter-Ocean hotel, on the corner of Blake and Sixteenth streets, and two tenements fronting on Blake street, situated on the southerly side of said hotel, the said hotel and tenements being situated on lots number one, two and three (1, 2 and 3), in block forty-two (42) E. D., do hereby, for value received, bargain, sell, surrender and yield up from this day to Benjamin O. Cutter, assignee of said lease, and the lands and premises therein mentioned, and the term of years therein set forth, and I do covenant that said premises and lease are free and clear from all incumbrance done and suffered by me.

In witness whereof I have hereunto set my hand and seal this 19th day of August, A. D. 1874.

M. B. GOODELL. [SEAL];

together with a certificate of acknowledgment thereof, the affidavit stated that the deponent further says that he did not know of this said instrument before the trial of said cause, but that a knowledge of the existence of the same came to him after the trial of said cause, and there were other allegations in the affidavit which were not considered by the court.

On the cross-examination of Goodell, by the appellant's attorney, it appeared that the appellant had information as to the existence of said release.

There were questions and answers which arose upon the cross-examination of Cutler, as to that release, as follows, viz :

"Q. You recollect the time papers were prepared between you and Goodell? A. Yes; somewhere about the

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20th of August, I think. Q. There was no written understanding between you until then in regard to the Inter-Ocean hotel, as to his interest? A. Nothing." * * * "Q. You never got together to prepare papers until about the 20th? A. No. Q. You say when the receipt was given it was drawn for rent? A. It was; it made no difference how it was drawn, as long as I had settled it up, got the house out of his hands quietly. Q. You say a release was signed? A. I think there was. Q. Was not that release to take effect on the 1st of September? A. The release — you were doing my business." * * * "Q. Was not the release to be delivered on the 1st of September? A. I don't recollect." * * *

Mr. G. G. SYMES and Mr. W. S. DECKER, for appellant.

Mr. T. G. PUTNAM, for appellee.

STONE, J. This was an action of assumpsit, for use and occupation, and for money lent and advanced. There was a verdict for the appellee for \$1,400.

A motion was made for a new trial. Upon the suggestion of the court the appellee remitted \$800; thereupon the motion for a new trial was overruled, and judgment rendered against the appellant for \$800. The appellant claims that he is entitled to a new trial, on the ground that the court permitted evidence relating to an account between the parties as partners to go to the jury.

That all the testimony in relation to the partnership accounts existing between the parties, and that related to their copartnership business, was improperly admitted by the court, we have no doubt; and, generally, it is a ground for a new trial, if illegal testimony is admitted. Yet, if the illegal testimony did not prejudice the case, or the verdict can be justified without it, or did not affect the verdict, and justice appears to have been done, a new trial will not be granted. *Ware v. Gilman*, 49 Ill. 278; *City of Champaign v. Patterson*, 50 id. 61; *U. S. v. Martin*, 2 McLean, 261 and 347.

Motions for a new trial are addressed to the sound discretion of the court, and are granted or denied, not as a matter of strict right, but as the substantial justice of the case may appear to require, and are based upon the ground that there has not been a fair trial on the real merits; and, therefore, the litigation should be gone over again. *Edmondson v. Marshall*, 1 Term R. 4; *Johnson v. Harris*, 1 Cranch's C. C. 257; *Lloyd v. Scott*, 4 Cranch, 207; *Finch v. Green*, 16 Minn. 367. The jury in this case was instructed by the court to "reject from consideration all the testimony of disbursements made by plaintiff on account of the firm of Chapin & Goodell, whether made while they continued as partners or after the partnership ended." That these instructions destroyed the effect of much of the testimony erroneously admitted is evident from the fact that the verdict, as reduced, is for a matter entirely outside the partnership accounts. The record discloses that the judgment was rendered upon the count in the declaration for use and occupation; therefore, the illegal testimony did not prejudice the case; the verdict as it stands is correct, notwithstanding the testimony. *Horford v. Wilson*, 1 Tenn. 12; *Ware v. Gilman*, 49 Ill. 278.

The appellant claims that he is entitled to a new trial on the ground of newly-discovered evidence, viz.: The deed of surrender or release executed by Goodell to Cutler, on the 19th day of August, 1874.

In his affidavit it is stated that he had no knowledge of the existence of this deed until after the trial.

The record does not sustain the statement made in the affidavit; it shows that, upon the cross-examination of Mr. Cutler, a witness for the plaintiff, five different and distinct interrogatories were propounded to him respecting this same release deed. In view of the questions propounded, and the answers of the witness Cutler, referring to this release deed, we think sufficient evidence was disclosed upon the trial as to its existence to put the appellant upon notice; and the rule is, that the party applying for a new trial on the ground of newly-discovered evidence must make

his diligence apparent; and if it is left even doubtful that he knew of the evidence, or that he might, but for negligence, have known and produced it, a new trial will not be granted. 1 Graham & W. on N. T. 473.

It is insisted that the verdict was manifestly against the evidence in the case. There is evidence that the defendant occupied the hotel from about the middle of June to the 1st of September, 1874; that he was to pay \$800 a month; that the rent for June and July was paid. It does not follow, from the language of the witness, "that the rents for June and July were paid," that it was paid from the middle of June to the middle of August. That it was not the intention of the witness to be so understood is manifest from what he afterward says, "that no rent was paid for the month of August."

The verdict should be sustained if the evidence, by any fair construction, will warrant the finding.

We think the verdict is authorized by the evidence, and we see no error in the instructions given by the court to the jury. In our view of the case, it is unnecessary to consider the motion to strike from the files the affidavits of Goodell and Sargent, filed in opposition to the motion for a new trial.

The judgment of the court below is

Affirmed.

BOYLSTON v. CHASE.

ASSUMPSIT — *for money paid at defendant's request.* For money paid by plaintiff at defendant's request, assumpsit may be maintained, and the circumstance that the defendant is liable to plaintiff for the same money upon the covenants in a deed by him executed to plaintiff does not change the rule.

Upon an express promise by one who was previously liable for the same money.

Where lands are conveyed with a covenant that the same are free from taxes, upon payment of taxes then lawfully assessed against it, and an express promise by the grantor to refund the same, assumpsit lies, notwithstanding the grantor's liability upon the covenant in his deed.

Error to Probate Court, Arapahoe County.

SUIT was brought before a justice of the peace, and thence appealed to the probate court. At the trial in the probate court, defendant admitted that on the 1st day of December, 1873, he conveyed to plaintiff certain lots in the city of Denver, and covenanted in the deed executed to plaintiff, that he was seized in fee simple of the said lots, that the same were free from taxes, and that he would warrant and defend the title to the same; that certain taxes amounting to \$36.95 assessed against the property in the year 1873, existed as an incumbrance upon the lots at the date of the deed, and that the same were paid by plaintiff's agent. Plaintiff then offered one Chas. B. Green as a witness, who testified that he had conversations with defendant in regard to paying the taxes on the lots for the year 1873, both before and after the payment of said taxes. That before payment, defendant requested witness, he being, at the time, in charge of the lots for plaintiff, to pay the taxes, and said that he would pay them back if the witness would do so. That, after the taxes were paid, defendant said he would pay back the amount, and that this promise was reiterated upon several occasions. Upon this evidence the plaintiff was nonsuited.

In support of the judgment of the probate court, it was contended that plaintiff in error must rely upon the covenants in her deed, and that the promise to refund the money was without consideration.

Mr. W. S. DECKER, for plaintiff in error.

Mr. H. R. HUNT, for defendant in error.

STONE, J. The record in this case raises but a single question: Was the judgment of nonsuit properly entered?

The evidence makes out a case of money paid by the plaintiff upon the request of the defendant, and discloses a

good consideration. A benefit to the promisor, or advantage to the promisee, constitutes a good consideration. This is a case of a new, simple contract, upon a new consideration, to pay a sum of money, admitted to be due for taxes upon certain lots, and that the defendant had sold to the plaintiff under a covenant that the same were free from taxes. The defendant was liable to pay the taxes; he promised the plaintiff he would pay them; afterward requested the plaintiff to pay them, and after the plaintiff had paid them at his request, he promised to pay the sum paid back to the plaintiff.

We think the plaintiff entitled to recover in the form of action adopted in this case. 1 Ch. Pl. 104, 119; 2 Chit. on Cont., 11th Am ed., 881, 882; *Scott v. Hawsmen*, 2 McLean, 185.

The judgment of the probate court is reversed, and cause remanded for a new trial.

Reversed.

MARTIN et al. v. SKEHAN.

PROMISSORY NOTE—*of the right of a surety to compel proceedings by the holder against a principal maker.* The holder of a promissory note being requested by a surety to proceed against the principal maker, and failing to do so, if the principal maker afterward becomes insolvent the surety is exonerated. *Pain v. Packard*, 18 Johns. 174.

PRACTICE—*of the affidavit of merits under the act of 1874.* The act of 1874 (10 Sess. 61) which requires a defendant to file an affidavit of merits before pleading is imperative, and if, in a case within the statute, pleas are filed without such affidavit, they may be disregarded.

The affidavit cannot be sworn before the attorney of the defendant. *Anderson v. Sloan*, 1 Col. 83. An affidavit in support of a motion to set aside a judgment previously entered, although the defense be set forth in it, is not an affidavit of merits; such affidavit cannot be incorporated in another paper filed for another purpose. It must be made distinctly as an affidavit of merits, and should be so indorsed.

Of setting aside a judgment and admitting defendant to plead. A judgment *nū dicit* may be set aside at the term in which it was rendered, and the defendant may be allowed to plead by the first day of the next term.

Under the circumstances exhibited in the record, although the defendant had not put in a proper affidavit of merits, the cause was remanded, with directions to allow the defendant to plead upon filing such affidavit.

Error to Probate Court, Arapahoe County.

THE action was founded upon a promissory note. The pleas referred to in the opinion were first filed June 9, 1874. On the 15th day of that month they were stricken from the files on motion of plaintiffs; and, on motion of defendant, leave was granted him to file an affidavit of merits, and to refile the same pleas. Defendant then put in an affidavit of merits, which appeared to have been sworn before A. Q. MacGregor, a notary public, on the 1st day of June, 1874, and refiled the same pleas, together with an additional plea. Mr. MacGregor appeared of record as an attorney of defendant. June 20, 1874, the pleas were, on plaintiff's motion, stricken from the files, and judgment *nil dicit* was entered. The damages having been assessed, final judgment was entered June 24, 1874. On the 26th of the same month, and at the same term, defendant again appeared, and moved the court to vacate the judgment which had been entered in the cause and allow him to plead therein, which was allowed upon the payment of costs. In support of this motion the defendant made affidavit setting up his defense substantially as in the pleas. On the 29th day of June, 1874, being of the same term, the costs having been paid, the judgment was vacated and time was given the defendant to plead until the first day of the next term, which convened the following week. Plaintiffs excepted to this, and also the previous orders allowing the defendant to plead. The pleas were filed again July 2, 1874, and on the 6th of that month plaintiffs were ordered to reply to them. Plaintiffs not having replied, judgment was entered against them on the 7th of the same month. When the pleas were last filed no affidavit of merits was put in. It was contended, in this court, that the affidavit in support of motion to vacate judgment should be regarded as an affidavit of merits. The pleas are sufficiently stated in the opinion.

Mr. L. B. FRANCE, for plaintiffs in error.

Mr. W. S. DECKER, for defendant in error.

BRAZEE, J. The rulings excepted to in the court below, assigned for error, as stated in the abstract, are as follows: The probate court erred in overruling the motion of plaintiff in error for judgment *nihil dicit*, filed July 12, 1874. Also, in permitting the defendant, Patrick A. Skehan, to refile said pleas after the motion to strike out the same had been sustained. Also, in vacating the judgment rendered in favor of the plaintiffs, and in permitting the defendant, Patrick A. Skehan, to plead in said action, and in continuing said cause for that purpose. Also, in ordering the plaintiff to reply to said pleas of said Patrick A. Skehan. Also, in rendering the judgment, as appears of record, in favor of the said Patrick A. Skehan, and against the said plaintiff, and also, for other errors in the record and proceedings.

The action is in assumpsit, brought upon a joint and several promissory note made by the defendant and Pierce Skehan, Pierce not having been served with process. The defendant plead,

First. The general issue.

Second. That he was a surety for Pierce Skehan, the principal debtor, as the plaintiff well knew, and shortly after the note in suit matured, and on the 10th day of July, 1873, he notified and requested the plaintiffs to forthwith proceed and collect the note of Pierce Skehan, but the plaintiff neglected and refused to do so, and Pierce Skehan became insolvent in the following January, and unable to pay his debts; that the plaintiffs might, by diligence, have collected their demand of Pierce Skehan at any time before January, 1874, who, up to that time, was in good circumstances, able to pay said indebtedness, and by the plaintiffs' laches, the defendant lost the indemnity which he would have had, if the plaintiffs had been diligent in the premises.

Third plea substantially like the second, with an additional averment that upon the alleged notice and request aforesaid being made, the plaintiffs agreed to look to Pierce Skehan for the money due on the note, and exonerated and discharged the defendant from the payment thereof.

The first question we consider is, whether the defense set up by the special pleas is, in law, good. The authorities upon this question are not uniform. The case of *Briggs v. Bank, etc.*, 10 Peters, 266, 267, and 14 id. 201, cited by the counsel for plaintiffs to show the defense untenable, was an action brought upon an obligation under seal, which recited that the defendant was a principal, and the court held that he was estopped by this recital in his deed from contradicting it, and distinguished that case from *Paine v. Packard*, hereinafter referred to. The question in the case of *Taylor v. Beach*, 13 Ill., arose in action upon a contract to deliver broom brush, and we do not think it in point. The head-note in the case *Ex parte Babcock*, 3 Story's C. C., tends to sustain plaintiffs' position, but the case, as appears in the opinion, presented a very different state of facts from the facts alleged in the special pleas at bar. In that case, Kendall was the holder of a bill of exchange, drawn by Leonard upon Babcock, and indorsed by Leonard to Kendall. Babcock was an accommodation acceptor, but that fact was not known to Kendall at the time of his taking the bill, while in the case at bar, the pleas allege that the plaintiffs knew, at the time the note was made, the defendant was an accommodation maker. The only other case upon this point cited by plaintiffs' counsel is, *Executors of Dennis v. Pedee*, 2 McLean, which holds to the doctrine contended for here, in a court of law, but also holds that, under the circumstances of that case, similar to this, the surety would be entitled to relief in equity.

On the other hand, there are authorities which sustain the doctrine maintained by the defendants' counsel respecting the question under consideration, which authoritatively decide that facts like those set up in the pleas at bar constitute a defense at law. See *People v. Jansen*, 7 Johns., and

Paine v. Packard, 13 id. The last case is treated as an authority in the case in 10 Peters, referred to, for the court do not question its authority, but distinguish it from *Briggs v. Bank, etc.*

The above cases of *People v. Jansen* and *Paine v. Packard* have been cited to this day as authority in the State of New York, which perhaps is more largely interested in commercial paper than any other State in the Union. The same doctrine prevails in Massachusetts. 21 Pick. 195.

Accordingly, we hold the plea in question set forth a defense at law.

Having arrived at this conclusion, we hold that the rulings of the court below respecting the orders assigned for error were not improvidently granted in the exercise of a sound legal discretion, provided an affidavit of merits was filed at the proper time, because those orders in letting in a meritorious defense, disclosed by the pleas, were in furtherance of substantial justice, and not in law erroneous. It is true, that, in setting aside the plaintiffs' judgment and permitting the pleas to be filed the first day of the next term, the discretion of the court was extended to its extreme limit, yet the delay occasioned thereby was very slight; it is not clear that the plaintiffs lost a trial, and probably did not lose a trial thereby.

Error cannot be predicated upon the orders referred to, and the subsequent granting judgment to the defendant upon his pleas, provided a proper affidavit of merits was filed, before the pleas were filed upon which the judgment was rendered. The statute of this Territory (Laws of 1874, p. 61) provides that a defendant, in such a case as this, "before he shall be permitted to plead," shall file an affidavit of merits. This is not a rule of practice, but an imperative law which must be complied with, and admits of no discretion being exercised in respect to pleas before an affidavit of merits is filed. The affidavit of merits, so called, filed in this case, sworn to before one of the defendant's attorneys in this cause, we think, under the decision of this court in *Anderson v. Sloan*,

1 Col. 33, which we regard as salutary, cannot be recognized by this court, and must be rejected.

The affidavit made by the defendant, upon which his motion to set aside the plaintiffs' judgment was founded, was made and filed for that purpose, and cannot be regarded as an affidavit of merits, and thus be made to serve a double purpose. It is a general rule that an affidavit made and used for the purpose of one motion cannot be made to serve as the foundation for another. An affidavit of merits in the technical sense is a document on the files which has a peculiar office to perform—to advise the court that the defendant verifying it has, as he verily believes, in good faith, a defense upon the facts, and not to disclose what that defense is; to prevent a default and not to set a default aside; to entitle a party to file as of right, his plea, and not to invoke the grace of the court for leave; it should be indorsed with the title of the cause, and as an "affidavit of merits," so that it can readily be discovered on the files; it should never be ambushed in some other paper, filed and indorsed for another purpose to appear upon occasion to the surprise of court and counsel. The affidavit upon which the judgment was set aside, while it, if true, discloses a meritorious defense, was not filed as an affidavit of merits in the cause, and the office of an affidavit of merits is not claimed for it by the defendant's counsel. There being, then, no affidavit of merits filed before plea in this cause, it follows that under the statute the defendant's pleas were not rightfully upon the files of the court below at the time the judgment was entered upon them; the judgment is, therefore, erroneous and must be vacated. But, inasmuch as the pleas disclose a defense at law, the court will not let the defendant suffer by reason of mistakes his attorneys may have made in practice; he should have leave in the probate court upon this cause being remanded to it, to file an affidavit of merits and thereupon plead over.

The judgment of the court below is reversed and remanded to the probate court of Arapahoe county for the further proceedings herein expressed.

Reversed.

AFFIDAVIT OF MERITS MUST PRECEDE PLEAS, and cannot be substituted for them; *Central City v. Willcozen*, 3 Colo. 509.

TIERNEY v. WHITING et al.

WARRANTY — breach of covenant in a deed — act of 1861. Under the act of 1861 (1 Sess. 65), a grantee in a deed, who has obtained possession of the premises conveyed, cannot maintain an action upon a covenant of warranty in such deed until legal proceedings have been commenced against him to obtain possession of such premises.

That act does not apply when possession is not obtained under the deed, nor when the holder of the adverse title has obtained possession of the premises since the deed was made.

What will amount to eviction. Where the grantee holds possession of the premises conveyed, he cannot voluntarily yield to paramount title, but if he is actually evicted, although under circumstances which would enable him to regain possession, he may have his action upon the covenant of warranty.

Where a tenant to the grantee surrendered the premises to the holder of adverse title, who retained possession, the eviction was complete, and the grantee may maintain an action against his grantor upon a covenant of warranty in his deed.

Whether plaintiff must show title paramount in another. In an action upon a covenant of warranty in a deed, the warrantor is not bound to defend the title by him conveyed against a mere trespasser who has no title.

And the burden of proof is upon plaintiff to show that the party by whom he was evicted had the better title.

When a widow, claiming in right of her deceased husband, may be said to have title.

Where plaintiff was evicted by the widow of a former owner, and defendant purchased at a sale made by an administrator of the estate of such former owner, and it did not appear whether the widow claimed in fee or in right of dower, or that dower had been assigned to her, or that she had a right to occupy the premises until dower should be assigned, the evidence was not sufficient to establish the widow's title.

If the widow claimed in fee under the act to protect the rights of married women (1 Sess. 153), her right was extinguished by the administrator's sale and conveyance.

If the widow claimed a dower interest under the act concerning dower (1 Sess. 863), she had no right of entry until dower should be assigned to her.

DAMAGES — measure of — where eviction is under claim of dower. In an action upon a covenant of warranty upon proof of eviction by a widow, under claim of dower, the measure of damages is the value of the widow's life interest in the estate, estimated by the amount of the purchase-money paid by the covenantee.

Error to District Court, Gilpin County.

WM. A. WHITING and Joel P. Whitney alleged in their declaration that John Tierney, on the 22d day of April, 1866, executed to them his certain deed by which he conveyed to them a building lot in Central City, and covenanted that he would warrant and forever defend the title to the same to the said Whiting and Whitney, and their heirs and assigns forever, against the claims of all persons except the government of the United States; that they took possession of the lot conveyed, and were afterward evicted by Lucinda M. Dougherty, widow of Michael Dougherty, lawfully claiming the said premises by an older and better title not derived from the plaintiffs or the government of the United States. There were several counts in the declaration which were not materially different.

The defendant pleaded *non est factum*, and that plaintiffs were never lawfully evicted from the premises described, and issue was joined upon these pleas. Other pleas were, upon demurrer, regarded as insufficient, but no question was presented in this court respecting them.

At the trial it appeared that one Michael Dougherty was the owner of the premises in dispute, and that he died July 4, 1865. Plaintiffs put in evidence a deed from Frank Hall, as administrator of the estate of Dougherty, to Tierney, for the same premises, in which certain orders of the probate court directing the sale of the real property belonging to Dougherty's estate were recited, and from which it appeared that the property was sold for the purpose of satisfying debts due from that estate. The deed from Tierney and his wife to plaintiffs was dated April 22, 1866, and contained a covenant of warranty as alleged in the declaration. Other material facts as to the manner in which plaintiffs acquired possession, and the entry of Lucinda Dougherty, as the widow of the said Michael Dougherty, are stated in the opinion.

Upon the question of damages the court charged that the

plaintiffs were entitled to the amount paid by them to Tierney, for the premises, with interest thereon from the date of the deed to the time of trial, at 10 per cent per annum.

The jury returned a verdict for \$1,433.06, and judgment was given for that amount. The defendant sued out this writ of error against Whitney, and the heirs of Whiting.

Mr. CLINTON REED, for plaintiff in error.

Mr. W. S. ROCKWELL, for defendants in error.

HALLETT, C. J. This action was upon a covenant of warranty in a deed made by plaintiff in error, to Wm. A. Whiting and Joel P. Whitney, plaintiffs, in the court below. At the time the deed was made, the premises were in possession of one Goodfellow, a tenant, who subsequently attorned to the grantees in the deed. This tenant admitted Mrs. Dougherty to the possession of the premises, and she held them at the time this suit was brought, as the widow of Michael J. Dougherty from whom Tierney also derived title under a sale made by an administrator. Whether the entry thus made by permission of the tenant, Goodfellow, may be regarded as an eviction under the statute of 1861 (1st Sess. 65), which will support the action of covenant broken, is the first question to be determined. That section provides that no right of action shall exist upon a covenant of warranty against a warrantor until party menacing the possession of the grantee, his heirs, personal representatives or assigns shall have commenced legal proceedings to obtain possession of the premises in question, and the grantor, after notice, shall have refused to defend, at his own cost, the premises in such action. This is opposed to the general rule recognized by the courts, which allows the covenantee to surrender the premises to the holder of the paramount title before suit brought. *Rawle on Cov.* 246; *Kelly v. Platte*, 33 N. J. Law, 328. It will be observed, however, that the act does not apply, when possession is not obtained under the deed, for in such case the adverse possession of

another is regarded as an eviction at the date of the grant. *Noonan v. Lee*, 2 Black. 500. In the Revised Statutes of 1868 (R. S. 108), this section was restricted in its operation to cases in which possession of the premises conveyed, is obtained by the warrantee, a change of phraseology which is without effect upon the meaning of the section as originally adopted, for if the grantee has not the possession of the premises conveyed, he cannot be menaced in the possession, nor can legal proceedings be instituted against him in respect thereto.

The case is not different when the holder of the adverse title has, by any means, obtained possession of the premises, although subsequently to the date of the deed on which the action is brought. So long as the premises are held adversely, and the covenantee has not possession, no action can be brought against him, and, therefore, he is not within the terms of the statute. Where the grantee holds possession of the premises conveyed, he cannot voluntarily yield to the paramount title, but if he is actually evicted, although under circumstances which would enable him to regain possession, no reason is perceived for denying his right of action upon the covenant of warranty. To hold that in such case, he must resort to his action, and having recovered possession, wait until suit shall be brought against him upon the paramount title, is not demanded by the statute, or sanctioned by reason. Probably the plaintiffs below might have recovered the possession of the premises from Mrs. Dougherty in an action of unlawful detainer, for as she obtained possession from Goodfellow, she was estopped to deny the title by which he held. 2 Smith's L. C. 694-778, *Dutchess of Kingston's Case*. Nevertheless, the plaintiffs below, having lost the possession of the premises, without fault or negligence, may be regarded as actually evicted therefrom, and therefore not within the terms of the statute. It is not, however, enough that they were ejected from the premises if Mrs. Dougherty's title is not superior to theirs, for the warrantor is not bound to defend against all trespassers, but such only as are protected by title paramount.

In argument it is assumed that she claimed a dower interest in the premises, or that she had a right to occupy them until her dower should be assigned under section 23 of the act of 1861, concerning dower (1st Sess. 367); but of this we cannot be quite certain, for by another act (1st Sess. 153) she was entitled to the whole of her deceased husband's estate if there were no children of the marriage and the husband died intestate; or, if there were children, she was entitled to one-half his estate. Whether she had elected to take what would come to her under this statute after paying the debts of the estate, or to have dower under the other act (1 Sess. 363), we are not informed by the record, nor is it necessary to determine as the controversy now stands. Plaintiffs below assumed the burden of showing that Mrs. Dougherty's title was better than their own (Rawle on Covenants, 248), and as real estate might be sold for the purpose of paying debts of the decedent (1 Sess. 427; 2d Sess. 97), upon the showing here made we will presume that the administrator's proceedings were regular, and regard his deed as sufficient to vest title to the property in plaintiff in error. This, upon the assumption that the widow claimed under the act relating to married women (1 Sess. 153), would extinguish her right, but if counsel are correct in supposing that she had a dower interest, the case is somewhat different. It is very doubtful whether a possession lawfully assumed in virtue of the right of temporary occupancy given to the widow (1 Sess. 367) can affect the title to the estate so as to enable the party ousted to call upon his warrantor to defend it; but, however this may be, it was not shown upon the trial that the house and lot in controversy was the usual dwelling place of Dougherty next before his death. Dougherty was not living in the house at the time of his death, nor had he lived there at any time within nine months previous to his death, and his widow did not claim the possession until more than nine months after his death, a period long enough to obtain an assignment of dower if that had been desired. Upon these facts it is manifest that the claim to occupy temporarily, until dower should be

assigned, is an after-thought, invented to justify and support the unlawful possession of the widow.

As to the claim of dower, conceding that it existed, no right of entry could be based thereon until assignment made. 1 Washb. Real Prop. 255. So that, in any view we may take of the evidence, it is impossible to say that Mrs. Dougherty had title to the premises conveyed in the deed paramount to that of the plaintiffs below, or indeed any title whatever; and, of course, the judgment must for that reason be reversed.

Even if dower had been assigned in the premises, and the plaintiffs below had established the widow's right, the correct rule as to the measure of damages was not applied. In such case it is not the entire consideration mentioned in the deed, but only the value of the widow's life interest in the estate, estimated by the purchase-money, that can be properly allowed. *Terry v. Drabenstadt*, 68 Penn. St. 400.

The judgment of the district court is reversed with costs, and the cause is remanded for further proceedings.

Reversed.

HARRISON v. SMITH.

STATUTE—*conferring jurisdiction by appeal—effect of repeal.* The act of 1873 (9 Sess. 105), so far as it applies to the probate court of Arapahoe county, was repealed by the act of 1874 (10 Sess. 217).

And upon the passage of the act of 1874, an appeal pending in the district court of Arapahoe county, from a judgment of the probate court of the same county, was properly dismissed.

Error to District Court, Arapahoe County.

THE facts are stated in the opinion.

MR. W. S. DECKER and MR. T. GEORGE, for plaintiff in error.

MR. ORRIS BLAKE, for defendant in error.

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STONE, J. On the 27th day of January, 1874, judgment was rendered in the probate court of Arapahoe county, against the plaintiff in error for costs, and on the same day the plaintiff in error prayed an appeal to the district court of Arapahoe county, which was allowed upon his filing an appeal bond. On the 30th day of January, 1874, he filed his appeal bond, which was approved.

The transcript of the proceeding in said cause in the probate court was filed in the district court of Arapahoe county, and the cause was entered upon the docket of that court.

The court, on motion of counsel for appellee, dismissed the appeal.

The dismissal of the appeal is the error complained of in this case.

By the second section of an act of the territorial legislature, entitled "An act concerning probate courts," approved January 31, 1872, an appeal was allowed from the final judgment or decision of any probate court to the district court of the county. Acts 1872, p. 105.

By a subsequent act of the legislature, approved February 13, 1874, entitled "An act concerning the probate court of Arapahoe county," the act of January 31, 1872, was repealed so far as the same might apply to the probate court of Arapahoe county. It is conceded that the act of February 13, 1874, repealed the act of January 31, 1872, and took effect from and after its passage, and that the repealing act contained no saving clause as to causes pending.

The question to be considered is the effect of this repeal of the act of January 31, 1872, as to causes pending. The right of an appeal from the probate court of Arapahoe county to the district court of Arapahoe county, was a statutory right.

It was by virtue of the act of the territorial legislature of January 31, 1872, that the district court acquired jurisdiction of appeal causes from the probate court. Without jurisdiction, the court had no power to proceed in any case. The repeal of a statute conferring jurisdiction takes away all

right to proceed under the repealed statute, even in suits pending at the time of the repeal, unless they are saved by a clause in the repealing statute. *Illinois & Michigan Canal v. City of Chicago*, 14 Ill. 334; *Butler v. Palmer*, 1 Hill. 324; *Langdon v. Applegate*, 5 Ind. 327; *Rex v. Justices of the Peace for the city of London*, 3 Burr. 1456.

The rule, as we think, applicable to this case is very forcibly expressed by Lord Chief-Justice TINDAL, in the case of *Kee v. Goodwin*, 4 Moore & P. 341. He said: "I take the effect of a repealing statute to be to obliterate the statute repealed as completely from the records of parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and concluded while it was an existing law."

Dwarris expresses the result of the cases in this way: "When an act of parliament is repealed, it must be considered, except as to those transactions past and closed, as if it never existed." Dwarris on Statutes, 676. Pending judicial proceedings based upon a statute fall on its repeal. *Remington v. Smith*, 1 Col. 53. "Jurisdiction is power to declare the law, and where it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case, and this is no less clear upon authority than upon principle." Opinion of Chief-Justice CHASE, *Ex parte McArdle*, 7 Wall. 514. It is well settled by authority that "when a statute gives a right in its nature not vested, but remaining executory, if it does not become executed before a repeal of the law, it falls with it, and cannot, therefore, be enforced." *Bailey & Gilman v. Mason*, 4 Minn. 551; Sedgwick on Stat. and Const. Law, 108.

The right of appeal is a right which relates to the remedy, and what relates to the remedy is at the present day understood to be at the mercy of legislation. The legislation may be hasty and ill-advised, as in this case perhaps it was, in omitting in the repealing act a saving clause as to pending cases, but with that we have no concern. The act of February 13, 1874, repealed the act of January 31, 1872. The

act of 1872 was an act conferring jurisdiction. It being repealed takes away all right to proceed under it, even in suits pending at the time.

The motion to dismiss the appeal was properly granted, and the judgment of the district court is *Affirmed.*

REPEAL OF STATUTE CONFERRING JURISDICTION takes away all right to proceed under the repealed statute, even in pending actions, unless rights are expressly saved: *Smith v. District Court*, 4 Colo. 238.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PUEBLO v. CENTRAL COLORADO IMPROVEMENT COMPANY.

MEXICAN LAND GRANT — WHEN TAXABLE. When the confirmees of a Mexican land grant accept the provisions of an act of congress confirming the grant, the title to the confirmed grant, if void prior to the passage of such act of confirmation, becomes valid by virtue of the confirmatory statute.

The effect of the act of confirmation is to establish the title to the eleven leagues therein mentioned from the date of the grant by the Mexican government, and the location of the confirmed eleven leagues having been made, the confirmees hold, not from the United States, but from the prior owner of the soil.

The confirmed land having been identified, pursuant to the provisions of the confirmatory statute, becomes subject to taxation, and cannot in any proper sense be said ever to have been public land.

Appeal from District Court, Pueblo County.

THIS was an action in assumpsit, against the appellant, to recover back \$2,628.86 paid under protest by the appellees, on the 1st of July, 1874, as taxes for the year 1873. The cause was submitted upon an agreed statement of facts substantially as follows:

On the 1st day of December, A. D. 1843, Governor Manuel Armijo, being then civil and military governor of Mexico, granted to one Gervacio Nolan the following described and bounded tract of land, to-wit: Beginning at a point one and a half leagues below the mouth of the river St. Charles, on the Arkansas, at a monument, No. 1, on the south bank of said river; thence, following the said south bank of the said river Arkansas, upward, to a point five leagues above the junction of the St. Charles with the Arkansas river,

where is placed the second monument; thence, running half-way up the brow of the mountain, where is placed the third monument; thence, following the same brow of the mountain, to a point opposite the first monument, where is placed the fourth monument; thence, to the place of beginning; containing, by estimate, about five hundred thousand acres of land. Which said tract of land, at the time the same was granted, was lying and situate in the province of New Mexico, but is now situate, lying and being in the county of Pueblo and Territory of Colorado.

On, and prior to, the 1st day of May, 1873, the Central Colorado Improvement Company—the appellee—was seized and possessed of all the right, title and interest (if any) in and to the tract of land above described, which were by the making of the grant as aforesaid vested in Gervacio Nolan, the original grantee.

On the 1st day of July, 1870, the Congress of the United States, by an act entitled “An act to confirm the title of the heirs of Gervacio Nolan, deceased, to certain lands in the Territory of Colorado,” approved July 1, 1870, upon express conditions confirmed, to a limited extent, the said grant, to wit: To the extent of eleven square leagues, being 48,825 acres. Under and pursuant to the provisions of said act of congress, the plaintiff—appellee—after receiving notice of the completion of the survey of the lands within the exterior boundaries of said grant, did, as required by said act, select and locate in a compact form, and did furnish the surveyor-general of Colorado Territory, with a plat and description, of said selection and location, on the 27th day of April, 1872, subject to the revision of the commissioner of the general land office, and the secretary of the interior.

On the 22d day of May, 1872, Hon. Willis Drummond, then commissioner of the general land office, caused the register and receiver of the land office at Pueblo to give notice to the pre-emption and homestead settlers on the lands within the selected limits of the Nolan grant, to come forward and prove their right to said tracts, within three months from the date of the publication thereof.

Pursuant to said notice, pre-emption and homestead claimants, located within said preliminary selection of eleven leagues, did offer to prove, and did prove, their right to enter, and did enter, 6,565.42 acres, at the land office at Pueblo, in said territory; that said entries, made as aforesaid under the pre-emption and homestead acts, and pursuant to said act of congress of July 1, 1870, were subsequently approved by said commissioner of the general land office, and by the secretary of the interior.

On the 3d day of December, 1873, the register and receiver of the land office at Pueblo, were officially informed by said commissioner, that it appeared by the records of his office, there had been awarded to pre-emptors and homestead settlers, within said eleven league selection, lands amounting in the aggregate to 6,565 42-100 acres, and that, for that amount, the grant claimants were entitled to indemnity, as provided in the second section of said act of July 1, 1870.

On the 27th of April, 1872, a diagram and descriptive list was filed, of said eleven league selection, but at that time it was impossible to state, and set forth, the exact area of lots and fractional subdivisions bordering on the south side of the Arkansas river, within the said eleven league selection, for the reason that no official survey of the south meanders of the Arkansas river, within the limits of said grant, had at that time been made.

After the official survey of said meanders had been made, and the area of the lots and fractional subdivisions within said eleven league selection were officially ascertained, and designated on the proper township plats, by the surveyor-general, the plaintiff below prepared and filed with the surveyor-general a descriptive list of all the lands within said eleven league selection, showing the accurate areas of said lots and fractional subdivisions, and embracing the same lands and no other, than the identical tract embraced by the diagram filed as aforesaid on the 27th of April, 1872. Said descriptive list is here set forth.

By which said descriptive list, it appeared to the com-

missioner of the general land office, that by reason of the surveyor-general's failure to survey the meanders of the south bank of the Arkansas river, and to designate the area of lots and fractional subdivisions lying within said grant, the plaintiff below had made a preliminary selection and location of 49,741 48-100 acres, being an excess of 916 acres, over and above said eleven square leagues; therefore, on the 9th day of March, 1874, at the request of said commissioner, the plaintiff below *modified* its said selection, and, on that day, *withdrew* from said eleven league selection, 920 acres, and leaving to the plaintiff below, 48,821 43-100 acres of the said eleven leagues previously selected.

The withdrawal of the said 920 acres by the appellee was approved by the commissioner of the general land office on the 9th of March, 1874.

Said 6,565 42-100 acres allowed to pre-emption and homestead claimants, who had settled upon lands within said eleven league selection of appellee, and within said Nolan grant, prior to July 1, 1870, are then set forth in a descriptive list.

On the 30th of January, 1874, the appellee selected and located upon public lands not mineral, according to the lines of public survey, not exceeding 160 acres in any one tract, and all within the exterior lines of said "Nolan grant," a quantity of land equal to said 6,565 42-100 acres allowed to said pre-emption and homestead claimants. That a descriptive list of said "indemnity" selection (last aforesaid) by appellee, was filed with the surveyor-general of Colorado, and with the commissioner of the general land office. That on the 31st day of March, 1874, the commissioner of the general land office of the United States instructed the surveyor-general of Colorado to prepare such a plat of the selection made by the claimants of the "Nolan grant," as is directed to be made by the fourth section of said act of July 1, 1870.

That on the 31st day of March, 1874, and at divers other times, appellee applied to the surveyor-general of Colorado, for an estimate of the costs of so much of the survey of the

"Nolan grant," as inured, or might inure to the benefit of appellee; that appellee desired, and offered, to pay the amount of such estimate; that said surveyor-general informed appellee, that until all selections, including both the preliminary, eleven square league selection, and the "indemnity" selections located in lieu of the aggregate area of said land awarded to homestead and pre-emption settlers, were formally accepted by said commissioner of the general land office, he, said surveyor-general, could make no estimate of the costs of such survey; that government price for surveying lands where meandering lines of a river had to be run, was greater than for survey of complete subdivisions, where no meanderings are required, and that the government cost of survey could not be determined until after the approval and acceptance of the final selections made by the confirmees of said grant. That by reason of said surveyor-general's failure to furnish said estimate of survey, appellee did not and could not pay the costs of so much of said surveys of said grant as inured or might inure to the heirs of Nolan, deceased, prior to the 1st of May, 1874. That appellee has been legal representative of the heirs of said Gervacio Nolan ever since May 1, 1873, and is sole claimant under said act. Nor did said surveyor-general furnish to appellee, properly approved plats, as evidence of title, required by the fourth section of said act of July 1, 1870, prior to the 1st of May, 1874, or since; nor thence hitherto have the costs of so much of the surveys of said grant as inured or might inure to the benefit of appellee, been paid.

On the 13th of September, 1873, the board of county commissioners of Pueblo county met at the court-house in the city of Pueblo, and, by an order entered of record, fixed the rate of taxation for the year 1873, to wit: "It is ordered that the following rate of taxes be, and are hereby, levied upon all the taxable property in said Pueblo county, for the following purposes, to wit: For county purposes, 7 mills on the dollar; for school purposes, 2 mills on the dollar; for road purposes, 1½ mills on the dollar; for Ter-

ritorial purposes, 1½ mills on the dollar ; poll tax, \$2 per poll."

Under and by virtue of said order of the board of commissioners, the rate of taxation therein mentioned was levied upon all the lands embraced within said preliminary eleven league selection—particularly described by subdivisions and lots hereinbefore—save and except said 6,565 42-100 acres awarded to pre-emption and homestead settlers, and inclusive of said 920 acres withdrawn by the appellee from said eleven league selection.

The total assessed value of the lands of the appellee, upon which said taxes were levied for the year 1873, was \$208,539.

On the 1st day of July, 1874, the appellee paid to N. W. Duke, treasurer of Pueblo county, on account of said taxes, \$2,628.86, as follows, to wit: County taxes, \$1,459.75 ; school taxes, \$417.07 ; Territorial taxes, \$312.80 ; special road taxes, \$148.15 ; interest, claimed to have accrued from January 1, 1874, to July 1, 1874, \$291.09.

At the time of making said payment, said treasurer, as such, gave to the appellee his receipt for that amount, in full, for county, school, territorial, and road tax, on the lands therein described, being the identical lands embraced in said preliminary eleven league selection, exclusive of said land awarded to homestead and pre-emption settlers, and exclusive of said 920 acres withdrawn.

That the appellee paid said taxes to said treasurer involuntarily, under protest, and under menace by said treasurer that unless said taxes and interest were promptly paid by the appellee, he, said treasurer, would sell all the lands described in said tax receipt for taxes ; said appellee claiming at the time of making said payment, that said taxes were erroneous and illegal, and were assessed and levied upon the lands described in said tax receipt, when *said property was not subject to taxation.*

Upon this statement of facts the judgment of the court below was for the plaintiff.

Mr. ALLEN A. BRADFORD and Messrs. BLAKE & WHITEAKER, for the appellant.

Mr. HENRY C. THATCHER and CHARLES E. GAST, for the appellee.

HALLETT, C. J. The question to be determined in this case is, whether the land upon which the tax was levied was at the date of the levy, the property of the United States, and therefore exempt from taxation. It appears that a very large tract of land, including that taxed, was, in the year 1843, granted by the Mexican government to Gervacio Nolan, and that our government subsequently acquired dominion of the country in which that tract is located, now a portion of the county of Pueblo. In the treaty of Guadalupe Hidalgo (9 Stat. at Large, 929), titles existing under Mexican law were recognized, and it was declared that property of every kind should be inviolably respected. Under this treaty the title of Nolan to the entire tract, if valid at the time it was created, or subsequently perfected under Mexican law, would be unassailable. It is, however, contended that the grant was excessive in quantity, the governor of Mexico having authority, under the act of 1824 and the regulations of 1828, to convey eleven leagues only. *U. S. v. Vallejo*, 1 Black, 541; *U. S. v. Vigil*, 18 Wall. 449. The force of this objection was fully appreciated by the owner of the title, if we may judge from the circumstance that he was unwilling to rely upon his title without the aid of congress. On the 1st of July, 1870 (16 Stat. at Large, 646), congress confirmed the grant to the extent of eleven leagues, to be located within the bounds of the original grant, deducting therefrom lands occupied by actual settlers, and allowing the grantee to take other lands elsewhere in lieu of those claimed by the settlers. The Mexican title thus recognized, if invalid before that time, was no longer so, if the grantee or his assignee should accept the provisions of the act, and it appears from the agreed case that this has been done. Whatever may be said of the title given by the Mex-

ican government, we think that the effect of this act of confirmation is to establish the title to the eleven leagues therein mentioned, from the date of the grant by the Mexican government. The language of the act can only be applied to an existing grant, thus excluding the notion that congress intended to create a new estate. The fact that congress assumed to act in the premises may be cited to show that the general government had some interest in the land, but this may be conceded without abandoning the position assumed.

In *Fremont's Case*, 17 How. 542, a Mexican grant of 10 leagues of land, to be located in a certain district of country, was said to convey a vested interest in the quantity of land mentioned in the grant, although no land was specifically described. So here, congress appears to have acted upon the assumption that the grant to Nolan was good for 11 leagues, to be located within the bounds of the original claim, and this action of congress is not a grant *per se*, but a recognition of a pre-existing right in the grantee, conferred by the Mexican government. Consistently with this theory, it may be maintained that the legal title remains in the general government, until all conditions of the act of congress have been complied with, while the beneficial estate in the land is vested in the citizen, giving to the local government a right to collect taxes assessed upon it. *Witherspoon v. Duncan*, 4 Wall. 210.

In this view, the act of congress was necessary not to create the estate, but to attach the grant to a particular tract by prescribing the manner of locating it. It matters not that in certain contingencies, as for instance, if the grantee had refused to accept the provisions of the act of congress, and had failed to maintain, or had abandoned his Mexican title, the land would have reverted to the United States. In a recent case (*U. P. R. Co. v. McShane*), the supreme court held that a contingent right in the government to make another grant upon the failure of the first grantee to make sale of the land within a time specified, was not sufficient to exempt the land from taxation. Nor is the

circumstance that all the conditions of the act confirming the grant had not been performed at the time when the tax was levied at all significant as to the right of the Territory to collect revenue from the land. Conceding all these things, the controlling fact remains that before the tax was levied, the land had been identified as the subject of the grant, and it was held by a title which accrued long before the United States could have acquired an interest in it. By confirming the grant congress recognized the title as paramount to that of the general government, and the location having been made, appellee holds not from the United States, but from the prior owner of the soil. The fact that appellee claimed at first too much land, and that a portion was afterward withdrawn upon the suggestion of the commissioner of the general land office, does not materially affect the question. Payment was not made upon the 920 acres withdrawn, and as to the remainder of the location, in view of all the facts, it is impossible to say that it was at the time when the tax was levied, or has ever been public land of the United States. In this feature the case is distinguishable from *Railway Co. v. Prescott*, 16 Wall. 603, and *U P. R. Co. v. McShane*, decided at the present term, where a grant was made by the United States upon certain conditions, to be performed by the grantee. Until those conditions were performed, it was thought that no title could pass, and the land remained in the United States, and of course it was exempt from taxation. The case at bar is altogether different, inasmuch as appellee's title is derived from the Mexican government, and not from the United States. *Whitney v. Gunderson*, 31 Wis. 359, is more in point, but we are not disposed to follow it. The view here suggested has been fully adopted in California, and appears to rest upon a sound principle. *People v. Crockett*, 33 Cal. 150.

The judgment of the district court is reversed, and the cause remanded, with directions to the court below to enter judgment for appellant.

Reversed.

MEXICAN LAND GRANT—CONFIRMATION BY CONGRESS.—The judgment in the principal case was reversed: *Colorado Co. v. Commissioners*, 95 U. S. 269.

DAVIS et al. v. WANNAMAKER.

PRACTICE — *in debt on a penal bond*, the judgment of the court must be for the full amount of the penalty of the bond to be discharged upon payment of the damages.

JURISDICTION of probate court — *in debt on a penal bond*. If the penalty exceeds \$2,000, the probate court has no jurisdiction.

PRACTICE. Where the defect of jurisdiction appears on the face of the declaration, the question may be presented by demurrer.

PARTIES — *whether one of several obligees may sue*. In an action on an obligation to pay a gross sum to several persons, there being no stipulation to pay any portion of the amount to each, all of the obligees who are living must be joined as plaintiffs.

Error to Probate Court, Jefferson County.

It was alleged in the declaration that the Golden City and Arapahoe Ditch Company commenced certain proceedings in the district court of Jefferson county, to condemn the right of way for its ditch through certain lands therein described, belonging to defendant in error and others; that, in the course of such proceedings, the said ditch company was required to give bond in the sum of \$10,000 to defendant in error, and the others, conditioned for the payment of damages which should be awarded upon the condemnation of the said lands; that said ditch company did give such bond, with plaintiffs in error as sureties therein, and conditioned to pay all damages which might be awarded to the defendants in that proceeding severally, in the time and manner required by law; it was also alleged that certain proceedings were had for condemning the land of defendant in error, and that a sum of money was awarded to her as damages, which sum she sought to recover in this action. It did not appear that the obligors in the bond covenanted to pay any portion of the \$10,000 to defendant in error, or to any of the obligees named therein. Plaintiffs in error demurred to the declaration, and, the demurrer being overruled, judgment *nil dicit* was entered for \$2,000 debt and \$1,277.50 damages and costs, the debt to be discharged upon payment of the

damages. Upon the inquest of damages plaintiffs in error appeared and presented many objections to evidence, and took a bill of exceptions, which swelled the record considerably. It was insisted on behalf of defendant in error that these exceptions could not be heard, and that the costs of this part of the proceedings should be taxed to plaintiffs in error.

Messrs. HORNER and HARMAN, for plaintiffs in error.

Mr. A. H. DE FRANCO, for defendant in error.

HALLETT, C. J. The penalty in the bond described in the declaration is \$10,000, of which sum defendant in error demanded but \$2,000, and the same amount in damages. No argument will be required to show that the case cannot in that way be brought within the jurisdiction of the probate court. Upon such an instrument, although the plaintiff is entitled to collect damages only, the judgment must be for the full amount of the penalty of the bond, as debt, to be discharged upon the payment of the damages. R. S. 507. *Austin v. The People*, 11 Ill. 452; *Freeman v. The People*, 54 id. 153.

According to what was said in *Litchfield v. Daniels*, 1 Col. 268, the obligee in a bond may remit the whole or any part of the damages due to him upon the bond, and if he should remit the whole, probably he would have no right of action upon the instrument. But the principle there asserted does not affect the rule of practice which governs cases of this kind, which is that a recovery must be for the full penalty of the bond, as debt, and for such damages as the plaintiff may be entitled to. As the want of jurisdiction was apparent upon the face of the declaration, the question was well enough presented by demurrer, for the plaintiff was certainly required to state a case within the jurisdiction of the court.

There was also a defect of parties plaintiff, since there was no undertaking in the bond to pay defendant in error any

portion of the \$10,000, the obligation being to pay that sum to her and twenty-eight others. Upon such an instrument it is impossible to say that each of the obligees may maintain a separate action. *Farni v. Tesson*, 1 Black, 309.

We are not inclined to inquire whether the exceptions taken at the inquisition can be allowed in this court, and the costs must take the usual course.

The judgment of the probate court is reversed with costs.

Reversed.

BECKWITH v. TALBOT.

STATUTE OF FRAUDS — *whether the mem. may be in several parts.* Several writings of different dates may be read in connection to show a mem. of an agreement, under the 19th section of the statute of frauds. R. S. 839.

Where a contract was signed by one party and retained by the other, letters subsequently written by the latter, in which the contract was clearly referred to, are sufficient to show his assent, and that he subscribed the contract within the meaning of the statute.

Whether the relation of the several parts may be shown by parol. If, by his own evidence, the party to be charged show the mutual relations between the several writings, he cannot object that parol evidence was necessary to connect them. The rule that parol evidence shall not be received to connect the several writings, if it exists, is not applicable where such evidence is received without objection, or where the party complaining introduces it.

PARTNERSHIP — *of its elements.* Certain cattle were delivered to plaintiff and two other persons, to be kept for a time, at the expiration of which they were to be sold by defendant. After deducting the first cost of the cattle, defendant was to retain one-half of the remainder of the proceeds, the other half to be equally divided between the plaintiff and the other persons. In this there was no partnership, for

1. There was no community of profit and loss;
2. Or of ownership in the subject of the contract.

PARTIES — *whether a particular contract is joint or several.* Upon performance of such contract by the three persons named therein, who were to have the care and herding of the cattle, each became entitled to his separate share of the proceeds of the cattle, and each may have his separate action for the failure of the defendant to perform his part of the contract in respect to selling the cattle and dividing the proceeds of the sale.

CONTRACT — construction. The cattle being upon defendant's range when the contract was made, and remaining there when the contract was completed; *Semble*, that delivery of the cattle to defendant was not necessary.

DAMAGES — measure of. For breach of such contract, in respect to selling the cattle and dividing the proceeds of sale, the measure of damages is the market value of the cattle when the contract was completed, deducting therefrom the first cost, and giving to plaintiff one-sixth part of the remainder, as provided in the contract.

Whether interest may be allowed. Although the case is not within the statute regulating interest, a reasonable rate of interest from the time the suit was begun may also be allowed as damages, and 10 per cent, as fixed by the statute in cases where there is no agreement, was properly allowed.

ERROR — which does not prejudice. Parol evidence being received of defendant's assent to a written contract, which he had not signed, the error, if any, was rendered immaterial by written evidence afterward produced fully establishing the same fact.

EVIDENCE — tax schedule. Upon a question of the number and value of cattle in a herd, a tax schedule made by defendant's agent, and at his request, showing those facts, is competent evidence against him.

Appeal from District Court, Pueblo County.

THE issue is stated in the opinion. At the trial plaintiff (appellee) was first called as a witness and was proceeding to state a contract made October 7, 1870, substantially as in the writing of that date, which is set out in the opinion, when the defendant objected that this was within the 12th section of the statute of frauds, and the court sustained the objection, but allowed the plaintiff to prove service performed according to the agreement under the common count, which was found in the original declaration. Afterward, the plaintiff testified that he and his associates had fully performed the agreement by herding and caring for the cattle, as therein specified, and the court then ruled that evidence of the contract was admissible upon the question of damages. Counsel for defendant then produced the writing, dated October 7, 1870, and asked the following :

"Q. Is this [handing witness a writing] the agreement which was entered into between yourself and the Beckwith boys on the one part and the defendant upon the other, and about which you have been testifying, and upon which you ask to recover in this action ?

"A. It is.

"Q. Does that writing express the exact terms of the said contract?

"A. It does."

At defendant's request the writing so identified was then given in evidence to the jury by plaintiff, as stated in the opinion. Defendant then asked the following question:

"Q. Is the name, C. W. Talbot, signed to this instrument, your signature?

"A. It is, and that is the contract referred to, and the only contract."

The examination of plaintiff was then resumed by his own counsel, and they were permitted to ask:

"Q. Did Geo. C. Beckwith assent to and accept the terms of said contract?"

To which the witness answered: "A. He assented to said contract, and under said contract I acted."

Much evidence was given as to the number and value of the cattle mentioned in the agreement, and upon this point plaintiff produced a tax schedule which, at the head, bore the figures, 1872, and upon its face appeared to be a schedule of the real and personal property of defendant, and was sworn by Edwin F. Beckwith, one of defendant's sons. Elton Beckwith, another son of the defendant, testified that he made the schedule by authority of defendant, and that he was defendant's agent. Defendant objected that the schedule was not made by himself, nor did it appear that he had knowledge of its contents, and that it was irrelevant, which objection was overruled, and defendant excepted. Defendant afterward testified that he did not authorize the making of such schedule. Several letters written by defendant to plaintiff were put in evidence, of which two are given in the opinion. It was shown that the cattle ranged over a large country, in the Wet Mountain valley, some of which was claimed by defendant, but the greater part was public land; that the cattle were in this locality at the time the contract was made, and were kept there during the contract, and remained there at the expiration of the contract.

in the possession of Edwin F. and Elton T. Beckwith, who were parties to the contract, and sons of defendant. Plaintiff testified that there was no understanding as to delivering the cattle at expiration of contract. Defendant testified that he understood that the cattle were to be delivered to him. Upon this point defendant prayed an instruction, which was refused, that if the cattle were to be redelivered, and this was not done, the plaintiff could not recover. The court charged upon the question of damages, as stated in the opinion. Upon motion for new trial the verdict was regarded by the court as excessive, and the plaintiff was required to remit \$1,324.60, which he accordingly did, and judgment was entered for \$4,113, and defendant appealed.

MESSRS. CHARLES & PHELPS and MESSRS. PATTERSON & THOMAS, for appellant.

MR. HUGH BUTLER, for appellee.

BRAZEE, J. This is an action of assumpsit, commenced by summons, on the 12th of May, 1873, by the appellee against the appellant. A declaration was filed on the 16th of May, 1873, containing four counts, three of which were special counts for the breach of an express contract, and the fourth a common count for work and labor. The first and third counts were held bad on demurrer. On the 31st of May, 1873, the plaintiff filed an amended declaration, which contained only two counts, both special, for the breach of an express contract, to which the defendant plead the general issue. On the 12th of June, 1873, the plaintiff obtained leave to file, and filed, a second amended declaration, containing only two counts, both special, for the breach of the contract hereinbefore referred to, to which the defendant plead the general issue with notice of special matter, to the effect that the subject-matter of the plaintiff's special claim was a partnership transaction between the plaintiff, Elton T. Beckwith and Edwin F. Beckwith, and appellant, and the same was unsettled. The trial below

proceeded upon the theory that the common count was in the declaration, but, under the view we take of this case, it is wholly immaterial whether it stood with the special counts, or had been superseded by them.

The agreement declared on in the special counts was produced by the defendant at the trial, and by him was put in evidence, and is as follows :

“ WET MOUNTAIN VALLEY, *October 7, 1870.*

“ This is to certify, that the undersigned have taken two thousand two hundred and five head of cattle, valued at \$36,681.60, on shares, from George C. Beckwith, time to expire on the 5th day of December, 1872, then Geo. C. Beckwith to sell the cattle, and retain the amount the cattle are valued at above. Of the amount the cattle sell at, over and above the said valuation, Geo. C. Beckwith to retain one-half, and the other half to be equally divided between C. W. Talbot, Elton T. Beckwith and Edwin F. Beckwith.

(Signed.)

“ C. W. TALBOT.

“ ELTON T. BECKWITH.

“ EDWIN F. BECKWITH.”

Elton T. Beckwith and Edwin F. Beckwith were the sons of George C. Beckwith, one of whom, at the defendant's request, wrote the agreement, and after it was signed by the three other parties to it, the defendant took possession of the document, and retained it until the time it was produced and put in evidence on the trial by him. Four letters from the defendant to the plaintiff were put in evidence, all of them referring to the cattle, and two of them to the agreement, and are as follows :

“ DENVER, *September 21, 1872.*

“ MR. TALBOT—*Sir* : On my arrival from the mountains, I received your letter. As I have wrote you before, every day I see parties here that is offering their cattle very low, as the hard winter has discouraged them, and that is

the cause that cattle is so very low. There is now in the cattle in the valley, about \$25,000, and I am frank to say that as the market looks, they cannot be sold for more than that sum. I have used every exertion for the last three months to sell. I engaged a man to sell them, and agreed to give him \$1,000 to make sale of them, and he has written east, and advertised and tried to sell, without success. You suggest giving you a part of the cattle. That is entirely outside of the agreement. Also, where would be the interest put in the cattle coming from ; and also Elton and Edwin would be glad to do the same, but at that rate, I would not get my money back I put into the cattle. The cattle must be sold, and settled up, according to the agreement. I will do every thing I can, to sell at the best advantage; and you shall have every chance to get a purchaser for the cattle, so as to make the most out of them. I shall not give up the range ; as when the cattle is sold, I can buy three thousand head of stock cattle, from four year olds, cows, two year olds, and yearlings, for \$12 a head, mostly large cattle, and I shall do so and put them on a range and see if I can't make up part of what I shall lose in the cattle we now have. You shall have no chance to complain in my keeping up to the agreement, as I shall strictly ; although I have heard you have made complaints to parties, which I think is very unfair, and the parties you told so, said so too. Therefore, I am determined to give you no reasonable cause of complaint, although I shall be willing to leave it to any person. If, on the other hand, I had not reason to complain when you worked yourself out of coming up with the cattle, while we were out in sleet and rain, and out all night in rain storms, and running our horses while they lay down in the road and died, you was to home taking your comfort. I think that looks little like cause for complaint. Also you employed the poorest men and boys to herd for you. I should not of mentioned this, or made any complaint, if I had not heard of your talk. As there will be a large loss in the cattle to me, I should make the best of it, and as I have reason to believe there will be

a big loss in the cattle falling short in count, by losing, strays, and stealing and other ways.

"Yours, respectfully,

"GEO. C. BECKWITH."

"DENVER, *November 10, 1872.*

•MR. TALBOT—*Sir:* At first I thought it useless to answer your letter, as I am bound by the agreement, to sell the cattle in a very short time; that to commence pulling them out, and of the most desirable in the herd, and suppose I sold this thirty, then thirty and fifty more, until all the most desirable was sold, and at last, which would probably be months, and the balance would not bring enough to make the \$31,000 I am offered. Who would be the greatest loser then? I would lose \$30 to your \$1, and by your movements when I was in the valley, that you was the only one that was interested in the cattle. However, I have prolonged my letter. As for setting a price on the cattle, if you had done your duty, you would have had the cattle counted, as you agreed to, and as you have seen fit not to perform your part of the contract, the cattle is to be sold as they are; and I see no other way, and as I am advised by the best lawyers here, not one man in a thousand would have given you the chance that I have done. I notified you to get a purchaser for the cattle months ago, and what have I received from you in return for my pay? I must say I have never been treated so meanly by a man in my life. My rights was to sell the cattle. Does the agreement say that I was to say any thing to you or to any one else. But what next. You quarreled with me because I would not break the agreement, and give you the cattle to sell at figures less than I had kept them in Denver for sale. Now I have been offered \$31,000 for the cattle. I have written to Edwin, and he will state to you what I wrote to him to say to you.

"Yours in haste,

"GEO. C. BECKWITH."

The contract was fully performed by the parties who signed it, by herding the cattle in the Wet Mountain valley upon the defendant's range, where they were at the time the agreement was entered into, and where they remained after the time therein specified for the fulfillment of the contract had expired. It is here objected to the contract that it was not subscribed by the defendant, the party sought to be charged in this action, and is therefore inadmissible and incompatible as evidence, and of no binding force or validity whatever, under the statute of "Frauds and Perjuries" (Sec. 12, R. S. Col. Ter. 339), which provides that "Every agreement, that by the terms, is not to be performed within one year from the making thereof," unless some note or memorandum thereof be in writing, and subscribed by the party charged therewith, shall be *void*.

The defendant is not in a position to raise in this court the question of the admissibility of this contract in evidence, for the very good reason that he introduced it in evidence upon the trial. The question as to the validity of contract is one which the appellant is in a position to raise in this court and is one of serious importance, if not the controlling question in the case. If the sole evidence of the contract rested in the document signed by Elton T. and Edwin F. Beckwith and the plaintiff, under some of the decisions, the contract would be taken out of the statute by the full performance of the contract by one of the parties to it; but, inasmuch as the authorities are conflicting, and nearly equally divided on this question, we do not place our decision upon that ground, but upon another.

It is a well-established rule of law that the note or memorandum evincing the agreement may be on one or many pieces of paper, cotemporaneous, or of different dates. The general rule is thus stated in *Brown on Frauds*, sec. 350: "The written memorandum need not be contained in a single paper, but may be made out by comparing and connecting two or any number of papers." Correspondence by letter between the parties is instanced as illustrating the rule, and he says: "A letter or other instrument, signed by the proper

party, may be for this purpose taken in connection with a previous writing not signed." Sec. 346.

Under this rule we are to look at the letters of the defendant to the plaintiff, to see whether they are a sufficient note or memorandum of the agreement in writing subscribed by the party charged to validate the agreement in suit. In the letter of July 20, 1872, this language is used: "You suggest giving you a part of the cattle; that is entirely outside of the agreement." Again: "The cattle must be sold and settled up according to the agreement." Further on: "You shall have no chance to complain in my keeping up to the agreement, as I shall strictly." In his letter of November 10, 1872, he says: "I am bound, by the agreement, to sell the cattle in a very short time;" and again: "Does the agreement say that I was to say any thing to you, or any one else?" As a witness in his own behalf, on direct examination concerning the contract, the defendant testified that the "matter was all talked over, and I thought understood. I said to my son Elton, 'You understand the matter; will you write the contract?' He wrote it, Talbot read and signed it, and then my sons signed it." On his cross-examination he further testified: "After being signed the contract was delivered to me, and has been in my possession ever since until this trial. It is the contract as we talked it over."

In view of this evidence of the defendant, can there be any doubt as to whether the defendant's letters referred to the agreement signed by the plaintiff and the defendant's two sons on the 7th of October, 1870, which, at the time he wrote the letters, was in the defendant's possession? It is said, in some of the cases, that the mutual relation of the writings must appear upon their face, and cannot be shown by parol evidence. This rule is, however, not uniform (See *Lee v. Mahoney*, 9 Iowa), but whether it is sustained by the weight of authority, or not, is immaterial in this case. That rule is applicable, if at all, to cases where the parol evidence to connect the writings is offered by the party seeking to enforce the contract, and objected to by the other side. It can have no application where such evidence is received without

objection, much less where the party sought to be charged as in this case, voluntarily gives the parol evidence which serves to connect the writings, and which, when connected, evince the contract. Looking, then, at the agreement memorandum of October 7, 1870, the defendant's letters and his evidence, there is no doubt that the letters referred to and affirmed that contract, as much as if the defendant had written thereunder, "I shall strictly keep this agreement on my part," and had then subscribed his name thereto. We hold, therefore, that the letters referred to the agreement of October 7, 1870, and were such a note or memorandum of the agreement subscribed by the party charged, as take this contract out of the statute of "Frauds and Perjury" (12th section), under the rule recognized and applied in *Jackson v. Lowe*, 1 Bing. 9; *Gale v. Nixon*, 6 Cow. 444; *Lee v. Mahoney*, 9 Iowa, 344.

It is claimed by the learned counsel for the appellant that under the contract the appellant, appellee and the two younger Beckwiths became partners, and therefore that the action cannot be maintained. "A partnership is a contract of two or more competent persons, to place their money, effects, labor and skill, or some or all of them, in lawful business, and to divide the profit and bear the loss in certain proportions. The two leading principles of the contract are a common interest in the stock of the company and a personal responsibility for the partnership engagements," says Kent, and a common title in the partnership effects is an element of this contract too well known to require more than a mere mention.

Under the agreement in question, there was no community of loss; if the cattle, which were the subject-matter, had died the next day after the agreement was entered into, the whole loss would have fallen upon George C. Beckwith alone. Neither was there any community of title in the subject-matter; there was no joint ownership in the original herd, nor in the increase thereof, created by the contract, but the title to the herd, and the increase thereof, remained in the defendant, who, alone, under the contract, had the right

dispose of either. Such is the fair interpretation of the contract in these respects, and in this construction all the parties seem to have acquiesced. Neither was there any community of expenses, either between the four parties to the contract, nor as between the three who were to do the herding, for, as appears by the evidence, each of these three paid his own expenses, without contribution from the others. The contract, then, lacked these essential elements of a partnership, viz.: community of loss, community of title, community of expenses, and a common right to dispose of partnership property for the purposes of the partnership.

If this contract created a partnership it was an anomalous, abnormal monstrosity, unknown to the law, in which the legal title to the partnership assets, together with all the increase thereof, and the right to dispose of the same vested in one of the partners only, who was in no case to be liable for any of the expenses of the concern.

The next question presented for our consideration is, whether the plaintiff and the two younger Beckwiths were jointly interested in the damages which accrued by reason of the non-fulfillment of the contract by the defendant?

We have seen, that, as between themselves, there was no joint expenses incurred by these three — each paying his own expenses, and the plaintiff hired herders at his own expense. So far, then, these three parties treated the contract as if their respective interests were several and not joint. If, as alleged in the declaration, the defendant had settled with his two sons, for their respective shares, it is clear that in that event the sons would have had no interest in the subject-matter of this action. Again, supposing the cattle had been sold at the agreed time, at an advance on the original valuation, and the sons had received, respectively, each his share of the proceeds of the sale, but the defendant had refused to pay the plaintiff any thing, could the plaintiff have maintained an action against the sons, jointly or severally, to recover any part of the proceeds which they might have thus respectively received from their father? We think not. On the whole, upon the face of the con

tract, and the light thrown upon it by the action of the parties under it, we regard it as an agreement of the defendant to compensate his two sons and the plaintiff, respectively, by dividing the proceeds of sale over and above the original valuation in the manner pointed out by the contract, and the non-fulfillment by the defendant gave the plaintiff a separate cause of action against him. It follows, then, that, in any view of the pleadings, the contract was properly in evidence, and afforded the only basis for damages in case of its non-fulfillment.

Another question is raised in regard to the measure of damages. The rule adopted in the court below was, that the increase of the herd in value, if any, afforded the measure of damages, and the court instructed the jury that if the contract was such as the plaintiff claimed, and the cattle were worth more than \$36,681.60 at the expiration of the time fixed by the agreement for its fulfillment, and the plaintiff might and could have obtained more than that sum for them at that time, the plaintiff might recover the one-sixth part of the sum which might thus have been obtained after deducting \$36,681.60, and this, we think, affords the proper rule for damages in this case, so far as it goes. Another item, or element, of damages was submitted to the jury, which was, that to the amount which they might find for the plaintiff, under the aforesaid rule, they might add interest upon such amount so found by them, at the rate of ten per cent from the 12th day of May, 1873, when the action was commenced, which, we think, was proper upon authority. In *Goddard v. Foster*, 17 Wall. 123, which was an action to recover for the value of services in assumpsit upon special promises, and common counts (Id. 128), the United States supreme court say:

"Beyond all question the plaintiff was entitled to interest from the commencement of the suit," and decided that as to the rate the *lex fori* is to govern. The fact that there may be no statute in the place where the transaction takes place does not prevent the recovery of interest. In such case interest, at a reasonable rate, conforming to the custom

of the locality, will be allowed by way of damages. *Young v. Godbe*, 15 Wall. 562.

If there was error in permitting Talbot, after objection, to testify that the appellant assented to, and accepted the terms of the contract of October 7th, 1870, no injury could have possibly resulted to the appellant therefrom; for the appellant, as subsequently appeared, assented to the contract by his letters, which have been referred to, and he testified to the same thing in his own behalf. The evidence so objected to simply went to establish a fact, the existence of which, viz.: the assent of the appellant to the contract of October 7th, 1870, there is no dispute between the parties whatever, and no injury could, therefore, have resulted to the defendant from overruling his objection in this respect. The tax schedule of the cattle herded under the contract in question was made by Elton Beckwith, who, as appears by his evidence, as well as by the defendant's letter of April 13, 1871, was authorized to make the same as the basis of assessment, and was competent evidence to go to the jury as the act of the defendant by his authorized agent, on the question of the value of the herd.

We find no error in the instructions; they were given in accordance with the views expressed herein. No ground for vacating is shown, and the judgment is accordingly

Affirmed.

JUDGMENT AFFIRMED: *Beckwith v. Talbot*, 95 U. S. 289, affirming agreement.

PERRIGO GOLD MINING AND TUNNELING Co. et al. v GRIMES.*

PRACTICE—*waiving demurrer to pleas.* Where, after a demurrer to pleas has been sustained, the defendants take leave to amend and file other pleas, the first will not be reviewed in this court.

Replevin bond—*effect of submission to arbitrators in replevin suit.* To an action on a replevin bond, it is a good defense under sec. 14, R. S. 540, that the matters in controversy in the suit wherein such bond was given were submitted to arbitrators who made an award, upon which judgment

* Another cause between the same parties, involving the same points, was determined in the same way.

was entered, and that defendants were the owners of the property replevied and mentioned in the condition.

An unconditional submission to arbitrators of the matters in controversy in a replevin suit will operate to discontinue the suit, and, thereupon, it cannot be said that the merits of the case have been determined in that action.

The plaintiff does not by such submission dismiss his suit, nor suffer nonsuit therein, within the meaning of section 14 of the replevin act.

The stipulations in a replevin bond refer to the acts and omissions of the principal obligor in the replevin suit.

And if the replevin suit in which the bond was given be withdrawn from the court and referred to arbitrators, by the agreement of the parties, a surety in the bond is discharged.

What the plea should contain. But in order to have advantage of this defense, a plea by a surety, setting up the facts, should traverse some matter alleged in the declaration, as that the replevin suit was prosecuted to judgment.

And if this is not done, except inferentially, as by alleging matters inconsistent with the truth of the declaration the plea will be bad on demurrer.

When a submission to arbitrators will not discontinue the suit. A submission to arbitrators of matters in controversy in a pending suit, which provides that the award of arbitrators shall have the force and effect of a verdict of a jury, and that judgment may be entered thereon in that action, is distinguishable from one which contains no such stipulation, inasmuch as it plainly requires further proceedings in the cause. By such submission the cause is not withdrawn from the court, as would be the case if there was nothing to show an intention to proceed further therein.

Whether by such submission judgment is confessed. And where such submission is made, the parties are regarded as confessing the judgment, which may, thereafter, be entered according to its terms upon the award of arbitrators.

Whether sureties in the replevin bond are discharged. And in such case neither the principal nor the sureties in the replevin bond will be discharged from their obligation by the reference to arbitrators.

Such a reference to arbitrators does not operate to stay proceedings in the replevin suit.

And, therefore, it cannot be said that the obligee in the bond has given time to the principal obligor, and thereby discharged the sureties.

Damages where plaintiff is a mortgagee only. As between mortgagor and mortgagee, the measure of damages in an action on a replevin bond is the amount due on the mortgage, and evidence tending to prove that that relation existed between the principal obligor and the plaintiffs in replevin should be received.

Error to District Court, Gilpin County.

THE second additional plea mentioned in the opinion is thus: And the said defendant, Robert W. Mead, for a fur-

ther plea in this behalf, by leave of the court here for this purpose had and obtained, says that he ought not to be charged with the said debt by virtue of the said writing obligatory, because he says that after the making of the said supposed writing obligatory, to wit: on the 22d day of July, A. D. 1872, and while the said suit in replevin in which said supposed writing obligatory was given, was being prosecuted and was still pending and undetermined, the said Hahn and Clark of the one part, and the said Perigo Gold Mining and Tunnel company of the other part, made and entered into an agreement in writing in and by which said agreement they agreed to, and with each other, that said suit in replevin and all matters, disputes and issues growing out of the same, should be submitted to Gilbert B. Reed, I. Newton Wilcoxon and Clinton Reed for trial and arbitrament and decision, and that the decision of the said arbitrators, or any two of them, should be binding and final upon said parties as to all such matters, and each of them, and that the award of the said arbitrators, or any two of them, should be filed in the office of the clerk of the district court of said county of Jefferson, as the basis of a judgment; and that afterward, to wit: on the 23d day of September, A. D. 1872, the said Clinton Reed and Wilcoxon, in pursuance of said agreement, did hear, try and determine said matter in replevin, and all matters and disputes connected with the same, and did render and make an award therein, which said agreement and all proceedings had and done under the same were made, had and done without the knowledge or consent of the defendant, and this defendant, therefore, avers that on the said 22d day of July, A. D. 1872, by reason of the making of said agreement, the said suit in replevin was discontinued, dismissed and ended, and the said writing obligatory became null, void and of no effect, and ever since has been, and now is, null, void and of no effect. And this the said defendant is ready to verify; wherefore, he prays judgment, etc.

The agreement to submit to arbitrators, after the title of the replevin suits, is as follows, to wit:

Know all men, that the said Perigo Gold Mining and Tunnel company, plaintiff in the above-entitled cause, originally sued out of the district court, within and for the county of Gilpin, in Colorado Territory, and made returnable thereat, and subsequently moved from the said Gilpin county court, to said court for said Jefferson county, on motion of the said plaintiff, and now pending in said last-named court, and the said James Clark and S. B. Hahn, defendants in said action, having agreed and hereby do agree to submit the decision of said action to Gilbert B. Reed, I. N. Wilcoxon and Clinton Reed, Esqrs., and to the majority of them, and to abide the award of them, or of any two of them, that the award when made by all, or by any two of the said arbitrators, may be filed by the successful party with the clerk of said district court, for said county of Jefferson, as the basis of a judgment in said cause, and that execution may be issued for its collection or enforcement, and it is further hereby expressly agreed and stipulated by and between the said plaintiff and the said defendant, that the award of said arbitrators, or a majority of them, that may be made herein, shall be final, and that judgment shall be entered upon, and in accordance with said award in said action, and that such award shall have the same force and effect in all respects as the verdict of a jury would have if obtained herein by regular and strictly correct legal trial of said cause by such jury; and also, that such reward may be made herein by two or all of the said arbitrators, and also the judgment thereon shall be final, and not subject to reversal for any cause or reason whatever, and finally, that if either of said parties neglect to appear before the said arbitrators, after due notice given them of the time and place appointed by said arbitrators for hearing the parties, the arbitrators may proceed in the absence of any such party.

Dated the 22d day of July, A. D. 1872.

And the judgment upon the award of the arbitrators

who tried the replevin suit, wherein the bond sued on in this action was given, was that the defendants in the replevin suit have possession of the property in said plaintiff's declaration mentioned, and that they have a writ of *retorno habendo* therefor, and that the said defendants have and recover of, and from the said plaintiff, their costs and charges in this behalf expended, and that they have fee-bill therefor.

All other material facts are set out in the opinion.

Mr. HUGH BUTLER, for plaintiffs in error.

Mr. H. M. TELLER and Mr. WILLARD TELLER, for defendants in error.

HALLETT, C. J. To the sixth and seventh pleas first put in a demurrer was sustained, and plaintiffs in error took leave to amend. Subsequently other pleas were filed, in which a new defense was set up, and defendant in error again demurred. By filing new pleas under leave to amend, the intention to abandon those first put in was evinced, and the judgment of the court, as to them, is not now open to review. *Dickhut v. Durrell*, 11 Ill. 72; *Dean v. Gecman*, 44 id. 287. The first of the additional pleas to which a demurrer was sustained, is based upon section 14 of the act relating to replevin (R. S. 540), which provides that in an action upon a replevin bond, when the merits of the case have not been tried in the action of replevin, the defendants may plead the fact, and their title to the property in controversy in bar of the action. To establish this defense, it was alleged that the matters in controversy in the replevin suit were submitted to arbitration, and thereby the replevin suit was dismissed; that the arbitrators heard the evidence and made an award upon which the court entered judgment; that the merits of the replevin suit were not tried in that action, and that defendants were the owners of the property, and entitled to the possession of the same. Assuming that the submission to arbitrators was unconditional as stated in the plea,

there can be no doubt as to its effect upon the replevin suit. Thereby the action was discontinued, the parties having resorted to another forum. *Reeve v. Mitchell*, 15 Ill. 297; *Camp v. Root*, 18 Johns. 22. And the suit being thus brought to an end without a trial, it must be true that the merits of the case were not tried therein. It is said, however, that the plaintiff in replevin, the principal obligor in the bond, by entering into the arbitration voluntarily dismissed his suit, and, therefore, he is denied this defense by the express language of the last clause of section 14, *supra*. But the difference between the discontinuance which results from submitting a cause to arbitration, and the dismissal mentioned in the statute, is too plain for argument. The latter is the voluntary act of the plaintiff in replevin, by which he withdraws his case from the court for the purpose of avoiding a trial, and upon which, by the 12th section of the act (R. S. 540), the court must give judgment against him for the return of the property. When the parties agreed to go before another tribunal, it would be absurd to say that the defendant may have, by the judgment of the court, the relief which he has agreed to ask of the arbitrators. By the agreement to submit, the parties declined to accept the judgment of the court, and, therefore, none could be pronounced except as to the matter of costs. The allegation that the arbitrators made an award upon which judgment was entered, is not inconsistent with the statement that the suit was dismissed, although it appears to be quite unnecessary to the defense set up. It is not alleged in the plea that the judgment on the award was entered in the replevin suit; and by statute (R. S. 50), a judgment may be entered by the clerk upon an award of arbitrators, and so the replevin suit may have been discontinued by the submission, and upon an award made, judgment afterward entered as alleged, but not in that action. Objection that the plea contained redundant matter was not made, and I do not see that any other can be maintained. The second additional plea was interposed by Mead, one of the sureties in the replevin bond, setting up a submission to arbitrators in the replevin suit, and an award

made by which the suit was discontinued. Here, as in the first plea, the submission to arbitrators appears to have been absolute and unconditional, which is a material circumstance with reference to its effect upon the suit, as will be explained hereafter. And if the replevin suit was by that means withdrawn from the court by consent of parties, it would be impossible to charge a surety in the replevin bond upon his obligation. The bond was to secure the due prosecution of the replevin suit, and the return of the property when adjudged, all of which was dispensed with by the act and agreement of the defendants in replevin, for whom the bond was taken by the sheriff. By removing the cause into another forum, they made it impossible to go on with it in the district court, and the bond must be taken to refer to the acts and omissions of the principal obligor in the latter tribunal. *Perkins v. Rudolph*, 36 Ill. 306; *Archer v. Hale*, 4 Bing. 464.

Therefore, if the cause was removed from the court by agreement of parties, as it must have been if the submission contained nothing from which it may be inferred that the parties intended otherwise, no action can be maintained against a surety in the bond, the fact being well pleaded. There is a difficulty, however, as to the plea, which is or should be in the form of a special traverse. Confessing that the replevin suit was begun and the bond given as alleged in the declaration, the pleader doubtless intended to deny that the suit was prosecuted to judgment, as was also alleged in the declaration. This was done by setting up the submission to arbitration, and consequent discontinuance, which is not a direct denial of any thing alleged in the declaration, but a statement of matters inconsistent with the truth of what is there alleged. Steph. Pl. 179. Because of this omission, the demurrer was properly sustained, although the plea appears to be otherwise sufficient. Upon other issues the cause was brought to trial before a jury, and the submission to arbitrators, together with their award, was put in evidence. Upon another trial a question may arise upon the submission, which should now be discussed in order to

explain what has been said touching the sufficiency of the pleas and to secure a correct result. Attention has been directed to the fact that in the pleas the submission does not appear to be subject to any condition respecting the further prosecution of the replevin suit, but when produced in evidence, we find that it is entitled in the cause, and that it expressly provides that the award of arbitrators shall have the same force and effect as the verdict of a jury, and that judgment shall be entered thereon in that action. This gives to the case a new aspect and presents a distinction which has been fully recognized in cases of this kind. Although a reference to arbitrators without more will operate to discontinue a suit pending, if a different intention can be gathered from the submission, such result will not be allowed. This point was expressly ruled in *Ex parte Wright*, 6 Cowen, 399, and is fully illustrated in *Green v. Patchen*, 13 Wend. 293. The practice of referring matters in litigation to arbitrators is not unknown to the courts, and many cases may be found in which the manner of proceeding is discussed. It seems that a rule of court or judge's order directing the submission was required, and that the plaintiff usually took a verdict for his security, particularly when bail was given in the case. Tidd's Pr. 819. If the plaintiff did not take a verdict the bail was discharged, but this was upon technical grounds, which cannot be recognized at the present day. Tidd's Pr. 838, 1097. The essential feature of the practice for present consideration is that, by entering into the submission with a stipulation for judgment upon the award, the party against whom the award is made is held to have confessed the judgment, entered according to his agreement. *Yates v. Russell*, 17 Johns. 461; *Hills v. Passage*, 21 Wis. 298; *Merritt v. Thompson*, 27 N. Y. 232. In *Cunningham v. Craig*, 53 Ill. 252, this distinction was not mentioned, and probably it escaped the attention of the court.

As, therefore, it cannot be doubted that a plaintiff in replevin may, by confessing judgment in favor of the defendant, bind himself and his sureties to the performance of the

judgment, no reason is perceived for discharging the sureties when the judgment is obtained according to the terms of a submission to arbitrators. In another view which appears to be advanced in *Perkins v. Rudolph*, 36 Ill. 306, and *Archer v. Hale*, 4 Bing. 464, it may be contended that by submitting the replevin suit to arbitrators the defendants therein gave time to the principal obligor in the bond, and thereby discharged the sureties. It is, however, settled that a reference to arbitrators will not operate to stay proceedings (Tidd's Pr. 822), and therefore the principal obligor in the bond was at liberty to proceed in the replevin suit notwithstanding the submission. If he had moved the cause for trial pending the proceeding before arbitrators, that of itself would have been a revocation of the submission and he was not disabled from prosecuting the suit according to the conditions of the bond. Upon the trial in the court below, plaintiffs in error offered to prove that Clark & Hahn, for whose use the suit was brought, were mortgagees of the property replevined, and that the amount due them upon the mortgage was less than the value of the property, which evidence was rejected. Whether the Perigo Company was the general owner of the property does not appear, but probably the evidence would have shown whether it was such owner or not. As between mortgagor and mortgagee, the rule of damages in cases of this kind is that the latter can recover only the amount due on his mortgage if the value of the property exceeds that sum. Sedgw. on the Meas. of Dam. 580; *Warner v. Matthews*, 18 Ill. 83. It is conceded that the rule is different where the defendant is a wrong-doer, and has no interest in the property, but the evidence should have been received for the purpose of showing the relations of the parties to the property. It is understood that the same facts are presented in another cause between the same parties pending in this court, and the judgment in both must be reversed for error appearing of record. The causes will be remanded for further proceedings according to the views here expressed. *Reversed.*

BOND — EVIDENCE IN ACTION: See *Lee v. Hahn*, 4 Colo. 188.

FRANCIS v. WELLS.

VENDOR'S LIEN in favor of assignee of purchase-money. Where, upon sale of land, the vendee agrees to pay a portion of the purchase-money to a third party, as against the vendee and those claiming under him, with notice, such third party may have a lien upon the land to secure the amount so agreed to be paid.

Where the vendee assigns his contract. And if the vendee assign the contract to another, the assignee will take the land subject to the same lien, and be equally bound to perform the stipulations of the contract.

Of the nature of the lien. But if the vendee altogether fail to perform the contract, he acquires no interest in the premises, and there is nothing to which a vendor's lien can attach in favor of such third party.

Where time is of the essence of the contract, upon failure of the vendee to perform, the vendor may lawfully sell to another.

And the last purchaser will not be bound by the stipulations of the first contract, unless he agreed to so bind himself.

W. sold to M. certain lands, and gave a bond for a deed in the usual form, making time of the essence of the contract. Complainant negotiated the sale for W., and was entitled to part of the purchase-money as commission, which M. agreed to pay to him. M. failing to make payments, W. sold the same land to F. *Held*, upon bill to enforce a vendor's lien:

1. That M. acquired no interest in the premises, and no lien could exist as against him.
2. That upon M.'s failure to perform his contract, W. might lawfully sell to F., and the latter was not bound by M.'s contract, unless he so agreed.
3. That if the last proposition is wrong, the premises were held by F. subject to M.'s contract, and complainant must look to the fund to be paid by M.

PLEADING AND PROOF must correspond. Complainant must recover according to the allegations of his bill, if at all, and if the proof establishes a different case from that which he has alleged, although a good one, he cannot have relief.

Appeal from District Court, Clear Creek County.

THE bill was exhibited against Casper S. Francis, George McFarland, George Way, Erskine McClellan and Chas. R. Fish. If the statement of the case in the opinion of the court is regarded as insufficient, the allegations of the bill will be found fully set forth in the dissenting opinion.

The bill was filed September 8, 1873, and an injunction

was issued restraining Way from conveying to Francis. Afterward complainant consented that the deed should be delivered, reserving the right to enforce a lien against the premises. The court decreed that Francis pay to complainant within sixty days the sum of \$1,692.00, and in default thereof, that the premises be sold.

Mr. L. C. ROCKWELL, for appellants.

Mr. E. T. WELLS, *pro se*.

BRAZER, J. Appellee exhibited his bill in the district court of Clear Creek county, against appellant and others, to enforce a vendor's lien. He charges that one George Way, being the owner of certain realty, employed and empowered him to make a sale thereof, and authorized him to retain all that he should receive over and above a certain sum for his services; that he accordingly made sale of the premises to the Franklin Silver Mining Company, for a sum exceeding the amount specified by Way by \$750, payable in one year from the date of sale; that afterward, and before the money fell due, the Franklin Company assigned their contract to one McFarland, who obtained a renewal thereof from Way, and who executed to Way his promissory note for the sum of \$3,000, payable on the 6th of September, 1872, and who also executed to appellee his note for \$780, payable at the same time, the latter being the sum due to appellee for his services in selling the property. The bill also charges that McFarland failed to perform his contract, and that on the 6th of December, 1872, he assigned and transferred his interest therein to appellant. That appellant, McFarland and Myers, who acted as the agent of both, McFarland and Francis, fraudulently obtained another contract from Way, from which appellee's demand was omitted, no provision being made therein for the payment of his claim. It will be seen that the assignment from McFarland to appellant is an essential feature of the case made; for as provision was made in the bond given to Mc-

Farland for appellee's demand, by accepting an assignment of it, appellant would become bound by its terms. As to this, however, the proof is wholly insufficient. It appears that the McFarland bond was surrendered to Way on the 6th of December, 1872, who executed a new obligation to Francis, by which he bound himself to convey the premises to the latter.

It will be observed that Way was under no obligation to pay the sum promised by McFarland to appellee, nor could the premises be charged therewith until McFarland should perform his contract. The lien of vendors for purchase-money attaches to the interest of the vendee in the premises sold, and if the contract is not performed in any way, there is nothing to which the lien can attach. If a portion of the purchase-money is paid, the interest of the vendee thereby acquired may be sold to satisfy the remainder of the purchase-money, but if nothing whatever is paid, it is impossible to say that the vendee had any interest in the premises. In the case at bar nothing was paid by McFarland, and, therefore, he has no interest in the land which may be charged with appellee's demand. As to appellant, if he assumed to fulfill the McFarland contract, or expressly promised to pay appellee's demand, he may be held liable therefor, but he cannot be charged except upon his own contract, express or implied. In the McFarland bond, time was made the essence of the contract, and after the time therein specified had expired, it would seem that Way might sell to any one who would purchase, and upon the old terms or new terms, without regard to the previous contract. *Oliver v. Supervisors of Livingston County*, 62 Ill. 528.

In any event the purchaser would only be liable to perform the contract of his vendor, that is, to convey to McFarland upon payment of the money; that is, the fund from which appellee would receive payment, and not that paid to Way by the new purchaser. There is evidence to show that Francis, through his agent, Myers, promised to pay appellee's demand, as part of the price of the land, at the time the bond to him was executed. If such promise

was made the right of an assignee of the purchase-money to maintain a lien being conceded, there can be little doubt as to its validity. But no such promise is charged in the bill, and as we understand that a plaintiff must recover according to his allegation, if at all, the decree cannot be supported in that view. Story's Eq. Pl., § 257. It will be proper, however, for the plaintiff to amend his bill upon such terms as the district court may prescribe, and for that court to consider the sufficiency of the evidence upon that point.

The decree of the district court is reversed, and the cause is remanded.

STONE, J., dissenting. The bill charges that in July, 1870, one George Way was the owner of some right, estate or interest in a certain water power and mill site, together with the mill buildings, machinery, fixtures and appurtenances, one storehouse, two dwelling-houses, and one office in Masonville Lower Mining District, Clear Creek county, Colorado. That he was desirous to sell the same, and authorized the complainant to negotiate a sale thereof under an agreement that all the purchase-money in excess of \$3,000 cash, or \$3,000 payable in one year from time of sale, at ten per cent interest per annum, should be retained by the complainant as compensation for his services in effecting such sale.

That the complainant, on or about the 6th day of September, 1870, sold the said property to the Franklin Silver Mining Company for \$3,000, payable in one year thereafter, with interest at the rate of three per cent per month until paid; that said sale was ratified by Way, and complainant, in the name of Way, executed and delivered to the Franklin Silver Mining Company a bond conditioned to make title to said premises on payment of the purchase-money aforesaid.

That the amount due and payable to complainant for his compensation for effecting said sale was the sum of \$780, out of the total sum of principal and interest to be paid by the Franklin Silver Mining Company.

That afterward, on or about the 26th day of February, 1871, the Franklin Silver Mining Company assigned the said bond for title to George McFarland.

That in August following, McFarland, in order to get further time of payment on the notes for the purchase-money, with the consent of complainant, gave his notes to one Erskine McClellan, then the attorney in fact for Way, payable to Way for \$3,300, and his note to complainant for \$780, due and payable on the 6th day of September, 1872, and McClellan, for Way, executed, in the name of Way, a bond conditioned to convey the said premises to McFarland on payment of the notes last mentioned.

Afterward, on the 6th day of December, 1872, said McFarland assigned said bond to the defendant.

The bill further charges, that, in order to defraud the complainant out of that portion of the purchase-money payable to him, McFarland and the defendant, Francis, caused the said bond to be delivered up to said McClellan, with an indorsement thereon that it was canceled, and the property re-delivered to Way; whereas, the bond never was canceled, nor the contract of sale rescinded, but that either McFarland or Francis, in order to induce McClellan to give further time of payment for the purchase money, and to execute a bond of title to Francis, paid McClellan for the use of Way over \$1,000, part of the identical purchase-money agreed to be paid by McFarland to Way.

That, on the 6th day of December, 1872, for the purpose of cheating the complainant out of his share in the purchase-money, McClellan, in the name of Way, executed to Francis a bond for title to the said premises, conditioned upon due and full payment by Francis to Way of \$3,597 and interest, to convey the premises to Francis, and that afterward, on the 2d day of September, 1873, a deed was executed by McClellan for Way to Francis.

The bill charges notice to Francis of complainant's interest in the purchase-money, and insolvency of McFarland. The answer of Francis denies that McFarland ever

assigned the bond by Way to him, free, or that he ever had any right or title therein, that he is a purchaser of the property mentioned in the bill for a valuable consideration, without notice, actual or constructive, of any right, interest or claim of the complainant.

The question presented by this bill is, whether a third person having no title, but an interest in the purchase-money, and to whom a part of the purchase-money is, by the terms of sale, made payable, has a lien which in equity he may assert against the land sold for its payment, where the vendor gives a bond for title when the purchase-money is paid, and the purchase-money is not paid, and the vendor conveys to another.

It is a well-established principle of courts of equity, that the vendor of land has a lien on the land for the amount of the purchase-money, not only against the vendee himself, but against all subsequent purchasers having notice that the purchase-money was unpaid. The vendee becomes the trustee for the vendor to the extent of the lien, and all persons claiming under him, with notice that the purchase-money is unpaid, are in the same position as the vendee, and this lien exists independent of any agreement. It is an equitable lien in the nature of a trust, and the trust in favor of the vendor is implied, and, as a *general* rule, third persons have no interest in it. The rule is, that the lien exists as well for a part as for the whole of the purchase-money, and the burden of proof is on the purchaser to establish the fact that the lien has been waived by the consent or agreement of the parties, and if, under all the circumstances, it remains in doubt, then the lien attaches. 2 Story's Eq. Jur., § 1224. It is clear that George Way was the owner of the property described in the complainant's bill, on the 4th day of July, 1870, and that the legal title remained in him up to the time that Erskine McClellan, as his attorney in fact, executed the deed to the defendant, on or about the 6th day of September, 1873. On the sale of the property by the complainant, under the power of attorney from Way, to the Franklin Silver Mining Com

pany, he was indebted to the complainant the sum of \$780, as his compensation for making the sale, that being the residue of the purchase-money in excess of the price demanded by Way; and it is plain that that sum was to be paid to the complainant from the purchase-money arising from the sale of the premises. It is not denied by the answer, nor by any of the witnesses examined before the master. It is fully recognized in all the correspondence between the several parties. Blackman understood this when negotiating for the Franklin Silver Mining Company. It was included in the notes given by the Franklin Silver Mining Company to Way. It forms part of the consideration to be paid by it as a condition precedent to procuring a title from Way. It was well understood, when the time of payment was extended to McFarland, in August, 1871, and the new bond executed by Erskine McClellan for George Way to McFarland recites that \$780 of the purchase money was payable to the complainant. It is clear that Myers, who acted for Francis in making the purchase, had actual notice of all of complainant's rights, and notice to the agent is constructive notice to the principal.

The defendant having notice of this equitable claim of the complainant, is he, under all the circumstances of the case, chargeable with its payment? Or, in other words, is it a charge upon the property conveyed to him by Way?

It is conceded that if a vendee, who purchases land on a credit, and takes a bond for title when he pays the purchase-money, fails to pay according to the terms stipulated, the vendor may consider the contract at an end, and may lawfully sell to a third person, and that such purchase would take the land free from all liens and charges of which he had no notice. But the case is different when the vendee has notice of a charge or lien upon the land, and recognizes it as a valid and subsisting lien, and promises to pay it. Had McFarland acquired the title to this land from Way, knowing, as he did, that the complainant held a note for a part of the purchase-money, without paying the note, the

complainant could enforce its payment out of the land by virtue of the equitable lien in him as the holder of note given for the purchase-money.

If Francis voluntarily takes the place of McFarland with the same notice that McFarland had of the equity of the complainant, and recognizes and expressly or impliedly promises to pay it, he is as much bound as McFarland would be had he acquired the legal title from Way. That Francis occupied this position, we think the evidence satisfactorily shows, and was properly admitted. The lien attaches by virtue of the consideration or purchase-money for the land remaining unpaid, as a security for its payment; it is independent of any contract, and, having once attached, continues until expressly waived, or a manifest intention is shown that the party entitled thereto intends to waive it. There has been no such intention manifested in this case, but, on the contrary, it is plain the complainant never intended to waive it. By the terms of the sale a part of the consideration, nearly equal to one-fourth of it, was made payable to the complainant, and to that extent he was substituted the vendor, by the act of the vendor, the vendor retaining the legal title; and we have been unable to find a single case where it has been held that a third person, to whom the consideration, by the terms of the sale, is made payable, has not a lien which he may assert against the land sold for its payment. A different rule has prevailed when the vendor, at the time of sale, parts with the legal title. In such cases it is held that the lien does not inure to the benefit of the indorser of the notes.

But when, upon a sale of land, only a bond to convey a title is made by the vendor to the vendee, and note given by the vendee for the consideration agreed upon, whatever title is passed is incumbered with a lien, which passes to the assignee of the notes, which cannot be defeated by a deed from the original vendor to a sub-purchaser of the original vendor. If the lien passes with the notes it cannot be avoided by the act of others. *Dishmore v. Jones*, 1 Cold. T. R. 554; *Honore v. Bakewell*, 1 B. Monr. (Ky.) 72; *Thomp-*

son v. Pyland, 3 Head (Tenn.), 537; *Inland v. Berryman*, 3 Bush (Ky.), 356; *Johnson v. Jackson*, 27 Miss. 498; *Hamilton and Wife v. Gilbert*, 2 Heisk. (Tenn.) 680.

A different rule would enable the vendor to perpetrate a fraud upon the party interested in the purchase-money, and manifestly defeat the actual intention of the parties at the time the sale was made. The rule as to a vendor's lien is manifestly founded on a supposed conformity with the intention of the parties upon which the law raises an implied contract; it is not inflexible, but yields to what manifestly appears to be the intention of the parties in the particular case. It is made subservient to all the equities between the parties. *Gilman v. Brown*, 1 Mason, 190. The whole testimony in this case discloses a condition of things in relation to this property inconsistent with any other idea than that the complainant has a lien on the land for that portion of the purchase-money represented by the note he holds, a lien, as the evidence shows, recognized and assented to by all the parties who have ever claimed any interest in the property. There is evidence to show, and, perhaps, sufficient to authorize, a legal inference that Francis holds the legal title for the use of the original vendee, the Franklin Silver Mining Company, and in that event he would be merely a trustee for that company, and subject to all the equities complainant had against it. It is, however, unnecessary to discuss that question. My associates, in the opinion announced in the case, seem to concede that, if the defendant, Francis, promised to pay the demand of complainant as part of the price of the land at the time the bond to him was executed, the lien of complainant attaches to the land. The court say: "There can be little doubt of its validity, but no such promise is charged in the bill, and that a plaintiff must recover according to his bill, if at all." It is true relief cannot be granted for matter not charged in the bill, that the decree is pronounced *secundum allegata et probata*, and it is equally true that a general charge or statement of the fact is sufficient; it is not necessary to charge minutely all the circumstances which

may conduce to prove the general charge, for these circumstances are matters of evidence which need not be charged in order to let them in as proofs. Story's Eq. Pl., §§ 28, 257. It appears to me that the allegations in the bill, taken as a whole, are sufficient to sustain the decree. It is positively and distinctly averred that the demand of the complainant is founded upon the trust created by the vendor's lien. That the defendant, Francis, was a purchaser with notice and took the property subject to the lien. These allegations are the substance of the issue involved, and by them the defendant is informed of the nature of the case against him. The circumstances attending the sale and transfer of title are matters of evidence tending to prove the main fact.

That such allegations are sufficient has been decided by this court. *Logan v. Clough*, February term, 1874.

In my opinion, the decree of the court below should be affirmed.

Reversed.

DANIELS et al. v. THE CITY OF DENVER.

PRACTICE — *motion in arrest is matter of record.* A motion in arrest of judgment is a part of the record without a bill of exceptions or other authentication.

Presumptions indulged on motion in arrest. Upon such motion formal defects in the declaration will be disregarded, and all things implied in or inferable from what is alleged, will be taken as having been proved before the jury.

DENVER — *of the power to provide sewers and drains in streets.* The power to provide sewers and drains in the public streets of the city of Denver (§ 5 Sess. 100) is to be exercised in the discretion of the corporate authorities.

And where the city has not attempted to provide drainage in a public street, it cannot be held liable in damages for injuries resulting from the want of such drainage.

Error to District Court, Arapahoe County.

THE declaration is sufficiently stated in the opinion. The trial was upon the general issue, and plaintiffs obtained a

verdict for \$3,000 damages. The city moved in arrest of judgment, which was allowed, and the plaintiffs sued out this writ of error. A bill of exceptions which appeared in the transcript, and which embraced the written motion upon which judgment was arrested, having been quashed on a former day of this term, it was said in argument that the ruling of the district court upon that motion was not open for review; that this court must assume that the district court was correct on that point.

Mr. E. L. SMITH and Mr. N. HARRISON, for plaintiffs in error.

Mr. T. M. PATTERSON and Mr. M. BENEDIOT, for defendant in error.

Mr. Justice STONE, having been of counsel, did not participate in the decision.

HALLETT, C. J. A motion in arrest of judgment is a part of the record, without a bill of exceptions or other authentication, and the question here presented is, whether the declaration will support the verdict. Formal defects cannot be regarded, and we are to presume that all things implied in or inferable from what is alleged were proved before the jury. Gould's Pleadings, 495, Cap X, §§ 11 and 12.

But, if it is claimed that facts, not in any manner referred to in the declaration, may now be imported to sustain the verdict, upon the ground that a liberal rule in regard to amendments has been adopted in courts of original jurisdiction, the proposition cannot be entertained. Plaintiffs charge that they were possessed of a building and storehouse on Larimer street in the city of Denver, which was inundated and overflowed by water on the 8th day of June, 1873, and thereby they suffered great damage in the loss of merchandise and otherwise; that such overflow was caused by a sudden and heavy rainfall, against which the city had not provided by constructing proper and sufficient drains,

sewers, culverts, and other outlets for the safe and convenient passage of the water on Larimer street, as it was required by its charter to do. It was not alleged that the city had ever made or attempted to make any drain or other conduit for water in that street, nor is it alleged that the water was discharged out of the street into the plaintiff's premises. The case stands upon the express or implied duty of the city to provide a means of conveying off surface water from plaintiff's premises. By the charter, the usual authority to establish, grade, pave and improve streets, and to provide sewers and drains is conferred (5 Sess. 100, and it has never been supposed that a corporation may be liable in damages for the mere failure to exercise such power. 2 Dill. on Corp., § 801.

Some diversity of opinion exists as to the liability of the city for an improper or insufficient exercise of the power, but it is believed that all the authorities are in unison upon the principle that the time and manner of beginning the work of improvement is to be determined by the corporate authorities. In *Mills v. Brooklyn*, 32 N. Y. 489, this was said to be a very clear proposition, and I have not found any case in which it is denied; certainly, the legislature did not intend to impose upon the city of Denver the duty of providing sewers and drains in every street, but to give the power to make such improvements when convenience or necessity should require them. To examine authorities upon this point would not make it plainer, nor can any thing be added to what is said in the books upon the subject. The declaration does not show that the corporation was bound to provide sufficient drainage, nor that it contributed to the injury complained of, and, therefore, it is fatally defective.

The judgment is affirmed with costs.

Affirmed.

WRIT OF ERROR—JURISDICTION.—The office of a writ of error being fully explained by the common law, and Congress having authorized the issuance of such writs, jurisdiction to hear and determine causes under them would be complete without further legislation: *Vance v. Rockwell*, 3 Colo. 243.

FAILURE OF CITY TO EXERCISE DISCRETIONARY POWER (the power to make drains and sewers), is not actionable: *Denver v. Dinmore*, 7 Colo. 243.

HEIDERER v. THE PEOPLE.

APPEAL from justice of the peace—by prosecuting witness in criminal case.

Where, in a criminal prosecution before a justice of the peace, judgment is given against the complaining witness for costs, pursuant to R. S. 414, § 80, no appeal lies from such judgment.

Error to Probate Court, Arapahoe County.

THE facts are stated in the opinion.

Mr. M. R. LEVERSON, for plaintiff in error.

Mr. C. S. EYSTER, district attorney, and Mr. C. S. THOMAS, *contra*.

STONE, J. The plaintiff in error, on the 30th day of October, 1874, entered a complaint before Daniel Sayer, a justice of the peace in Arapahoe county, charging one Charles Ulmer with the offense of *petit larceny*. A trial was had before said justice, and the accused was found not guilty, and the defendant was discharged, and the costs of suit taxed against the plaintiff in error, who was the complaining witness. Heiderer appealed to the probate court, and that court dismissed the appeal.

The statute clearly gives the right to the justice trying the cause, to give judgment against the complaining witness for the costs, when it appears to him there was no reasonable ground for the prosecution, and that it was maliciously entered. R. S. 414, § 80. The right of appeal from an inferior to a superior tribunal only exists when it is expressly given by statute. *Edwards v. Vandercook*, 13 Ill. 633.

We have not been referred to any statute giving the right of appeal in a cause like the one made in this record. We know of none.

The appeal was properly dismissed by the probate court. The judgment of the probate court is affirmed with costs.

Affirmed.

THE DENVER AND SWANSEA RAILWAY COMPANY et al.
v. THE DENVER CITY RAILWAY COMPANY.

CORPORATION — *whether its existence may be collaterally questioned.* Upon a bill between corporations to restrain the defendant from unwarrantably interfering with the rights, privileges and property of the complainant, upon charges preferred by each against the other, the successive steps in the organization of each will not be investigated for the purpose of determining whether the corporations legally exist. Such charges may be more properly investigated in a proceeding by *quo warranto*.

Of the right to inquire into the grant of franchise. The rights, privileges and franchises claimed by each of the corporations are, however, a proper subject of inquiry in such suit.

Who may grant a franchise. The right to construct and operate a street railway in a city, and to take tolls from persons traveling on the same, is a franchise which the sovereign authority alone can grant.

Of the power of the legislative assembly. Under the acts of congress of 1867 (14 Stat. at Large, 426) and 1872 (17 Stat. at Large, 390; R. S., U. S., 333) the legislative assembly cannot grant the right to construct and operate a street railway in a city, except by general law.

Seemle, that the general law of the Territory, relating to corporations (R. S. 117) does not provide for granting such right, and no right to construct and operate a street railway can be acquired under it.

Of the power of the corporation of Denver. In the years 1873 and 1874, the corporation of Denver could not grant to individuals or a corporation a special privilege or franchise of constructing and operating a railway in the public streets of the city, because —

- 1st. The legislative assembly, from which the city received its authority, had not, at that time, any such power.
- 2d. In the general power over the streets of the city, which was conferred by the charter of 1866 (5 Sess. 95) no such authority is given.
- 3d. If the charter of 1874 (10 Sess. 269) was intended to confer such power, the legislative assembly exceeded its authority, and the act is, in that particular, void.

Of the Denver City Horse Railroad Co. The act to incorporate the Denver City Horse Railroad Company (6 Sess. 105), passed before any restriction was put upon the legislative assembly in respect to corporations, is valid.

The exclusive right to construct and operate a horse railway in a city is not infringed by constructing a road in the same city, to be operated by steam.

Whether a railway in a street is a nuisance. A railway constructed in a public street of a city, without authority of law, is a continuous obstruction, which amounts to a public nuisance.

When equity will enjoin. For an injury which an individual or corporation suffers in common with the public generally, equity will not relieve.

A steam railway in a street in Denver, which is not occupied by complainant, although in itself a public nuisance, and intended for carrying passengers in the manner pursued by complainant, is not a special injury to complainant's road which equity will enjoin.

An unauthorized interference with complainant's lines of road in actual operation, and one which complainant was engaged in building for the purpose of constructing such steam railway, is a special injury to complainant, which equity will enjoin.

Error to District Court, Arapahoe County.

THE bill was filed by the Denver City Railway Company against the Denver and Swansea Railway Company, Miers Fisher, Charles Ruter, and John G. Perrenoud. It alleged that complainant was a corporation under an act of assembly approved January 10, 1867 (6 Sess. 105), which was set out in the bill. The provisions of the act are given in the opinion. Complainant claimed an exclusive right under said act to construct and operate railways in the city of Denver, for transporting passengers for hire. The bill also alleged that complainant had constructed several lines of railway in Denver, and was about to extend its road on Twenty-third street, from the intersection of Champa street, in a south-easterly direction; that complainant had already a road built, and in operation, on Champa street, and that, on the 18th day of June, 1874, it commenced work on Twenty-third street, with a view to building a road on that street; that, after some progress had been made in the work, the defendants, Ruter, Fisher and others, pretending that there was such corporation as the Denver and Swansea Railway Company, and that it had a right to build a road in the same place, interfered with the work, and obstructed the complainant, etc. The ordinances of the city council, which are mentioned in the opinion, were also set out, and it was averred that defendants were building a road on Holladay street, and that they proposed to build one on Fifteenth street, on which complainant already had a line of road built, and in operation. It was also averred that defendants had not complied with the ordinances of the city, and that the work done by them was without authority

of law, and a public nuisance. Complainant prayed that defendants be enjoined from doing the wrongful acts mentioned, and from building and operating any road upon any of the streets mentioned.

The answer, admitting some and denying other allegations of the bill, it is not necessary to state at length. It alleged that the Denver and Swansea Company was duly incorporated under the general law of the Territory, on or about April 26, 1873. It averred that the city owned the streets in fee, and relied upon the ordinances which were mentioned in the bill. Defendants averred that the Denver and Swansea company had purchased a large amount of material for a road, and was engaged in building such road on Holladay and Twenty-third streets; that the said company might at some time construct a road on Fifteenth street. The alleged interference with complainant's operations, as charged in the bill, was not denied. Before the master some evidence was taken relating to the organization of each of the corporations, which the court declined to notice. It was shown that the Denver and Swansea company had constructed half a mile or more of road on Holladay and Twenty-third streets, and that at the intersections of Champa and Twenty-third streets it would be necessary to cross the complainant's road. At this point, complainant commenced to build a road south-easterly on Twenty-third street, and soon came in collision with the workmen of the defendant corporation. It was also shown that the defendant's road was intended to be operated by steam. The court decreed that the defendants be restrained, and perpetually enjoined from in any manner obstructing and preventing the complainant from building, constructing and operating its railway on Twenty-third street, and from removing any obstructions in said street which interfered with the construction and operation of the complainant's railway on said street, and also that the defendants be enjoined and perpetually restrained from constructing and operating their said railway on Holladay street, in the city of Denver.

Mr. J. Q. CHARLES and Mr. A. C. PHELPS, for plaintiffs
in error.

MESSRS. SAYRE, WRIGHT & BUTLER, Mr. E. L. SMITH
and Mr M. BENEDICT, for defendants in error.

Mr. Justice STONE, having been of counsel, did not sit at
the hearing.

BRAZEE, J. On the 29th day of June, A. D. 1874, the
defendant in error filed its bill of complaint against the
plaintiff in error, and the relief prayed for therein was, in
substance, that the defendant below be restrained from pre-
venting and obstructing the plaintiff from building, etc., its
railway on Twenty-third street, in the city of Denver, and
from preventing and hindering the plaintiff from removing
obstructions in said Twenty-third street, and from construct-
ing in Holladay street, in said city, or any part thereof, a
railway, and from placing ties, rails, and other material on
the same; and from constructing or operating a railway
upon any other street, in the complaint mentioned, in the
city of Denver. A temporary injunction was obtained, and
by it the defendants were enjoined, substantially, as prayed
for in the bill, and enjoined "from building, constructing
or operating a street railway on any of the streets of Den-
ver." The defendants answered the bill, evidence before a
master was taken, a hearing was had upon the pleadings
and proofs, and a decree entered on the 5th day of Febru-
ary, 1875, by which it was decreed that the injunction heretofore granted in this case be made perpetual. The com-
plainant became a body corporate under an act of the
territorial legislature, which is set out "*in hæc verba*." The act incorporates W. Stimpson and others, as "The
Denver Horse Railway Company," and provides that the
corporation shall have "the sole and exclusive right and
privilege of building, constructing and operating a horse
railroad in the city of Denver, and additions thereto. *

* * * * *

And shall have the exclusive right and privilege of building

and constructing along the streets of said city of Denver, railroads, and to run horse cars thereon," and allow the company "to charge each person riding on their horse cars for each passage not to exceed 10 cents." The act goes on to provide certain conditions upon non-compliance with which the exclusive privilege granted is to cease. By an amendment to the foregoing act, the name of the corporation was changed to the Denver City Railway Company. It constructed, equipped, and now has in operation, a horse railway on Champa and Fifteenth streets. On the 18th of June it graded a curve on Twenty-third street, at its intersection with Champa street, and a road-bed on the middle line of Twenty-third street from Champa nearly to Stout street, and laid and embedded ties thereon. When its workmen returned the following morning, they found the ties and rails laid on Twenty-third street had been removed and the grading injured by the defendant, whereby the construction of the road was impeded. They proceeded to repair the damages and continued the work of construction in the same line until hindered and obstructed by another track, constructed by the defendant upon complainant's grade, which the complainant's employees attempted to remove and were prevented by threats and menaces of violence from a large number of defendant's employees, acting by direction of one of the defendants. The title to the streets included in the original congressional grant of a town site for Denver, was conveyed to that city before the 10th of January, 1867, by the probate judge of Arapahoe county, but it does not appear that, as to the streets and parts of streets outside of the congressional grant, the city had any other title than that conferred by the city charter. For the purpose of this action we consider that the Denver and Swansea company was incorporated under the general law of the Territory on the 26th of April, 1873.

The city council of the city of Denver, on the 24th day of April, 1873, passed an ordinance of which the following is the first section :

"SECTION 1. That the right of way be and the same is hereby granted to H. G. Bond, Miers Fisher and Charles Ruter and their assigns and successors, to build, operate and maintain a railway (to be propelled by dummy engines) adapted for propelling street railway cars, with a single or double track, with the necessary turn-outs or side-tracks, through the following streets in the said city of Denver, and the additions thereto, to wit: Holladay street, Delano street, Thirty-first street, Lawrence street, Champa street, Twenty-eighth street, Fourth avenue, Colfax avenue, Fourteenth street, Fifteenth street, Welton street and Tenth street in Schinner's addition. Provided, nevertheless, that this grant to the said H. G. Bond, Miers Fisher and Charles Ruter is upon this express condition: That they will build culverts at the gutters at each side of street crossings; said culverts to be of such size and dimensions and of such material as shall be designated by the city surveyor of the city of Denver, and to be of sufficient capacity for the complete drainage of all street crossings on the line of said railway, and will also grade the approaches of all streets crossing the line of said railway in a complete and workmanlike manner; the said work to be done under the direction and supervision of the city surveyor."

This ordinance further provided that dummy steam engines should be used for propelling cars, by Bond, Fisher and Ruter; imposed other conditions, non-compliance with which worked a forfeiture of "all rights and privileges" therein conferred and thereby granted, but prescribed no other limits to the enjoyment thereof. Fisher, Bond and Ruter afterward petitioned the city council to add to the right of way granted by the ordinance, Twenty-third and other streets. A committee appointed to consider the petition, on the 5th day of June, 1873, reported that the prayer of the petition be granted, and the report was then adopted by a vote of the city council, and no further action taken thereupon. On the 21st of June, 1873, Fisher, Bond and Ruter assigned all their right, title, interest, privileges and immunities, conferred upon them by the city council, to the

Denver and Swansea company. On March 5, 1874, the city council extended the time for laying the first mile and a quarter of the track, prescribed in the former ordinance, and required the Denver and Swansea Railroad Company to lay a rail weighing twenty-three pounds to the yard.

The defendants, at the time the suit was commenced, were building their railway on Holladay street, and proposed to build at some time thereafter a line on Fifteenth street, on which the complainant then had a line constructed and in use, and the complainant averred that "if the defendants constructed a road on Twenty-third and Holladay streets it would hinder complainant and cause a loss of business and profits, and the plaintiff would be compelled to bring repeated suits," etc., but it does not aver any facts tending to show in what manner the defendant's railroad in Holladay street would hinder complainant and cause a loss of business and profits, and compel repeated suits. The respective corporations, which are parties to this suit, by divers allegations seek to dispute the legal existence of each other. We think these allegations can be more properly determined in a proceeding by or in the nature of *quo warranto*. A suit in equity between private parties cannot be metamorphosed into an inquisition at law, respecting the exercise of franchise in which the parties have no greater right than the citizens generally have in common with them. Besides, these corporations have, by impleading, treated each other, for the purposes of this suit, as legal entities, and for the same purposes, we treat them as they in this respect have treated each other. Angell and Ames on Corporations, 635-6, and 734. As to questions, however, arising upon conflicting claims set up by them to the use of the streets of Denver, we may inquire. Each claims to be entitled to certain rights of way, privileges and franchises, in such streets not common to the public in general, and more or less in derogation of the common right — one claiming, under its charter from the legislature, an exclusive right, the other claiming a similar though not exclusive right, under and by virtue of a grant, from the city council and

mayor of Denver, under the ordinance and proceedings referred to. The rule of construction is well settled and not open to question, that grants of franchises, privileges and powers of the character of those claimed by the parties to this action respectively, are to be strictly construed. This rule is applicable in this case, as well to the municipality of Denver as to the corporations that are parties. The complainant's charter grants to it in terms, "the sole and exclusive right and privilege of building, constructing and operating a horse railroad in the city of Denver, and additions thereto," * * * and "the exclusive right and privilege of building and constructing along the streets of said city of Denver, railroads, and to run thereon horse cars," * * to "level upon said streets a track upon which to build, lay, and operate their said horse railroads," * * and "to charge each person riding on their horse cars" * * "for each passage, not exceeding ten cents." The exclusive right granted by this language is to construct and operate "a horse railroad," "to run horse cars thereon," "to charge fare for riding on their horse cars." The building and operating by steam a street railway in the city of Denver, by an authorized person or corporation, for the purpose of conveying passengers for hire in said city, is not, in our opinion, an infringement of the plaintiff's exclusive charter right to convey passengers in horse cars for a consideration. Were the city council and mayor of Denver authorized to grant the privilege or franchise which the defendants claim, is the next question to be determined. At the time of the passage of the first ordinance, April 24, 1873, under the charter of February 9, 1866, the city council was empowered to "open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve and keep in repair streets, avenues, lanes, alleys, sidewalks, drains and sewers," to "remove all obstructions" therefrom, "prevent and remove all encroachments into or upon all or any streets," and to "make all ordinances" necessary for carrying into effect the powers specified in the act "not repugnant to nor inconsistent with the con-

stitution of the United States, or the organic act of this territory." We must now inquire what powers the government of the United States had invested the territorial legislature with to grant franchise and privilege. By the act of congress of March 2, 1867, the territorial legislature is prohibited from granting private "charters or special privileges," but may, by general incorporation acts, provide for incorporation of bodies corporate for mining, manufacture, and other industrial pursuits; and by the act of June 10, 1872, the territorial legislature may, by general laws, permit corporations to be formed for the construction or operation of railroads, and other purposes not necessary to mention.

The ordinance in question, if within the powers conferred upon the city council by the charter of February 9, 1866, conferred a special privilege upon the persons therein mentioned and their assignees, the Denver and Swansea Railway Company, and in this respect was in contravention of the spirit of the congressional act of March 2, 1867, inasmuch as the power to grant such privilege, if ever possessed by the territorial legislature, had, before the passage of the ordinance under consideration, been taken away by the last-mentioned act. The city council was the creature of the territorial legislature, and we think could not, after the passage of the act of March 2, exercise a greater power in this respect than the legislature which created it. If we are right in this conclusion, the ordinance, in so far as it attempted to confer an especial privilege, was void. We might rest our decision here, but desire to go further and place our decision upon other grounds as well.

On the 13th of February, 1874, the charter of the city of Denver was amended, and in addition to the powers hereinbefore enumerated, the amended charter conferred upon the city council power "to regulate the running of horse railway cars, or cars propelled by dummy engines, the laying down of tracks for the same, the transportation of passengers thereon, and the form of rail to be used."

If it is contended that the action of the city council,

under the charter of 1874, in adopting the ordinance of March 5, at that time affirmed the right of the Denver and Swansea Railway Company in the streets in question, and thereby gave the defendants the rights which they claim to exercise. That position cannot be maintained, for it is apparent that the territorial legislature had not power, after the passage of the congressional act of March 2, 1867, to confer an especial privilege, and of course could not confer the power upon the city council to grant such especial privilege.

That the ordinance in question, taken in all its parts, undertook to confer an especial privilege and franchise, there is not the shadow of doubt. The answer avers that by the proceedings of the city council on the 5th of June, 1873, the "privileges, rights and immunities asked for in said petition were granted, and the rights, privileges, immunities and franchises in said ordinance were extended and made applicable" to Twenty-third street. Such railroad, as the ordinance contemplates, would be a strict monopoly. Persons riding in the cars upon it would be compelled to pay the fare demanded, and its railway track would be for its exclusive use, not admitting of rivalry in the running of cars thereon.

This ordinance then undertook to confer an especial privilege not enjoyed by the people of the Territory in common, and conferred such privilege in perpetuity, for there is no limitation to it in point of time, and no power of revocation reserved to the city council therein. Such a privilege is a franchise. In England the granting of a franchise was a royal prerogative, and could only be granted by the crown, and in the *Bank of Augusta v. Earle*, 13 Pet. 595, Chief Justice TANEY says: "Franchises are special privileges, conferred by the government upon individuals, which do not belong to the citizens of the country generally of common right." It is essential that a franchise should be created by a grant from the sovereign authority. It is doubtful whether the legislature can delegate the power to grant such a franchise at all. *People's Railroad v. The Mem-*

phis Railroad, 10 Wall. 50. In this case it appeared that the city of Memphis had power "to grant privileges in the use and enjoyment of streets," but Justice CLIFFORD says, at page 52, it would be a forced construction to hold that the power to grant a franchise for twenty-five years, as the ordinance under question in that case provided, was included in the corporate power above referred to. It is true, the case was not decided upon this point, but the reasoning of the learned justice is very forcible to show that the ordinance in that case, if perfected, was unauthorized by the charter of Memphis, and therefore invalid. His opinion is entitled to great respect, if not the force of an authority. In the case of *Davis v. The Mayor, etc., of the City of New York*, 14 N. Y., the court of last resort in that State held that the city of New York, under its charter, conferring powers quite as extensive as the charter of Denver confers upon its mayor and city council, had no power to pass an ordinance granting a privilege similar to the one under our consideration, and that an ordinance or resolution granting such a right as the defendant claims here, is void. The claim of the defendant cannot be supported upon the ground that, as the owner of the fee in its streets, the city of Denver has the right to grant to the defendants the rights which they claim to have. The streets of New York city are owned in fee by that municipality; and yet it was decided that it held the streets in trust for the people of the whole State, and not as corporate property. *People v. Kerr*, 27 N. Y. 188. The corporate authorities of a city, under such circumstances, have no power to confer such a franchise, and a resolution authorizing it, without limitation as to time or power of revocation, is not a license, merely, but a contract which, if valid, it could not abrogate. *Milhan v. Sharp*, 27 N. Y. 611. Upon authority we hold that the ordinance and resolutions in the case at bar were void, and conferred no authority whatever upon the defendant, and cannot be invoked to give them protection. What was the legal character of the acts of the defendants in the construction of a railway in Holladay and Twenty-third

streets? Upon the established facts we must say they create a public nuisance. If authorized by law, their acts might have been justified, no matter how much inconvenience to the public they might have occasioned, but being without right, no matter how little inconvenience this permanent appropriation of a part of the street may occasion, they cannot defend themselves from the charge of nuisance. The authorities for this position are constant and uniform, and leave no doubt on the question. 14 N. Y. 524, and cases cited. On the other hand, the territorial legislature, acting under the general delegation of legislative powers at the time the complainant's charter was enacted, had the authority to incorporate the complainant, and confer upon it, as such corporation, the franchise specified in its charter. The proposition was not controverted on the argument.

In this view of the case, the complainant is entitled to relief just so far as its allegations, sustained by proof, will justify a court of equity in intervening in its behalf. In so far as it suffers from the wrongful acts of the defendants in common with the public generally, it cannot have relief; but, to the extent that its private rights are invaded or threatened by a wrong-doer, it is the duty of the court to protect it. As we have seen, the complaint does not allege facts showing how the defendants' railway on Holladay street will hinder complainant and cause loss of business and profits. For aught we can see, the defendants' cars may, in fact, bring passengers to some of the complainant's lines and thus increase complainant's business and profits. We have searched with diligence the authorities cited and many others, to see whether, under the circumstances developed by the pleadings and the proofs in this case, the injunction, as it respects Holladay street, and other streets than Fifteenth, Twenty-third and Champa streets, can be sustained. The strongest case we have found to sustain the complainant's claim in this behalf is the case of the *Newbury Turnpike Company v. Miller*, 5 Johns. Chan. Rep. 101. Under its grant in that case the complainant, as appeared by the allegation and proofs, had, upon complet-

ing a turnpike road between two places more than 12 miles apart, and building in connection therewith a bridge across the Walkill, the right to take toll at the bridge, and the act imposed a penalty upon persons who, having traveled upon the road, should go around the bridge for the purpose of avoiding the payment of tolls. The defendants had built a free bridge within 80 rods of the complainant's bridge, and had constructed a highway from complainant's turnpike to the defendants' free bridge, by which persons traveling on complainant's turnpike could avoid payment of tolls, and upon these facts the court granted a perpetual injunction to protect the complainant in the enjoyment of its franchise. Upon the state of facts in that case it is clear that the complainant would be materially injured by the defendants' highway and bridge furnishing a shunpike, but there are no facts alleged and proved in this case to show that complainant is or will be materially injured by the defendants' road in Holladay street.

Upon the facts appearing in the record the complainant was entitled to relief only as to its lines of road actually built and in operation, and to that end the defendant should have been enjoined from interfering with the road in Champa and Fifteenth streets, and from opposing the construction of complainant's road in Twenty-third street, and not otherwise, and the decree of the court below will be so modified.

Decree modified.

DRAKE et al. v. ROOT.

HOMESTEAD — *how conveyed.* A deed in ordinary form, executed by husband and wife, which contains no waiver of the homestead right, is sufficient to pass the title of the grantors to lands occupied by them as a homestead under the act to provide for homesteads in Colorado Territory. R. S. 385.

How recorded. If the word *homestead* is not entered in the margin of the record of the title as required by section 2 of the act, the claimant is not entitled to the benefit of its provisions.

ESTOPPEL — *by deed.* A defendant in ejectment, who has conveyed the land in controversy to the plaintiff, with warranty, is estopped to deny that he had the estate which he assumed to convey.

DEED — *construction of — parol evidence affecting.* A deed for land, which contains no reservation to the grantor of the right of possession, passes such right to the grantee, and parol evidence cannot be received to show that by agreement between the parties at the time of the execution of the deed the grantor was to retain possession of the premises conveyed for one year after its date.

MORTGAGEE — *not entitled to possession.* Until forfeiture, a mortgage is a security only, which confers no right of entry on the mortgagee.

EJECTMENT — *who are actual occupants.* A son who resides in his father's family on the premises in controversy, and who does not assert any ownership or right of possession therein, is not an actual occupant, within the meaning of the fourth section of the ejectment act. R. S. 272.

PRACTICE — *when objection should be made.* But if he allow verdict and judgment to go against him, without objection in the court below, he cannot be relieved in this court.

PLEADING — *in ejectment — title.* An averment in the declaration that the plaintiff claims title by purchase is not a sufficient statement of title, under the eighth section of the act relating to ejectment. R. S. 274.

VERDICT — *bad for uncertainty.* Where the declaration in ejectment contains two counts, in one of which the plaintiff claims title in fee, and in one the right to occupy under local law, a verdict which finds that the plaintiff is owner, as averred in the declaration, is uncertain and insufficient.

Error to District Court, Gilpin County.

MANSEL H. ROOT brought ejectment against Lester and Eugene Drake, to recover possession of a certain lot of ground, of about two acres, together with a dwelling-house and stable. In the first count, the plaintiff claimed title in fee; in the second count, he set up title as follows: "And said plaintiff avers that he claims title to said premises in this count mentioned by purchase from Lester Drake." In the third count, he set up title as follows: "And the said plaintiff avers that he claims title to the premises in the count mentioned by purchase, and by possession and occupation, under the laws of the United States, and the laws of said Territory of Colorado, and the local laws, rules, usages and customs of Lake Gulch District, in which said lands are situated. The trial was had at the November term, 1874, upon the general issue. At the trial, the plaintiff gave evidence to prove that Lester Drake, with his family and his son Eugene, resided upon

the premises ; he also put in evidence a warranty deed, in the usual form, from Lester Drake, and Eliza, his wife, to the plaintiff, dated December 8, 1873, conveying the premises described in the declaration. The certificate of acknowledgment was as follows :

“ Be it remembered, that on the 10th day of December, A. D. 1873, before me, the undersigned, a notary public in and for the county of Gilpin aforesaid, personally came Lester Drake and Eliza Ann Drake, his wife, who are personally known to me to be the same persons described in, and who executed, the foregoing deed and acknowledged that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned. And I further certify that the said Eliza Ann Drake, wife of said Lester Drake, having been examined by me touching the execution and acknowledgment of said deed, separate and apart from and out of the presence of her said husband, the contents, meaning and effect of said deed were by me fully explained to her, separate and apart and out of the presence of her said husband, and after such explanation by me, and while still separate and apart from and out of the presence of her said husband, she acknowledged that she had freely and voluntarily executed the said deed for the uses and purposes therein mentioned, and that she did not wish to retract the same, and that the same was not made through the fear or compulsion of her said husband.”

To which the defendants objected that there was no waiver of the homestead right in deed or acknowledgment. The defendant Lester Drake gave in evidence that he had resided with his family upon the premises, the most of the time for ten years past ; that he was residing there in December, 1873, when the deed to plaintiff was made, and that he had resided there ever since that time ; that Eugene Drake was his son, residing with him. The defendants then offered to prove that before and at the time of the execution of the deed to plaintiff, the defendant Lester Drake was indebted to plaintiff in the sum of \$18,828.65, which was mentioned as the consideration in the deed, and which was secured on a portion of

the property described in the deed ; that at the time of the execution of the deed it was agreed between them that said Drake should deed to the said Root the lands described in the deed, and that the amount of indebtedness due should be taken as the consideration in the deed. That Root should at the same time give back to Drake a bond to reconvey to said Drake the property in said deed mentioned, at any time within fifteen months from the 1st day of January, 1874, upon payment of the said sum in deed and bond mentioned, and that the said Drake might retain the possession of the house and lot in controversy, for the space of one year; and further, that the said bond to reconvey was duly executed by Root, and the said Root also verbally agreed at the time of the execution of the bond and deed, that the said Drake might retain possession of said house and lot in controversy, for the period of one year. Which said evidence the court refused to hear, and the defendants excepted.

The defendants then offered in evidence a deed of trust, in the usual form, being dated April 5th, A. D. 1867, made by said Lester Drake to Willard Teller, conveying a large number of lode claims, together with the house and lot in controversy; which said deed was declared to be in trust to secure the payment of three promissory notes therein mentioned, amounting to \$6,393.32, and interest at the rate of four per cent per month.

And upon the objection of the plaintiff, the deed last mentioned was excluded.

The defendants asked the court to charge, "That in order that plaintiff may recover in this case, he must show to their satisfaction that he has the legal title to the property in the declaration mentioned, and that he was at the time of the commencement of this suit entitled to the possession thereof, and that the legal title is all the title with which they have any thing to do, and that it is also incumbent on the plaintiff to show what title he claims, whether in fee, or for a term of years, or the right to occupy, possess and enjoy the property under the local laws and customs of said mining district, and if plaintiff has failed to

show what title he claims, he is not entitled to recover in this action," which the court refused and the defendant excepted.

The verdict was as follows :

"We, the jury in the above-entitled cause, find the defendants guilty ; and we find that the plaintiff is the owner of the premises, as averred in the declaration, and is entitled to the possession thereof."

Upon which the court gave judgment and the defendants sued out this writ of error.

Mr. H. M. TELLER and Mr. WILLARD TELLER, for plaintiffs in error.

Mr. L. C. ROCKWELL, *contra*.

HALLETT, O. J. The act which exempts homesteads from execution and sale, under process of law (R. S. 385), contains no provision as to selling or conveying such property, except by way of mortgage. By the sixth section it appears that a wife must join in a mortgage of the homestead, but nothing is said as to any other conveyance, and, therefore, all others must be governed by the general law regulating conveyances of real estate. It will not be contended that by living upon a tract of land the owner will lose the right to alienate it, and as to the wife, under the general law (R. S. 259), she has no right of dower, and by the fourth section of this act, she has a right in that homestead only of which the husband is seized at the time of his death. But, if it was necessary that the wife of Lester Drake should join in the deed to defendant in error, that was done, and the instrument was executed and acknowledged in the manner required by section six of the act. In Illinois, the statute seems to require an express waiver of the exemption, on the part of both husband and wife, and therefore the authorities in that State are not in point. *Van Zant v. Van Zant*, 23 Ill. 536. Again, it does not appear that Lester Drake had caused the word "homestead" to be entered in the

margin of the record of his title, as required by the second section of the act. What is meant by the record of title, whether one or all of the conveyances that make out the chain is not pointed out, but probably a reasonable construction would require that the entry should be made in the margin of the record of the deed, by which the claimant of the homestead acquired his interest. No reason is perceived for dispensing with this entry, which was manifestly intended to give notice to the world of the peculiar conditions affecting the property. We have no difficulty in saying that the deed was properly received in evidence, and as it contained a covenant of warranty, the grantor was thereby precluded from denying that he had the estate which he assumed to convey. *Van Rensselaer v. Kearney*, 11 How. 297; *French v. Spencer*, 21 id. 228; *Goodtitle v. Bailey*, 2 Cowper, 597.

A grantor can never be allowed to set up a prior conveyance made by himself to a third party, in order to defeat his own grant, and this was what was proposed by plaintiffs in error upon the trial. The offer to show by parol that Lester Drake was to remain in possession of the premises for one year after the grant, was opposed to the statute (R. S. 107), the ninth section of which declares that all conveyances of real estate, and of any interest therein duly executed and delivered, shall be held to carry with them the right to immediate possession of the premises or interest conveyed, unless a future day for the possession is therein specified. This provision accords with the general rule by which a contract or agreement becomes effectual from its date if there is nothing upon the face of it to indicate that the parties intend that it shall take effect at some other time. As defined by the legislature, the rule certainly requires that the intention to postpone the operation of the deed to a future day shall be declared in the instrument itself. As, therefore, the law required written evidence of the fact which plaintiffs in error were seeking to prove, oral testimony could not be received to establish it. 2 Starkie's Ev. 753. If we regard the testimony offered as contradicting

the deed, the rule is the same, for says Mr. Starkie at page 757: "As oral evidence is inadmissible either as a substitute for a written instrument required by law, or to give effect and operation to such an instrument where it is defective, it follows *a fortiori*, that it is not admissible to contradict or even to vary any instrument to which an exclusive operation is given by law, whether that exclusive quality result from a peremptory rule of law or from private compact." To illustrate the rule a case is cited from 5 B. & C. 109, *Williams v. Jones*, where two persons agreed to enter into partnership as attorneys, no time being mentioned, and it was held that the partnership commenced from the time of the agreement, and evidence was inadmissible to show that the agreement was not to take effect until a future day. It will be observed in the case at bar that under the deed as written the grantee was, by the statute, invested with the right to immediate possession, and this effect and operation of the deed it was proposed to contradict by parol. That this could not be done appears to be clear upon principle and authority. Oral testimony as to the existence and contents of the bond to reconvey, alleged to have been given at the time of the execution of the deed, was of course incompetent in the absence of evidence to show the loss or destruction of the instrument. I do not find that the bond was produced, or that any offer was made to prove that it was executed, to be followed by evidence of its loss or destruction, according to the usual practice. If any such bond was given, and by its terms it appears that the deed was intended as a mortgage, it will have an important bearing upon the case. To anticipate a defense which may possibly exist and may be interposed at another trial, it may be well to remark that we incline to the opinion that until forfeiture a mortgage should be regarded as a security merely which confers no right of entry upon the mortgagee. 3 Wash. Real Property, 99 *et seq.* Attention is asked to the evidence as to the occupancy of Eugene Drake at the time the suit was commenced, which shows that he was a member of his father's family, and residing with them upon the

premises in controversy, but fails to disclose that he was asserting any ownership or right of possession in the land. The fourth section of the act governing ejectments (R. S. 273) provides that the action shall be brought against the actual occupant, if there be one, but this does not refer to all who may reside upon the premises. A farmer may employ persons to cultivate the soil, and a manufacturer may have many persons employed in his factory, who would not be occupants in the sense of this act. So if one should keep a boarding-house it would be hard to say that all occupants of his house would be liable in ejectment for his act in withholding the premises against a superior title. *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 148. I do not perceive that Eugene Drake, residing in his father's family and not otherwise occupying the premises, could be subjected to the costs of this suit, but as the question was not raised in the court below, we should give little attention to it here if there was no greater error in the record. A party who allows a verdict and judgment to be taken against him without objection, the only effect of the judgment being to subject him to costs, should not ask to be relieved in this court.

The finding of the jury is a more serious matter, for by the seventh clause of the twentieth section of the act (R. S. 277), it is provided that the verdict shall specify the estate which shall have been established upon the trial by the plaintiff, whether in fee or for life, or a term of years, or a right of possession and occupancy only. By the eighth section, the plaintiff is required to set forth the estate which he hath in the premises; and by the twenty-third section, the judgment is to be given according to the verdict, while by the twenty-fifth section the judgment is made conclusive as to the title established at the trial. Thus, in the pleadings, as well as in the verdict and judgment, the estate or interest of the plaintiff in the property is made a matter of substance, which is not upon any account to be overlooked or omitted. In this declaration, we have three counts, in the first of which the plaintiff claimed title in fee; in the second, by purchase

from Lester Drake, and in the third by purchase and by possession and occupation under the laws of the United States, and the laws of the Territory of Colorado, and the local laws, usages and customs of Lake Gulch district, in which said lands are situated. Inasmuch as one may purchase a fee or a life estate, or any other interest in land, it is difficult to perceive how the language of the second count can be interpreted as an averment of title, and therefore that count may be disregarded. It is true, that by the last clause of the eighth section, if he claim a right to occupy and possess the premises under local law or otherwise, the plaintiff must state whether he is an original locator or purchaser, but in that case, the character of purchaser is a part only of the statement of his right, and not the whole of it. He holds by force of territorial or local law and usage, whether he is an original locator, or purchaser from some other locator, and the statute requires that he shall add to the description of his general right to occupy and possess the premises, a statement showing whether he is the locator or purchaser. If, however, we take into view the first and third counts only, they differ as to the title, and whether the jury intended to say that defendant in error owned in fee as averred in the first count, or that he had a right to occupy and possess as averred in the third count, we are utterly unable to say. If there was but one count in the declaration; the finding would manifestly refer to that, and when the verdict is that the plaintiff is the owner of the premises without more, it has been said that it will be interpreted as meaning that he is the owner in fee. *Hadlock v. Hadlock*, 22 Ill. 384. But here the finding is that defendant in error is owner as averred in the declaration, and it must be applied to one or the other of the counts, to make it effectual. To say that it means both counts as in some forms of action, we say that a verdict for the plaintiff establishes the truth of all that is charged in the declaration, involves the absurdity of supposing that the jury intended to find a fee together with a less estate in the same person. A little care on the part of counsel will secure verdicts in due form, and

according to the statute, and that result cannot be obtained by straining language beyond its ordinary meaning, or inventing rules of construction in support of defective verdicts.

The judgment of the district court will be reversed with costs, and the cause remanded for a new trial. *Reversed.*

HOMESTEAD WILL PASS BY DEED in the ordinary form, executed by the husband and wife, without any waiver of the homestead right: *Weitz v. Caywood*, 3 Colo. 408.
DEED WITHOUT RESERVATION PASSES RIGHT TO IMMEDIATE POSSESSION: *Omaha & G. S. & R. Co. v. Tabor*, 13 Colo. 50.

JENSEN et al. v. BROWN.

MECHANICS' LIEN — *where materials are furnished to the builder.* A sub-contractor cannot maintain a lien for materials by him furnished and used in a building under the act of 1872, relating to mechanics' liens (9th Sess. 147), unless at the date of notice to the owner of the building of his lien there was something due, or to grow due, from such owner to the contractor, for erecting and constructing such building.

Of the pleadings in such case. Where it did not appear in the petition or evidence that any thing was due, or to grow due, from the owner of the building to the contractor, the petition was properly dismissed.

Error to Probate Court, Arapahoe County.

THE petitioners (plaintiffs in error) alleged that they sold certain nails, locks, and other materials, to one Joseph Wood, to be used, and which were used in the erection and construction of a building in the city of Denver, which was owned by the defendant; that Wood contracted with defendant to erect said building, and that the defendant knew that the materials were so used. Other facts necessary to establish a lien, as that notice was served upon the defendant as required by the statute, the amount due, and the like, were alleged in the petition, but it was not alleged that any sum of money was due, or to grow due from the defendant to the said Wood, at the date of notice, or at any time.

The defendant answered, and evidence was taken before a referee, who reported that there was due to complainants, for principal and interest, \$122.56. Upon the hearing in

the probate court, the petition was dismissed, and the petitioners sued out this writ of error. The sufficiency of the notice to defendant was discussed in argument, but as it is not noticed in the opinion, the evidence on that point is omitted.

Mr. W. S. DECKER, for plaintiffs in error.

Messrs. SAYRE, WRIGHT and BUTLER, for defendant in error.

BRAZEE, J. The question presented by this case is whether a material-man, under the statute of Colorado, approved February 9th, A. D. 1872, furnishing material to a contractor, has a lien upon the building in respect to which the contract is made, and material furnished.

The first section of said act prescribes that "all artisans, mechanics, and others, who shall perform work or labor, or furnish materials to the amount of \$25, or more, for the construction or repairing of any building, or other superstructure, shall have and may claim and hold a lien upon such building or superstructure for the amount and value of the work and labor so performed, or materials furnished by each, respectively."

The proviso to the second section of the act enacts: "That when such lien is claimed by a sub-contractor, journeyman, or any other person than a contractor performing work or labor, or furnishing materials, the statement shall be filed within twenty days after the time when the last work or labor was performed, or the last materials furnished," etc.

The third section gives to those who shall perform work or labor or furnish materials to the construction or repair of any railroad, tramway, to all road, canal, water ditch, flume, aqueduct or reservoir, a lien.

The fourth section gives to miners, laborers and others a lien upon the mine, lode or other deposit for the value of the work performed thereon, or materials furnished therefor.

The fifth section gives to laborers who shall perform work or labor upon building lots in cities or towns in improving the same, a lien.

The sixth section of the act expressly gives to every sub-contractor, journeyman or laborer performing work or furnishing materials, a lien upon a superstructure or other property; and if money be due, or is to become due under the contract from the owner, upon the service of notice of claim of lien the owner may withhold a sufficient amount to satisfy the lien claimed, until the validity of the claim be established, and if established, the amount is made a valid set-off *pro tanto* in favor of the owner against the contractor. And after notice to the owner of the claim, etc., in case he fails to comply with the provisions of this section, a personal action is given to the lienor against the owner.

There is no provision in the constitution of the United States, nor in the organic act, which precludes the legislature of the Territory of Colorado from declaring a statutory lien in respect to future contracts in favor of the contractor, sub-contractor or laborer upon the building and premises of the owner for whose benefit services have been performed or materials furnished in erecting his building.

The act of 1872 was in force when the original contract in question was made. Every contract is presumed to have been entered into and executed with reference to existing laws, and subject to such modification in respect to the remedies of the parties as may result from subsequent legislation, if free from constitutional objection. The statute in question is free from such objection, as we think, under the construction which we apply to it.

That it was the intention of the legislature to give a lien, to some extent, by the act under consideration, upon a compliance with its provisions, to all artisans, mechanics and others, who should perform work or labor, or furnish materials to the amount of \$25 or more, for the construction of any building upon such building for the value of the work performed or materials furnished, is quite clear.

The extent to which such liens may attach is a question more difficult to answer. Such construction should be given to this act as will be just and equitable to all parties, and we regard it as susceptible of such construction. It would be unjust to the owner to give such a construction as would, under any circumstances, compel him, if acting in good faith, to pay more than the price contracted by him to be paid for the erection of the building, and we, therefore, hold that the rights of sub-contractors, mechanics, laborers and material-men must be determined and controlled in respect to the aggregate amount which the owner may be obligated to pay for the building by the terms of the original contract between the owner and original contractor.

All such persons are presumed to have notice of the existence of such contract, a general knowledge of its terms, and the rights and obligations of the parties thereto, and to have taken sub-contracts, contributed labor and materials in furtherance of the work, in strict subordination to such terms, relative rights and obligations in respect to the amount which the owner may be required to pay under his contract. *Henley v. Wadsworth*, 38 Cal. 361. The language of some of the sections preceding the sixth section of the act under consideration is so broad, that, if taken alone, it would give a lien to sub-contractors, and persons contributing labor and materials, for the full amount due them respectively from the contractor, without regard to payment in good faith, without notice of lien, of the full contract price by the owner to the original contractor. Such a construction might, in many cases, work manifest injustice to the owner by compelling him to pay, for the erection of a building, an amount far exceeding the contract price, and far exceeding the value of the building, and might, in this respect, leave the statute open to the objection of impairing the obligation of contracts. We, however, do not think such to be the true construction of the statute under consideration ; but construing the sixth section of the act with the preceding sections, we hold the act to give a lien, when its provisions are complied with, to the sub-contractor and

persons furnishing labor and materials for the value thereof, but not in amount exceeding the balance due, at the time of notice, from the owner to the original contractor; and in case the owner fraudulently fails to comply with the provisions of the sixth section of the act on his part, *i. e.*, fails to withhold from the original contractor the balance due him, or an amount sufficient to satisfy the established claim of the lienor, gives the lienor a right of action against the owner for the amount of the established claim.

This we consider to be a fair construction of the statute, as we glean its intent from the whole act, and believe it to be just and equitable. Under this construction the owner will be protected from paying more than the contract price. Unless he pays the contractor in full after notice, the laborer and material-men may protect their interests and no injustice be done to the contractor.

In the case at bar we find the allegation to be that the materials furnished by the complainants, for the value of which a lien is claimed, were furnished to the contractor at his request. The petition does not allege, the evidence does not show, nor does the referee find, that any thing was due from the owner to the original contractor, at the time of service of notice of claim of lien.

Under the statute with this state of pleadings, proofs and facts, no lien ever did attach or could have attached in the premises.

The petition was, therefore, properly dismissed. Judgment affirmed with costs.

Affirmed.

WRIT OF ERROR.—Jurisdiction given by the common law: *Vance v. Rockwell*, 3 Colo. 244. MECHANIC'S LIEN: *McIntire v. Burnes*, 4 Colo. 238; *Opley v. Scherer*, 5 Colo. 548; *Tabor v. Armstrong*, 9 Colo. 290; *Greely & St. L. & P. R. R. Co. v. Harris*, 12 Colo. 239; *Cannon v. Williams*, 14 Colo. 21.

THATCHER v. KAUCHER.

ERROR — in receiving evidence which does not mislead the jury. In an action of trover, evidence of the value of the goods several months before the alleged conversion was first offered and received, and afterward other evidence as to such value at the time of the alleged conversion was given, by which the jury were governed.

Semble, that in receiving the first evidence of value there was no error which can be ground of reversal.

EVIDENCE — *as to value — knowledge of witness.* Upon the question of value a witness who has made inquiry in the market where the conversion took place, as to the value of such goods in that market, may be asked to state it.

As to agency — interview between principal and agent. In trover, for goods alleged to have been sold to the defendant, without authority from the plaintiff, by one in whose care they had been left, the plaintiff may show what instructions he gave to his agent at the time the goods were committed to the care of the latter.

TROVER — *what shall be a defense.* In such action evidence tending to prove that the agent sold some of the goods to others, claiming them as his own, is no defense, the question being whether he had authority from the plaintiff to sell.

PRINCIPAL AND AGENT — *authority of agent to sell goods.* Where one was left in charge of a large quantity of goods, with instructions to sell so much thereof as should be necessary to pay the agent's board; *semble*, that the agent had no authority to sell the whole quantity *en masse*, and that, upon sale thereof in that way, the owner may maintain trover against the purchaser.

INSTRUCTIONS — *should be confined to matters in issue.* The court cannot be required to charge the jury upon matters which are not presented in the evidence.

Appeal from District Court, Arapahoe County.

DECLARATION in trover to recover the value of 45 packages or barrels of bourbon whisky, alleged to be worth \$3,500. Plea: Not guilty. At the trial the plaintiff gave evidence tending to prove that he stored a quantity of whisky in a building in Denver, and left it in charge of one Minch, with instructions to unbung the barrels daily, and to move them to and fro for the purpose of improving them. That Minch being without means, the plaintiff gave him the privilege to sell enough of the whisky to pay his board; that no other or further authority was given to Minch; that the whisky was so left in care of Minch on the 24th of December, 1872, and that in March, 1873, Minch sold to the defendant 45 barrels of the whisky, which defendant removed to a commission house, and sold at prices ranging from \$1.50 to \$2.00 per gallon. There was much evidence as to the value of the whisky. The plaintiff himself was the first witness, and before any evidence was given as to the date of the alleged conversion, plaintiff's counsel asked the following question:

"State what means of knowledge you had for knowing the value of such liquor at this point at the time you left the liquor?"

Defendant objected that the time specified did not appear to be the date of conversion. The objection was overruled, and the witness answered that he had inquired of dealers as to the prices of such liquors.

Plaintiff's counsel then asked the following question :

"Did, or did not these men at that time, after your telling them the quality and character of this liquor, fix a market value for it?" Upon objection the court ruled the question improper and said: "I think that if, by inquiry in this market, he ascertained the rate at which whiskies were selling at that time, he can state it." Thereupon the witness stated, apparently in answer to the question as proposed by the court, "I did by inquiry; the market rate at which whiskies were selling at that time was \$1.75 per gallon." Another witness, Mr. Mahar, the commission merchant who sold the whisky for defendant, was asked to state what it was worth by the gallon or by barrel in the market? To this defendant's counsel objected generally, and the court overruled the objection. The witness answered that he sold the whisky for \$1.50 to \$2 the gallon. The plaintiff called Joseph Bloom, and inquired of him what authority he, the plaintiff, gave to Minch, on the day the plaintiff left Denver? To this the defendant objected generally, and the objection was overruled. The witness answered that Minch was instructed to sell no more than to pay his board, and to take care of the whisky. Other witnesses were asked to state the value of the whisky per gallon, to which the defendant entered a general objection, without specifying any ground therefor, and the court overruled the objection. Various sums ranging from \$1.25 to \$2 per gallon were given as the value of the whisky. It was also in evidence that the plaintiff left Denver about the 24th of December, 1872, and was absent at the time the defendant removed the whisky from the house at which it had been placed, to the commission house of Mr. Mahar, which was in March, 1873.

It did not appear that the defendant had any knowledge of the instructions given by plaintiff to Minch, or of the manner in which he had been left in charge of the goods. Several persons called by defendant, testified that Minch sold by quantities, large and small, during the months of January, February and March, 1873, and that he appeared to be keeping the house open for business during those months.

Upon motion of the plaintiff, the court directed the jury to disregard all the testimony so given on the part of the defendant. The defendant presented to the court a number of prayers for instructions, which were in substance: That if they believed, from the evidence, that the goods were left in a way, and at a place exhibiting an apparent purpose of sale, the plaintiff would be bound by a sale made by the person in charge, in the ordinary course of trade, to a *bona fide* purchaser, without notice of the relation existing between the principal and the agent.

The defendant also asked the court to charge as follows: "If the jury believe, from the evidence, that the plaintiff departed, leaving the property in question, together with other goods, all in the same store, in the possession of said Joseph Minch, with instructions to sell a sufficient quantity thereof to pay or defray expenses, but leaving the amount of such expenses undetermined, the defendant was not bound to know or make inquiry as to such expenses, or whether the said Joseph Minch was selling more of said goods than was sufficient to defray the same, but under such instructions the said Joseph Minch had a discretionary power, so far as third persons are concerned, to sell, in the usual course of trade, any and all of said stock of goods, and the plaintiff would be bound by such sale or sales."

All the prayers of the defendant were refused by the court, and the defendant excepted.

The jury found for the plaintiff in the sum of \$2,710.40 damages, which appeared to be within the value of the goods, at the time of the alleged conversion, as given by the witnesses. The plaintiff had judgment and the defendant appealed.

Mr. H. R. HUNT and Mr. B. M. HUGHES, for appellant.

Mr. J. Q. CHARLES and Mr. A. C. PHELPS, for appellee.

STONE, J. The first, second, third and fourth assignments of error relate to the admission of certain evidence offered by the plaintiff, under objection by the defendant, and the fifth to the rejection of certain evidence offered by the defendant.

We are of the opinion that the evidence received by the court was properly admitted, and that rejected, properly rejected.

The seventh and eighth assignments relate to the withdrawing from the consideration of the jury the evidence introduced on the part of the defendant, and the instructions of the court directing the jury to disregard it. If the evidence withdrawn tended to establish any valid defense to the action, it was error to withdraw it from the consideration of the jury; but if such was not its tendency, then there is no error in withdrawing it, and instructing the jury to disregard it. We are unable to see any tendency in the evidence withdrawn, to establish any defense to the action; admit it, and it does not show any authority in Minch to sell the whisky, and it was therefore properly withdrawn, and the jury properly instructed to disregard it.

The ninth assignment relates to the refusal of the court to give the instructions requested.

The instructions asked presuppose that there is some evidence before the jury which they have a right to consider. If there is no evidence for the jury to consider, instructions ought always to be withheld. Correct instructions, if applicable to the case, the court, as a general rule, is required to give, unless the same are in substance and effect embodied in those previously given by the court to the jury; but the court is never required by law to give an instruction to the jury, which is not applicable to the case, even though it be correct as an abstract principle or rule of law, and no prayer for instructions can

be regarded as applicable to the case when it is wholly unsupported by the evidence introduced to the jury. Where there is no legal evidence of any kind to support the theory embodied in a prayer for instructions, whether presented by the plaintiff or the defendant, the instruction should always be refused, and such a ruling can never become a good cause for reversing the judgment.

It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts of which no evidence has been offered, as the instruction presupposes that there is some evidence before the jury which they think sufficient to establish the fact hypothetically assumed in that way by the court, and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them, as it may induce them to indulge in conjectures, instead of weighing the testimony. When a prayer for instruction is presented to the court, and there is no evidence upon the subject in the case for the consideration of the jury, it ought always to be withheld. The true rule, if there be no evidence to support the theory of fact assumed in the prayer, is to reject it, as it is error to leave a question to a jury in respect to which there is no evidence. *Insurance Company v. Baring*, 20 Wall. 161.

We find no error in the record, and that the motion for a new trial was properly refused. *Judgment affirmed.*

CONVERSION — EVIDENCE OF VALUE. — In trover evidence of the value of the goods, both before and after the conversion, is properly admitted to fix the amount of damages: *Thatcher v. Kaucher*, 131 U. S. App. cxlvi, affirming the judgment in the principal case.

PERSON ASSUMING TO BE AGENT CANNOT BIND PRINCIPAL by sale of personal property, unless he is either authorized to make the sale, or held out to the public, by the principal, to have such authority: *Thatcher v. Kaucher*, 131 U. S. App. cxlvi, affirming the judgment in the principal case.

CITY OF CENTRAL v. BROWN.

PLEADING. AGENCY OF MAYOR AND CLERK — CITY WARRANTS. Where the mayor and city clerk signed and issued warrants on behalf of the city, upon which the city was sued, and a plea verified, by affidavit, denied the execution of the warrants; such plea put in issue the signatures of the mayor and city clerk, and also their authority to issue such warrants as agents of the city.

EVIDENCE. In this case it was not shown that the mayor and clerk had authority from the city to issue the warrants sued upon, or that any allowance had been made by the city council to the plaintiff for his services *Held*, that the warrants were improperly received in evidence.

Error to District Court, Gilpin County.

SUIT in assumpsit; attached to the declaration as a part of the account sued on were 14 (so-called) city warrants, of which only two were specially declared on.

With others, there was filed a plea which averred that said 14 warrants constituted the whole grounds of the plaintiff's action, and denied their execution; which plea was verified by the affidavit of the mayor of said city.

Upon the trial below, there was no other indebtedness shown in evidence by the plaintiff than that which was evidenced by said warrants.

Mr. A. P. HEREFORD, for plaintiff in error.

Mr. G. B. REED, for defendant in error.

HILLETT, C. J. This suit was brought upon certain warrants issued to appellee by the mayor and clerk of the city, or by persons who were acting as such officers, in payment for services rendered by appellee as marshal of the city. It appears that during the time in which the services were rendered, two bodies claimed to have and exercise the corporate powers of the city. and each had a clerk and marshal, and perhaps other officers. The warrants in question were signed by the mayor, as to whom there was no dispute, and by the clerk of one of the councils, and attested by the seal of the city; but there is no evidence in the record as to the authority of these officers to execute such instruments, or of any allowance to appellee made by either of the councils. The execution of the warrants was denied by plea verified by affidavit, as provided in section 14 of the practice act (R. S. 506), which was sufficient to put in issue not only the signature of the officers, but their authority to issue such

paper on behalf of the city. *Dwight v. Newell*, 15 Ill. 333; *Delahay v. Clement*, 2 Scam. 575. Assuming that the mayor and clerk were rightfully in office, they were agents of the city only, whose authority, when denied in the manner prescribed by statute, must be proved. The power to appropriate money and provide for paying the debts of the city, and also to fix the compensation of officers, is by the charter vested in the council. 3 Sess. 244-6. And it was not shown that appellee's demand had ever been recognized by either of the bodies claiming the right to represent the city. It is quite true that warrants issued by officers having general authority to execute such instruments, are *prima facie* evidence of the indebtedness of the corporation (*Dillon's Corporations*, § 411); but this is only true when the authority of the officers is not directly denied. In the case at bar there was nothing to show that the mayor and clerk had authority from the city to issue such paper in any case whatever, or that any allowance had been made to appellee for his services, and, therefore, the warrants were improperly received in evidence. The judgment of the district court is reversed with costs, and the cause is remanded for a new trial.

Reversed.

PARTY WISHING TO DENY EXECUTION OF WRITTEN INSTRUMENT should file a verified plea: *Central City v. Wilcoxon*, 3 Colo. 569; *Parkison v. Boddiker*, 10 Colo. 509.

THE PEOPLE v. MELLOR et al.

RECOGNIZANCE OF BAIL—*defect in proceedings of justice of the peace.* Justices of the peace have jurisdiction to inquire into the truth or probability of a charge of burglary, and to hold persons to bail to answer to such charge upon an affidavit in which the offense is wrongly or defectively stated.

ERROR—*that works no injury*, in a proceeding by *scire facias* upon a recognizance of bail, in the name of the people, whether the suit stands to the use of the county, and is so entitled, is a matter of no consequence to the defendants.

RECOGNIZANCE OF BAIL—*form of.* A bond to the people in the usual form, signed by the parties, and approved by two justices of the peace, is a sufficient recognizance of bail under the statute (R. S. 250).

PRACTICE—*judgment, where some of the defendants are served and others not served.* In a proceeding by *scire facias* upon a recognizance of bail, without service upon all the defendants, judgment may be taken against those who have been duly served with process.

Error to District Court, Gilpin County.

THE affidavit on which the proceeding was founded was as follows:

TERRITORY OF COLORADO, } ss:
COUNTY OF GILPIN.

B. T. Wells, being first duly sworn, upon oath, says, that on the morning of the 8th day of January, A. D. 1870, the crime of burglary was attempted to be committed at the Smith & Parmelee Quartz Mill, in the county of Gilpin and Territory aforesaid, by breaking into the mill of said company, and attempting to break into the amalgam room of said company, and by firing a pistol at the person of John Frick, and that he has just reason to believe and does believe that James Feehan and Joseph Cook are guilty of said crime of burglary, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the Territory of Colorado.

B. T. WELLS.

The recognizance as set out in the *scire facias* was in the following form:

Know all men by these presents that we, Joseph Cook and of the county of Gilpin, in the Territory of Colorado, are held and firmly bound unto the people of the Territory of Colorado, in the full and penal sum of \$500, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators or assigns, firmly by these presents, signed with our hands, sealed with our seals, and dated this 8th day of January, in the year of our Lord one thousand eight hundred and seventy.

The conditions of the foregoing obligation are such that whereas the above bounden Joseph Cook was arrested, and brought before George B. Backus and Samuel H. Bradley, two justices of the peace, in and for the county of Gilpin, aforesaid, on the 8th day of January, A. D.

1870, for examination on the charge of burglary, and whereas, after an examination before the said George B. Backus and Samuel H. Bradley, justices of the peace, as aforesaid, the said Joseph Cook was recognized, and required to give bail in the sum of \$500, to secure his appearance at the next term of the district court, in and for the said county of Gilpin, to answer said charge of burglary. Now, if the said Joseph Cook shall personally be and appear before the district court, in and for the said county of Gilpin, on the first day of the next term thereof, to be holden at the court-house, in Central City, in the said county of Gilpin, commencing on the 3d day of May, A. D. 1870, and shall not depart from said court without leave, and shall abide by and obey all orders which the said court may make in the premises herein, until discharged or released from this recognizance, then the above obligation to be null and void ; otherwise, to remain in full force and effect.

In witness whereof, we have hereunto set our hands and seals on the day and year aforesaid.

JOSEPH COOK, [SEAL.]

WILLIAM WAIN, [SEAL.]

JOHN MELLOR. [SEAL.]

Signed, sealed and delivered in }
the presence of }

S. H. BRADLEY.

Approved January 8th, 1870.

S. H. BRADLEY, J. P.

G. B. BACKUS, J. P.

The writ was served upon Wain and Mellor only—Cook not found. With other matters, the defendants Wain and Mellor pleaded that the affidavit of Wells, upon which Cook was arrested, was not sufficient, in that it did not charge the offense to have been committed in the night-time, and that it charged an attempt only to shoot one John Frick, and not the fact of burglary ; that the affidavit did not aver that Cook, maliciously and forcibly or willfully and

maliciously, without force, entered the mill; that it was not averred that Cook entered the mill with intent to commit a felony. To this the people demurred, and, upon argument, the demurrer was sustained.

Mr. CLINTON REED, district attorney, for plaintiff in error.

Mr. L. C. ROCKWELL, *contra*.

HALLETT, C. J. Conceding that sureties in a recognizance may show that the court or officer before whom the recognizance was acknowledged, had no authority in that behalf, the second plea is clearly insufficient. The affidavit upon which Cook was arrested, although defective, as alleged in the plea, may have been sufficient to give the justices jurisdiction to inquire into the truth of the charge. It might have been amended at the hearing, or, if no objection was made by the accused, it may now be assumed that defects therein were waived. In Indiana, where the doctrine is maintained that the authority of the committing magistrate must be affirmatively established, it is expressly held that a defective affidavit may give jurisdiction. *The State v. Gachenheimer*, 30 Ind. 63. No question is made as to the sufficiency of the writ, and as the demurrer to it was voluntarily abandoned by filing pleas, probably none is entertained. It is not, therefore, necessary to determine whether these parties may deny a fact solemnly admitted and entered of record in their recognizance, as, that Cook was properly charged with the burglary, and upon due inquiry was required to give bail, for that has not been done in the plea.

There is nothing in the writ to show that the action was brought to the use of Gilpin county, and looking only to the pleadings we find the cause first so entitled in defendants' pleas. The circumstance that the clerk, without authority, had previously entered the case in that way was not an error which the defendants could adopt for the purpose

of defeating the action. But whether the suit was brought to the use of Gilpin county is a matter of no consequence to the defendants. The people are plaintiffs, and payment to them will protect the defendants, whatever may be done with the money. As to the form of the recognizance the case of *Shattuck v. The People*, 4 Scam. 477, is decisive, and that judgment may be taken against the defendants served with process, although the principal cognizor has not been served, is equally well settled. *McFarlan v. The People*, 13 Ill. 9. The demurrer to the second plea should have been sustained, and upon that ground the judgment will be reversed with costs, and the cause remanded for further proceedings, according to the views here expressed.

Reversed.

RECOGNIZANCE, FORM OF. — The fact that the bond is on a separate sheet of paper, and signed and sealed by the obligors, but not spread on the justice's docket, does not affect its validity: *Haney v. People*, 12 Colo. 340.

BUCK v. FISCHER et al.

PARTIES — *husband of executrix may join as plaintiff.* Upon marriage with an executrix, the husband becomes co-executor of the same estate, and he may join with her as plaintiff in a suit to foreclose a mortgage given to decedent.

PLEADING — *character in which plaintiffs sue.* In a bill by husband and wife to foreclose a mortgage, if the facts alleged show that they sue as executor and executrix of an estate, the failure to describe themselves as such will not be fatal to the suit.*

PRACTICE — *general order of reference.* Upon the resignation of a master in chancery, all causes then before him may be referred to his successor in office, by a general order.

Appeal from District Court, Arapahoe County.

THE bill alleges that Wm. Buck, February 15, 1868, executed a promissory note to Frantz A. Bocker, since deceased, payable June 1, 1868, for \$300, and secured it by mortgage upon certain premises in Douglass county, which are described in the bill. Bocker died August 28, 1870, leaving the complainant, Amelia, his sole legatee and

* B. C., ante, 182.

devisee; that his last will and testament was admitted to probate, and letters testamentary, with the will annexed, were issued to the said Amelia; that the said Amelia afterward, February 24, 1872, intermarried with the co-complainant, C. F. A. Fischer, and that she is now the lawful wife of the said Fischer. The defendants, William and Annie Buck, answered, and there was a reference to H. E. Luthe, Esq., master in chancery, to take proof. Afterward, upon the resignation of Luthe, the court entered a general order, directing that all causes referred to him, and which he had not reported upon, should be referred to Wm. B. Mills, Esq., to proceed in the same manner as Luthe was directed.

This cause was before the court upon writ of error at the February term, 1873, *ante*, 182.

Mr. E. L. SMITH, for appellant.

Mr. T. G. PUTNAM, for appellee.

HALLETT, C. J. Appellant executed a mortgage to one Bocker, who afterward died, having bequeathed all his property to Amelia, his wife, and appointed her executrix of his estate. After letters testamentary were issued to her, Amelia intermarried with C. F. A. Fischer, and thereby he became co-executor of the estate. 3 Redf. on Wills, 78.

The failure of appellees to describe themselves as executrix and executor of the estate, the facts being alleged from which that conclusion may be drawn, cannot be fatal to the suit. That the suit could only be maintained by appellees as personal representatives of the estate, may be conceded (1 Story's Eq. Pl., § 200), but the character in which they sue sufficiently appears from the facts alleged in the bill. Under chapter, 60 R. S. 455, a *femme covert* may sue and be sued in all matters relating to her property, person and reputation, in the same manner as if she were sole, but this suit was not brought to enforce any such right. As executrix of the estate of Bocker, the present husband was

responsible for her conduct under the general rule, and therefore he had a right to join with her, as plaintiff, in the suit.

Whether the rule has been changed by the late statute of 1874 (10 Sess. 185), we need not determine, since that statute was passed after the suit was brought.

The objection that Mr. Mills had no authority from the court to take evidence in the cause is without foundation. The general order by which he was directed to proceed as master in chancery, in all causes which had been previously referred to Mr. Luthe, was a sufficient delegation of power.

We find no error in the record, and therefore affirm the decree of the district court, with costs.

Affirmed.

HALL v. KING.

INTEREST — *plea that promise to pay was not in writing.* To an action for money loaned, and for interest upon money loaned and upon an account stated, a plea that the several promises were to pay interest at a greater rate than ten per cent per annum, and that such promises were not in writing, is bad.

Statute of frauds. In such action a plea that the promises were made upon sale of certain goods exceeding in value the sum of \$50, and that the promises were not in writing, is bad.

PROMISSORY NOTE — *whether action may be maintained for interest upon, after surrender of note.* If, upon payment of the principal sum due on a promissory note, the maker promise to pay interest due on the same note at a future day, and the payee thereupon cancel the note, and deliver it to the maker, to enable the latter to show it to other parties with whom he has dealings, an action may be maintained upon such promise.

And parol evidence of conversations between the parties in regard to such note and the payment of it, may be received to establish such promise.

NEW TRIAL — *where the evidence is conflicting,* and the judgment appears to be correct, a new trial will not be granted.

Appeal from District Court, Arapahoe County.

THIS is an action of assumpsit. In the declaration the plaintiff alleges that on February 1, 1874, defendant was

indebted to him in the sum of \$3,500 for interest upon, and for the forbearance and use of large sums of money, before then due from the defendant to the plaintiff, for long spaces of time before then elapsed, forborne by plaintiff to the defendant at the request of the latter, and for so much money before that time lent by the plaintiff to the defendant, and for so much money due from defendant to the plaintiff, on an account stated between them; and that being so indebted, the defendant, on the day and year last aforesaid, promised the plaintiff to pay him the said sums of money above stated when requested,

The defendant filed four pleas: 1st. Non-assumpsit. 2d. That none of the supposed causes of action accrued within six years next before the commencement of the suit. 3d. That the supposed promise was an agreement to pay interest at a greater rate than ten per centum per annum, and there never was any memorandum or note thereof, signed by the defendant. 4th. That the supposed promise was an agreement founded upon the sale of certain goods for the payment of a sum of money exceeding \$50, and that there is no memorandum or note thereof, signed by the defendant. Replication to the second plea, that the causes of action sued on did accrue to the plaintiff within six years before the commencement of the suit.

The plaintiff demurred to the 3d and 4th pleas — demurrer sustained. Trial by the court without a jury; finding and judgment for plaintiff \$1,061.48 and costs.

At the trial certain questions were put, and witness' answers received against the objections of the appellant — which action of the court below is here assigned for error, — the same are as follows, viz.:

Dean W. King testified for the plaintiff:

Question.—“State whether the defendant here is owing you any money, and for what?”

Answer.—“He is owing me.”

Question.—“State on what account he is owing you — what it is for?”

Answer.—“It is on account of a note that he gave me for borrowed money.”

Question.—“Has that note ever been surrendered?” [to which the defendant objected, because the suit was not brought on any note, nor upon a lost note, nor had any step been taken under the statute for the production of any note. Objection overruled, and defendant excepted.]

Question.—“Where is that note, if you know?”

Answer.—“I don’t know ; no, sir, unless I tell what was done with it.”

Question.—“Where did you see the note last?”

Answer.—“I saw it in the hands of Mr. Hall.”

Question.—“How did it come in his hands?”

Answer.—“I delivered it to him.”

Question.—“What else was done at the time you delivered the note to Mr. Hall?”

Answer.—“The day the note was delivered, there was an agreement made between Mr. Hall and myself.”

Question.—“State that agreement?”

Answer.—“He notified me a very short time before to meet him in Denver ; that he had some money for me ; I came in and met him at the Ford House or Charpiot’s and I went up to his room with him ; he told me he had some money, provided he could do a certain thing ; I asked him what that thing was, and he said he wanted to go to Europe, but he was afraid he could not accomplish what he wanted to accomplish, unless he could take up all of the paper he had in Colorado, and be able to say that he had not a dollar’s worth of paper out in the Territory ; I told him I had been paying interest on this money since 1867, and that there was a suit commenced against me in the First National Bank, for, I cannot give you the exact amount, but it was near then \$2,800 or \$2,900 ; and, after talking it over a while, he guessed he could go down and fix it with Moffat, so that, by paying a portion of it, the rest could run a year ; I won’t say a year or what it was, but it could run a while, and I agreed to meet him again at some hour in the afternoon, and I met him again and we went down to the First National

Bank ; I went down to the bank and he paid that day the exact face of the note."

Question.—"State how much he paid.

Answer.—"He paid \$2,100, which was the exact face of the note, and he told me before we went to the bank, that he would see Moffat and fix it, so the balance of the debt against me at the bank could run ; and when I met him and Mr. Moffat together at the bank, the arrangement seemed to be fixed ; he agreed with me that he would see me out of that debt at the bank, at least that was his expression, every word ; if I stated that the balance of the account at the bank was to run a year I will recall it ; it was not a year ; this was in the fall ; October or November, I think, and it was to run until some time next season ; I cannot tell, I think it was a year ; this payment of \$2,100 was made, as near as I remember, in the latter part of October or fore-part of November, 1872 ; when he paid me the money, the note was given up to Mr. Hall."

Here, under a notice from the plaintiff, the note above mentioned was produced by the defendants' attorneys, and was identified by the witness, and was introduced in evidence, and is as follows, viz. :

"GEORGETOWN, Col., October 20, 1867. (The 7 being written over an 8, or *vice versa*, which, is uncertain) ; \$2,100 in the left hand upper corner. "Eight months after date, I promise to pay to Dr. D. W. King or order, twenty-one hundred (2,100) dollars, with interest, at the rate of two per cent per month, payable at the banking house of George T. Clark & Co., at Georgtown, Col., (signed) J. W. Hall," on the face of which is indorsed, "Received payment, in full, to date, December 5th, 1872, D. W. King." And the witness further testified :

Question.—"What was that note given for?"

Answer.—"Borrowed money."

Question.—"State how much has ever been paid you upon this note?"

Answer.—“Well, it was given up when I wrote that receipt across it, and \$2,100 was paid last year; there was \$94 more paid, making \$2,194 in all.”

Question.—“Can you explain to the court how you came to sign that receipt for the full amount of the note?”

Answer.—“I can; he stated to me that he wanted to go to Europe, and that some English parties knew he had a good deal of paper. He wanted to be able to go there, and show them that he had all of his indebtedness with him; that was the plea under which I gave up the note; I supposed I had tested the man's honor.” Witness further testified that he gave up the note on that recommendation and at defendant's request, and that since the payment of the \$2,100, he had been paid \$94 on that indebtedness, some time in October last, when the panic occurred. Here witness was shown a certain letter (marked B by the court), bearing date October, 1873, and stated that he knew it to be in Mr. Hall's handwriting; had no other claim on defendant for any indebtedness except that growing out of this transaction.

Letter marked B is thus:

“DEAR DOCTOR.—Yours at hand. I will send check for ninety-four dollars in a few days, but cannot do it until the banks get straightened out a little.

(Signed)

“J. W. HALL.”

The witness further testified:

Question.—“At the time you surrendered that note, was there any thing said about a balance due you; if any thing, state what it was?”

Answer.—“Yes, sir; there was.”

Question.—“State what that was?”

Answer.—“He stated in the presence of Mr. Moffat and myself that he presumed the principal was more than I expected to get at one time; that he could now go to England and carry every thing with him; that he could go and say truly that he had not a dollar's worth of paper out in Colorado.”

Question.—“What was said about the balance that was due you?”

Answer.—“I don’t know as I can repeat the language, but he either told me or told Moffat, he congratulated me—one or both of us—he congratulated me that he had got the matter fixed at the bank, so that it would not trouble me until he got back next summer;—then he could fix it.”

Question.—“Fix what; the balance due on that note?”

Answer.—“That was connected with that. After paying the bank it was varied a few dollars from \$900. Mr. Sayre and Wright ought to know. It is the note you sued me on,” [to Mr. Wright].

Question.—“How much was the balance that was talked about being due you on that note?”

Answer.—“There was no sum stated that was due me on it.”

Question.—“I understood you, a little while ago, the promise was that he would take care of this indebtedness at the bank; how much was that over and above the amount he paid on that note?”

Answer.—“That balance was about \$900.”

Question.—“You can state whether or not this \$2,100 was accepted by you as full satisfaction for that whole indebtedness?”

Answer.—“No, sir, it was not.”

On cross-examination:

Question.—“Was it not agreed between you and Col. Hall at the time this settlement was made, this \$2,100 paid you was to be every thing; was to be a complete and full settlement between you?”

Answer.—“No, sir. It was not so talked or hinted between either of us.”

On re-examination:

Question.—“Have you had any conversation with Hall since you received the money in reference to the balance of the note?”

Answer.—“Yes, sir; both by letter and verbally.”

Question.—“State what occurred verbally?”

Answer.—“Yes, sir. I visited him several times.”

Refractive from it. Witness further stated that he met defendant at the legislative rooms; defendant said that he had received a note from plaintiff's attorney, and got mad and did not answer it. Witness went on to tell him how the bank was crowding that matter; that they had advertised his security (the man who indorsed the note with him), and were going to sell him out; that witness did not know how to save his wife's place, except the defendant helped him as he agreed at the bank; defendant replied that he had not a dollar, but was expecting some money from the east; finally before witness left him, defendant promised to telegraph east, and wanted witness to come down some day, three or four days ahead; witness told him he had to borrow money to pay car fare that morning; defendant said come down on Friday, and promised to furnish his car fare home, any way.

Re-cross-examination.—Witness thought the words “as you agreed,” were used in conversation with the defendant at the legislative hall; he went there to claim it of the defendant as money owed witness; never heard any objection; went to him as a matter of right, and presented to defendant what he owed him (witness), morally, legally, and every other way; did not tell him how much he owed, but many times told him that he did owe; could not remember every time they had talked of the matter; he has admitted that he owed witness; witness never heard of his denying it; supposed the defendant said he owed him for borrowed money on the note as they had had no other transaction.

Defendant moved for a nonsuit, for the following reasons: that the promissory note in evidence and the debt represented thereby had been released by the plaintiff; because there is no evidence of any cause of action; because the evidence of the cause of action, if any there be, is variant with the writings in evidence of the parties and for other good and sufficient reasons. Motion overruled, and exception taken, and this ruling is assigned for error

Appellant testified in his own behalf that he paid the \$2,100 mentioned by appellee in full settlement of the note, and that he did not promise to pay any further or other sum upon it. He explained other negotiations and transactions between appellee and himself, and averred that the note was surrendered to him in consideration that he would influence the First National Bank to allow to appellee further time for the payment of the balance due.

MESSRS. SAYRE, WRIGHT & BUTLER, for appellant.

Mr. J. W. BLACKBURN, for appellee

STONE, J. The third and fourth pleas of the defendant present no defense to the action, and the demurrer to the same was properly sustained.

The only issue made in the record is, is the defendant indebted to the plaintiff a sum of money for interest upon and for the forbearance and use of money as alleged in the declaration?

The evidence admitted by the court, we think, was relevant and material, and tended to prove the issue, and was properly received.

This was a trial by the court without the aid of a jury, and the question of the admissibility of evidence, strictly speaking, can seldom be raised, since, whatever the ground of objection, the evidence objected to must of necessity be heard by the judge, in order to determine its character and value.

In such cases, the only effect is upon the sufficiency and weight of the evidence. 1 Greenl. Ev. 65.

The judgment in this case is authorized by the evidence, and this court will not reverse the judgment of the court below, when, on an inspection of the whole record, we think substantial justice has been done, and no rule of law violated.

Judgment affirmed.

NEW TRIAL WILL NOT BE GRANTED where the evidence is conflicting, and the judgment appears to be correct: *Barker v. Hartley*, 4 Colo. 327.

HART & SCHLESSINGER v. FRANCIS.

RECOURSEMENT AND SET-OFF—*damages arising from tort.* In an action of assumpsit to recover the amount of a due bill, the defendant cannot recoup or set off damages resulting from the wrongful act of the plaintiff in seizing and detaining defendant's cattle, and causing defendant to hunt for the same.

Appeal from District Court, Gilpin County.

ASSUMPSIT brought by Francis, the plaintiff below, against Hart & Schlessinger, a corporation, upon a due bill in form as follows:

MOUNTAIN CITY, COLORADO,

September 22, 1870.

\$429.20.

Due Joseph Francis on work done for us..... \$286 50

Due Joseph Francis on work done for Hart, assumed by us..... 143 70

\$429 20

of which the amount of Hart's account is to be paid December 30th.

HART & SCHLESSINGER,
per T. S. SCHLESSINGER, *President.*

To the declaration the defendant filed the following plea:
“ And for a further plea in this behalf, said defendant says the plaintiff ought not to have his aforesaid action against it, because it says, that a part of said due bill, viz.: \$286.50 therein mentioned, was for work done by plaintiff for defendant under a contract made, to wit: February 1, A. D. 1870, by the terms of which, plaintiff agreed to work for defendant for \$50 per month; that said contract was in force at the time of giving the same, and was thereafter to continue in force; that the assumption of the \$143.70 by the defendant in said due bill described

to be paid December next following the date thereof was so included, upon the understanding and consideration that plaintiff's contract was still in force, and that plaintiff was to continue in defendant's employ, and in pursuance of such understanding, the plaintiff on receiving said due bill proceeded at once to the said mill of defendant, about eight miles distant from the place of making said due bill, for the purpose of resuming his work under the said contract, but, instead thereof, seized and took, forcibly, possession of a large amount of personal property of the defendant, to wit: ten head of working oxen, lot of wagons and other property, with the express and avowed purpose of holding and keeping the same in satisfaction and payment of said due bill, without legal process and against the protest of defendant. And defendant avers that said plaintiff so held the possession of said property for the period of two or three days, with threats of violence against the agent of said defendant if he attempted to resume the possession of said property, without first making payment of said due bill. And defendant avers that, while in the act of suing out a warrant for the arrest of said plaintiff, three head of said working oxen was lost, driven away, or destroyed by the plaintiff, of the value of, to wit: \$400, and the defendant has never recovered possession of the same. And the defendant avers that the taking possession of defendant's property in manner aforesaid, and for the purpose aforesaid, caused great loss, damage and annoyance, in and about the business of defendant, in the partial suspension thereof, and in the employment of men to hunt after said oxen in a large sum, to wit: \$500. And defendant avers that the sole and only cause of action in plaintiff's declaration mentioned, is founded upon said due bill; that the defendant has suffered damage to the amount of \$900, which it offers to set off, and recoup against said due bill, and this it is ready to verify, whereupon it prays judgment, etc.

To this the plaintiff demurred, and upon argument the demurrer was sustained, and defendant appealed.

Mr. ALVIN MARSH, for appellant.

Mr. WILLARD TELLER, for appellee.

BRAZEE, J. The only cause assigned for error herein is, that the court below erred in sustaining the demurrer to the third plea of defendant.

The declaration is in assumpsit upon a due bill given by the defendant to the plaintiff. The plea sets up a trespass and tortious seizure of the appellant's personal property by appellee after the due bill was given, for the purpose of enforcing payment thereof.

The plea offers to set off and recoup the damages resulting from the tort, without alleging any promise of appellee to pay the damages. The case, therefore, presents the question whether a defendant may set off or recoup the damages occasioned by the tortious act of a plaintiff in violation of the defendant's rights in an action of assumpsit. We are of opinion that such defense cannot be legally interposed in assumpsit. The demurrer to the defendant's third plea was properly sustained, and the judgment is therefore

Affirmed.

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EXTRA ANNOTATION
TO
PRECEDING VOLUME

EXTRA ANNOTATIONS
—TO—
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—
VOLUME II

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NOTES

ON THE

COLORADO REPORTS.

CASES IN 2 COLORADO.

2 COLO. 1, PALMER v. COWDREY.

Jurisdiction of supreme court to issue writ of error.

Cited in *Vance v. Rockwell*, 3 Colo. 240, holding that writ of error may issue from supreme court to decree of probate court, to sell decedent's land to pay debts.

Regulation of practice in territorial courts.

Cited in *Ames v. Colorado C. R. Co.* 4 Dill. 260, Fed. Cas. No. 325, holding that chancery practice in territory of Colorado was not regulated by equity rules of federal courts; *Beery v. United States*, 2 Colo. 186 (dissenting opinion), on power of territorial legislature to regulate practice of territorial courts.

Prerequisites to order of publication.

Cited in *Cheely v. Clayton*, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328; *Clayton v. Clayton*, 4 Colo. 410; *Israel v. Arthur*, 7 Colo. 5, 1 Pac. 438; *Vance v. Maroney*, 4 Colo. 47,—holding that return non inventus made before return day of writ will not support notice by publication; *State ex rel. Kansas City v. Field*, 107 Mo. 445, 17 S. W. 896, holding court without jurisdiction to make order of publication until due diligence in making personal service is shown; *Himmelberger-Harrison Lumber Co. v. McCabe*, 220 Mo. 154, 119 S. W. 357, holding that summons should be retained by sheriff until return day unless defendant is sooner found.

2 COLO. 7, LISS v. WILCOXEN.

Appellate jurisdiction of supreme court.

Cited in *Vance v. Rockwell*, 3 Colo. 240, holding that writ of error lies from supreme court to decree of probate court to sell decedent's land to pay debts; *Stebbins v. Anthony*, 5 Colo. 273, holding that supreme court's jurisdiction to determine causes brought up by writ of error was complete under authorization from Congress without action

of territorial legislature; *Lockhaven Trust & S. D. Co. v. United States Mortg. & T. Co.* 19 Colo. App. 28, 73 Pac. 409, holding that right to appeal from money judgment does not exist unless statute creates it.

2 COLO. 11, CRAIG v. YOUNG.

2 COLO. 12, TAYLOR v. McLAUGHLIN, Later appeal in 2 Colo. 375.

2 COLO. 13, MACKEY v. PEOPLE.

Authority of court to summon jury from body of county.

Cited in *Imboden v. People*, 40 Colo. 142, 90 Pac. 608; *Walt v. People*, 46 Colo. 136, 104 Pac. 89; *Territory v. Chartz*, 4 Ariz. 4, 32 Pac. 166,—holding that court has power to summon grand jury from body of county notwithstanding statute, upon application of district attorney; *State v. Disbrow*, 130 Iowa, 19, 106 N. W. 263, 8 A. & E. Ann. Cas. 190, holding that court may order grand jurors drawn for current year to appear forthwith and draw therefrom new jury where indictment is set aside after grand jury for term is discharged; *Cavett v. Territory*, 1 Okla. Crim. Rep. 493, 98 Pac. 890, holding that grand jury may be summoned from body of county when names are exhausted from regular jury box of county; *Clawson v. United States*, 114 U. S. 477, 29 L. ed. 179, 5 Sup. Ct. Rep. 949 (affirming 4 Utah, 34); *Bennett v. Tintie Iron Co.* 9 Utah, 291, 34 Pac. 61, holding that summoning of special trial jury upon open venire, while regular list was exhausted was not error.

Organization of grand jury.

Cited in note in 27 L.R.A. 786, on organization of grand jury.

Number of persons constituting grand jury.

Cited in *Wilson v. People*, 3 Colo. 325, holding that under constitution grand jury consists of not more than twelve, nine of whom must concur in finding bill.

Cited in notes in 12 A. S. R. 904, on requisite number and concurrence of grand jurors; 27 L.R.A. 848, on number of grand jurors necessary or proper to act.

Challenge to array.

Cited in *Abbott's Crim. Tr.* 2d ed. 207, on challenge to array of jurors as not sustainable when panel of qualified jurors is in attendance.

Curing error in instructions.

Cited in *Fink v. Algermissen*, 25 Mo. App. 186; *Price v. State*, 1 Okla. Crim. Rep. 358, 98 Pac. 447; *Lufkins v. Collins*, 2 Idaho, 150, 7 Pac. 95,—holding erroneous instruction not cured by another instruction upon same subject, unless former is specifically withdrawn.

Correctness of instructions as to reasonable doubt.

Cited in *State v. De Lea*, 36 Mont. 531, 93 Pac. 814, on sufficiency

of instructions as to what reasonable doubt must be founded upon; *State v. Andrews*, 77 N. J. L. 108, 71 Atl. 109, holding, that instruction that reasonable doubt must be one founded upon some evidence, is erroneous.

Error in instructions as ground for reversal.

Cited in *Clare v. People*, 9 Colo. 122, 10 Pac. 799, holding that to prevent reversal for error in charge, it must appear that prisoner could not have been prejudiced thereby; *Babcock v. People*, 13 Colo. 515, 22 Pac. 817, holding that charge that jury should convict of murder in second degree, if they believe killing was without malice, was erroneous; *Wickham v. People*, 41 Colo. 345, 93 Pac. 478; *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614,—holding that instruction to jury, technically erroneous, does not furnish ground for reversal, if jury is not misled; *Wortman v. People*, 25 Colo. 270, 53 Pac. 1053, holding instructions as threats of personal violence inducing submission to sexual intercourse, reversible error in absence of evidence of such threats or submission.

Distinguished in *Young v. People*, 47 Colo. 352, 107 Pac. 274, holding that verdict will be reversed for error in charge, where facts are in dispute, and unbiased minds might draw different conclusions.

2 COLO. 20, ELDRED v. MALLOY.

Time for filing bill of exceptions.

Cited in *Packard v. Spellings*, 3 Colo. 109, holding that bill of exceptions, if signed and sealed at term or within time fixed by court, may be filed on subsequent day.

Necessity for filing and certifying bill of exceptions.

Cited in *Pettit v. People*, 24 Colo. 517, 52 Pac. 676, holding that bill of exceptions not filed in district court, or certified as true bill by clerk is not part of record.

2 COLO. 23, GILPIN v. EBERT.

2 COLO. 24, STERLING CITY GOLD & S. MIN. & TUNNELING CO. v. COOK.

Followed without special discussion in *Sterling City Gold & S. Min. Co. v. Hughes*, 3 Colo. 229.

Action for wrongful attachment.

Cited in note in 81 A. D. 468, on actions for wrongful attachments and defenses thereto.

Right to enforce indemnity bond against surety in first instance.

Distinguished in *Newman v. People*, 4 Colo. App. 46, 34 Pac. 3006, holding that joint judgment may be entered against constable and sureties on his bond in first instance.

Disapproved in *Mattler v. Brind*, 2 Colo. App. 439, 31 Pac. 348, holding that action on undertaking in attachment may be maintained against principal and sureties jointly in first instance.

Construction of adopted statute.

Cited in *Freas v. Engelbrecht*, 3 Colo. 377, holding that court is not bound by construction of statute by courts of another state from whence statute was adopted.

2 COLO. 28, HOBSON v. PORTER.**Secondary evidence of lost instrument.**

Cited in *Bruns v. Clase*, 9 Colo. 225, 11 Pac. 79, holding that proof of diligent, but unsuccessful, search for an instrument in place where same belongs, is sufficient to admit secondary evidence of its contents.

2 COLO. 32, WESTERN U. TELEG. CO. v. CLAYMORE.**2 COLO. 36, MACHEBEUF v. CLEMENTS, affirmed in 92 U. S. 418, 23 L. ed. 504.****Presumption as to officer's performing duty.**

Distinguished in *Frost v. Teller County*, 43 Colo. 43, holding that it will be presumed that county judge paid into county treasury surplus fees, as law requires.

Burden of proving negative allegations.

Cited in *Gans v. Woolfolk*, 2 Mont. 453, holding that burden of showing negative is upon complainant where he grounds his action on negative allegations.

Authority of supreme court to issue writ of error.

Cited in *Vance v. Rockwell*, 3 Colo. 240, holding that writ of error may issue from supreme court to decree of probate court.

Recitals in deed as evidence.

Cited in *Mulford v. Rowland*, 45 Colo. 172, 100 Pac. 603, holding that deed describing attorney in fact as party of final part and purporting to be executed by him is admissible to show existence of power of attorney.

2 COLO. 48, SOLANDER v. PEOPLE.**Conclusiveness of decision of court upon challenge of juror to favor.**

Cited in *Jones v. People*, 2 Colo. 351; *Babcock v. People*, 13 Colo. 515, 22 Pac. 817; *Thompson v. People*, 26 Colo. 496, 59 Pac. 51; *Imboden v. People*, 40 Colo. 142, 90 Pac. 608,— holding that in criminal case court's finding that juror stands indifferent between parties, upon challenge to favor, is conclusive, on writ of error; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *Minich v. People*, 8 Colo. 440, 9 Pac. 4, 5 Am. Crim. Rep. 20,—to a point that finding by court upon challenge to favor, of fact of juror's indifference is not reviewable.

Effect of expression of opinion upon qualification of juror.

Cited in *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526, holding that

under statute (General Laws p. 872) juror is not necessarily disqualified by reason of previously expressed opinion.

Crime of abortion.

Cited in note in 66 A. D. 91, on crime of causing abortion.

Admissibility of declarations of victim of abortion.

Cited in *Johnson v. People*, 33 Colo. 224, 108 Am. St. Rep. 85, 80 Pac. 133, holding that declarations of victim of abortion made to husband soon after operation that accused had operated upon her is admissible in murder prosecution; *State v. Crofford*, 133 Iowa, 478, 110 N. W. 921, holding that declarations of victim of abortion in furtherance of design, are admissible against her co-conspirators on trial for substantive crime; *State v. Power*, 24 Wash. 34, 63 L.R.A. 902, 63 Pac. 1112, holding that declarations of victim of miscarriage, that she was about to visit accused are admissible in prosecution for causing her death.

Victim of abortion as accomplice.

Cited in *Smartt v. State*, 112 Tenn. 539, 80 S. W. 586, holding that woman upon whom abortion is committed or attempted is not accomplice.

Validity of instructions as to credibility of testimony of accused.

Cited in *Territory v. Garcia*, 12 N. M. 87, 75 Pac. 34, holding that instruction as to credibility of testimony of accused is not error; *State v. Bartlett*, 50 Or. 440, 19 L.R.A.(N.S.) 802, 128 Am. St. Rep. 751, 93 Pac. 243, on credibility of testimony of accused in prosecution for crime of attempted extortion; *O'Brien v. People*, 42 Colo. 40, 94 Pac. 284, holding that jury should be cautioned concerning testimony of a witness who admits his own guilt and implicates accused.

Cited in *Abbott's Crim. Tr.* 2d ed. 604, on right to comment upon credibility of defendant's testimony.

Necessity of instructions as to weight of circumstantial evidence.

Cited in *State v. Overson*, 30 Utah, 22, 83 Pac. 557, 8 A. & E. Ann. Cas. 794, holding that court is not obliged to charge as to weight of circumstantial evidence, there being proper charge as to reasonable doubt.

Cited in note in 97 A. S. R. 799, on circumstantial evidence.

2 COLO. 70, BROWNE v. STECK.

Effect of omission of revenue stamp.

Cited in notes in 84 A. S. R. 195, on failure to comply with statute requiring stamping of writings; 48 L.R.A. 315, on effect of omission to stamp an instrument or to cancel stamps.

Measure of damages for default in payment.

Cited in *Buckingham v. Orr*, 6 Colo. 587, holding that rate of interest specified in promissory note, to be paid after maturity, is prima facie measure of damages recoverable.

Cited in Sutherland, Dam. 3d ed. 824, on rate of interest stipulated for in general terms before maturity continuing until verdict.

2 COLO. 79, BAKER v. HUGHES.

Nonsuit as proper where plaintiff's evidence insufficient.

Cited in Brasher v. Denver & R. G. R. Co. 12 Colo. 384, 21 Pac. 44, holding that judgment of non-suit may be entered where evidence for plaintiff is insufficient to sustain recovery.

2 COLO. 81, MELVIN v. LATSHAW.

Right to raise question of jurisdiction upon appeal from justice's court.

Cited in Utero County v. Hoffmire, 9 Colo. App. 526, 49 Pac. 375, holding that defendant against whom judgment has been rendered by justice of peace, without jurisdiction, may appeal, and on special appearance obtain dismissal of action; People ex rel. School Dist. No. 38 v. Court of Appeals, 33 Colo. 258, 79 Pac. 1017, to the point that defendant in justice's court who was sued in wrong township does not waive right to question jurisdiction on appeal where he moved to dismiss cause before justice.

Distinguished in Hardenbrook v. Harrison, 11 Colo. 9, 17 Pac. 72; Denver, S. P. & P. R. Co. v. Roberts, 6 Colo. 333,—holding that appearing in justice's court, and in county court on appeal, is waiver of privilege of defendant to have action brought in township in which he resides.

Jurisdiction of justice's court over nonresident served within jurisdiction.

Distinguished in Wagner v. Hallack, 3 Colo. 176, holding that debtors residing without state may be sued in justice's court wherever found.

Necessity that jurisdiction of justice's court affirmatively appear.

Cited in Downing v. Florer, 4 Colo. 209, holding that jurisdiction of a justice of the peace must affirmatively appear.

2 COLO. 85, LISS v. WILCOXEN.

Right of purchaser at sheriff's sale to maintain unlawful detainer.

Cited in Glenn v. Caldwell, 74 Miss. 49, 20 So. 152 (dissenting opinion), on right of purchaser of land at execution sale to maintain action of unlawful detainer against tenant of judgment debtor; Wilcoxen v. Morgan, 2 Colo. 473, holding that unlawful detainer lies at suit of purchaser at sheriff's sale against debtor and privies.

Parol evidence to show justice's jurisdiction.

Cited in Conway v. John, 14 Colo. 30, 23 Pac. 170, holding that contents of missing files in cause tried before justice of the peace, may be established by oral testimony; Behymer v. Nordloh, 12 Colo. 352, 21 Pac. 37, holding that on appeal, jurisdiction of justice of the peace to

render judgment may be shown by evidence in trial on merits; *Thorne v. Ornauer*, 8 Colo. 353, 8 Pac. 568, holding that defect of transcript of justice on appeal, from failure to record nature of cause of action, may be cured by oral evidence establishing justice's jurisdiction; *Morris v. Dooley*, 59 Ark. 483, 28 S. W. 430 (dissenting opinion), on admissibility of oral evidence to show that probate court had jurisdiction to make decree.

Cited in note in 20 A. S. R. 521, on evidence aliunde to show jurisdiction.

Necessity for exceptions.

Cited in *Martin v. Force*, 3 Colo. 199; *Patton v. Coen & T. B. Carriage Mfg. Co.* 3 Colo. 265,—holding that in cause tried by court, if no exception is taken to judgment, sufficiency of evidence cannot be questioned on appeal.

Invalidity of judgment in justice's court rendered without jurisdiction.

Cited in *Robinson v. Bonjour*, 16 Colo. App. 458, 66 Pac. 451, holding that judgment rendered by justice of the peace, without jurisdiction, is nullity.

Cited in note in 23 A. S. R. 114, on collateral attack upon judgment.

2 COLO. 89, WALKER v. TIFFIN GOLD & S. MIN. CO. 10 MOR. MIN. REP. 572.

Deed and separate agreement to reconvey as mortgage.

Cited in *Kelley v. Leachman*, 3 Idaho, 392, 29 Pac. 849, holding that absolute deed and separate agreement for reconveyance constitute mortgage.

Cited in note in 17 A. D. 304, on absolute deed and agreement to reconvey.

Parol evidence that deed is a mortgage.

Cited in *Gassert v. Bogk*, 7 Mont. 585, 1 L.R.A. 240, 19 Pac. 281, holding that parol evidence is admissible to show that deed and agreement to reconvey constitute mortgage.

Jurisdiction of supreme court to issue writ of error.

Cited in *Vance v. Rockwell*, 3 Colo. 240, on jurisdiction of supreme court to issue writ of error to decree of probate court.

2 COLO. 97, PEOPLE EX REL. FREMONT COUNTY v. COLORADO TERRITORY.

Mandamus to public officers.

Cited in *Sawyer v. Mayhew*, 10 S. D. 18, 71 N. W. 141, holding that mandamus does not lie against state auditor to compel allowance of claim against state; *Keefe Mfg. & Invest. Co. v. Board of Education*, 33 Colo. 513, 81 Pac. 257, holding that mandamus will not lie to control discretion of board of education.

Distinguished in *Lowell v. Bonney*, 14 Colo. App. 230, 60 Pac. 830,

holding that mandamus will lie against member of executive department of state to compel performance of act purely ministerial.

2 COLO. 101, COFIELD v. CLARK.

Order on bailee of goods as sufficient delivery to pass title.

Cited in *Lufkins v. Collins*, 2 Idaho, 150, 7 Pac. 95, to the point that delivery of order on bailee or seller of goods is sufficient to constitute delivery to purchaser.

Cited in note in 5 Eng. Rul. Cas. 96, on what is necessary to take goods sold out of the vendor's apparent possession.

Measure of damages for breach of contract to deliver chattels.

Cited in *Merritt v. Wittich*, 20 Fla. 27; *Schon-Klingstein Meat & Grocery Co. v. Snow*, 43 Colo. 538, 96 Pac. 182,—holding that measure of damages for breach of contract to deliver chattels is difference between contract price and market value when articles should have been delivered.

2 COLO. 112, CRAIG v. YOUNG.

2 COLO. 113, HOYT v. MACON.

When action for malicious prosecution lies.

Cited in *Kolka v. Jones*, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558; *Lipscomb v. Shofner*, 96 Tenn. 112, 33 S. W. 818,—holding that action for malicious prosecution will lie when civil suit is brought maliciously and without probable cause, and has resulted in actual damage; *Pope v. Pollock*, 46 Ohio St. 367, 4 L.R.A. 255, 15 Am. St. Rep. 608, 21 N. E. 356, holding that action lies for maliciously, and without probable cause instituting action in forcible entry and detainer; *Johnson v. King*, 64 Tex. 226, to the point that action case lies against one who maliciously attempts to defeat claim to public lands, under pre-emption laws of United States.

Cited in *Sutherland*, Dam. 3d ed. 3567, on right to damages for malicious bringing of civil suit; *Cooley*, Torts, 3d ed. 348, on suit for malicious prosecution as lying for interference by receiver with business or property.

Cited in note in 93 A. S. R. 467, on liability for malicious prosecution of civil action.

2 COLO. 124, BARRETT MIN. CO. v. TAPPAN.

Who may verify plea for corporation.

Cited in *Abbott's Pleadings*, 2d ed. 1141, on right of officer or agent of corporation to verify plea.

2 COLO. 128, STILES v. FORD.

Receiving verdict in absence of parties.

Cited in *Abbott's Civ. Tr.* 2d ed. 531, on right of court to receive verdict in civil case in absence of parties.

2 COLO. 131, COOK v. RICE.

Conclusiveness of conveyance by trustee under town site laws.

Cited in *Smith v. Pipe*, 3 Colo. 187, holding that conveyance by trustee under town site law, was unimpeachable, at law though trustee violated trust; *Singer Mfg. Co. v. Tillman*, 3 Ariz. 122, 21 Pac. 818; *Murray v. Hobson*, 10 Colo. 66, 13 Pac. 921; *Hanlon v. Hobson*, 24 Colo. 284, 42 L.R.A. 502, 51 Pac. 433,—holding that conveyance by trustee under town site laws is not open to collateral attack by one who, at time of its execution, was not occupant of the land nor beneficiary of trust; *Lockwitz v. Larson*, 16 Utah, 275, 52 Pac. 279, holding that no delay of government in allowing entry on town site under act of congress of 1867, can affect rights of those who were bona fide occupants at time of filing application and proof.

Necessity for actual occupation of premises under town-site laws.

Cited in *Aspen v. Aspen Town & Land Co.* 10 Colo. 191, 15 Pac. 794, holding that no claimant of lots comprising town site is beneficiary of the trust, without proof of actual occupation, either by claimant or his grantors; *Greiner v. Fulton*, 46 Kan. 405, 26 Pac. 705, holding bona fide occupant of town site entitled to have his possession protected. **Determination of rights of beneficiaries under town-site act as of date of entry.**

Cited in *Pascoe v. Green*, 18 Colo. 326, 32 Pac. 824, holding that rights of parties as beneficiaries under town-site act must be determined as of date of entry; *Adams v. Binkley*, 4 Colo. 247, holding that actual occupant and owner of improvements at date of entry of town site, under statute, is entitled there as against one claiming under third party, but who never had possession.

Right of supreme court to issue writ of error.

Cited in *Vance v. Rockwell*, 3 Colo. 240, on right of supreme court to issue writ of error to decree of probate court.

2 COLO. 137, MILSAP v. STONE.

Tenant's right to dispute landlord's title.

Cited in *Hochenauer v. Hilderbrant*, 6 Colo. App. 199, 40 Pac. 470, holding that tenant is not permitted to controvert title under which he was put into possession; *Arnold v. Woodard*, 4 Colo. 249, holding that, if, after leasing premises, tenant acquires rights adverse to landlord, he must surrender premises before he can assert them.

2 COLO. 141, WESTERN U. TELEG. CO. v. EYSER, Super-sedeas granted in 19 Wall. 419, 22 L. ed. 43. Reversed in 91 U. S. 495, 23 L. ed. 377.

Admission of corporate existence by appearance in suit.

Cited in *Missouri River, F. S. & G. R. Co. v. Shirley*, 20 Kan. 660, holding that corporation, by appearing in suit, thereby admits its corporate existence.

Contributory negligence as bar to recovery.

Cited in *Colorado C. R. Co. v. Holmes*, 5 Colo. 197, holding that plaintiff's right to recover, in personal injury case, is not affected by his having contributed to injury, unless he was at fault in so doing.

Cited in *Cooley*, Torts, 3d ed. 1447, on contributory negligence that will prevent recovery for injury caused by another's negligence.

Burden of proof of contributory negligence.

Cited in *New Castle Bridge Co. v. Doty*, 37 Ind. App. 84, 76 N. E. 557, holding that burden of proving contributory negligence, in personal injury case, is on defendant.

Right to exemplary damages in actions for tort.

Cited in *Sutherland*, Dam. 3d ed. 2795, on liability of carriers for exemplary damages; *Cook*, Corp. 6th ed. 102, on equal liability of corporations and natural persons for exemplary damages.

Distinguished in *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 366, 5 Pac. 119, holding that in actions for injury resulting from torts, where offense is punishable under criminal laws, exemplary damages, cannot be awarded.

Instructions as to degrees of negligence as error.

Cited in *Denver & R. G. R. Co. v. Peterson*, 30 Colo. 77, 97 Am. St. Rep. 76, 69 Pac. 578, holding that degrees of negligence are not recognized and court should not attempt to make such distinctions.

Liability of telegraph company for injury from wire hanging from pole in street.

Cited in *Western U. Teleg. Co. v. State*, 82 Md. 293, 31 L.R.A. 572, 51 Am. St. Rep. 464, 33 Atl. 763, holding that telegraph company is prima facie liable to pedestrian for injuries resulting from its negligence in permitting unused wires to come in contact with electric feed wire in street.

2 COLO. 169, MACHETTE v. WANLESS.**Validity of unacknowledged bill of sale.**

Cited in *Heisch v. Bell*, 11 N. M. 523, 70 Pac. 572, holding that bill of sale is good between parties though not acknowledged.

Sufficiency of record on appeal.

Cited in *Hunt v. Ohmert*, 15 Colo. 447, 24 Pac. 1047, holding that court cannot review judgment on appeal where record does not disclose basis of courts action or testimony.

Privileged communications as between attorney and client.

Cited in *Caldwell v. Davis*, 10 Colo. 481, 3 Am. St. Rep. 599, 15 Pac. 696, holding that communications made to one employed to draw deed and release are not privileged; *Sparks v. Sparks*, 51 Kan. 195, 32 Pac. 892; *Kirchner v. Smith*, 61 W. Va. 434, 58 S. E. 614, 11 A. & E. Ann. Cas. 870,—holding that communications made to attorney who was acting for both parties and made in presence of both are not privileged.

Cited in note in 66 A. S. R. 228, on attorneys as witnesses.

Reversal insufficiency of evidence.

Cited in *Barker v. Hawley*, 4 Colo. 316, holding that verdict on conflicting evidence will not be disturbed unless manifestly against the weight of the evidence; *Kansas P. R. Co. v. Twombly*, 3 Colo. 125, holding that verdict of jury in action on case will not be disturbed unless it appears to be clearly against evidence.

Measure of damages for conversion of property.

Cited in *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 32 L. ed. 854, 9 Sup. Ct. Rep. 458; *New Dunderberg Min. Co. v. Old*, 38 C. C. A. 89, 97 Fed. 150,—holding that in conversion interest on value of property is recoverable from date of conversion; *Tucker v. Parker*, 7 Colo. 62, 1 Pac. 427; *Greeley, S. L. & P. R. Co. v. Yount*, 7 Colo. App. 189, 42 Pac. 1023; *Omaha- & G. Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 5 L.R.A. 236, 16 Am. St. Rep. 185, 21 Pac. 925, 16 Mor. Min. Rep. 184,—to the point that in trover damages should embrace value of property at time of conversion with interest at time of judgment; *Johnson v. Bailey*, 17 Colo. 59, 28 Pac. 81, to the point that usable value is under some circumstances, measure of damages for detention of chattel; *Isabella Gold Min. Co. v. Glenn*, 37 Colo. 165, 86 Pac. 349, holding that in action for eviction from mine where defendant extracted one, in addition to net value of one, legal interest may be allowed; *Boston & O. Smelting Co. v. Reed*, 23 Colo. 523, 48 Pac. 515, holding that party holding moneys subject to order of court is liable for profits derived from its use where he mingles it with his own.

Cited in *Sutherland*, Dam. 3d ed. 3337, on right of owner to recover in replevin value of use instead of interest, during time he was deprived of possession.

Interest on unliquidated damages.

Cited in note in 29 L.R.A.(N.S.) 80, 42, on interest on unliquidated damages.

2 COLO. 182, BUCK v. FISCHER, Later appeal in 2 Colo. 709. Necessity that complaint state cause of action without regard to exhibits.

Cited in *Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co.* 11 Colo. App. 264, 53 Pac. 242, holding that insurance policy attached to complaint and referred to, cannot be considered as part of complaint; *Brooks v. Paddock*, 6 Colo. 36, holding that complaint must state cause of action itself without regard to exhibits.

Personal representative as proper party to foreclose mortgage.

Cited in *McGooden v. Bartholic*, 132 Ill. App. 392, holding that mortgage should be foreclosed by personal representative of deceased mortgagee.

Power of supreme court to issue writ of error.

Cited in *Vance v. Rockwell*, 3 Colo. 240, on authority of supreme court to issue writ of error to decrees of probate court.

2 COLO. 186, BEERY v. UNITED STATES.

Power of courts to issue open venire for jury.

Cited in *United States v. Kuntze*, 2 Idaho, 480, 21 Pac. 407, holding that in causes where United States is party district courts may issue open venire to marshal of United States; *Imboden v. People*, 40 Colo. 142, 90 Pac. 608, holding that court has power to summon grand jury by open venire, where it has not been summoned under statute.

Admissibility of confession of person accused of crime.

Cited in *Bram v. United States*, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547, to the point that advising a prisoner to make confession was sufficient to exclude such confession upon trial; *State v. Simas*, 25 Nev. 432, 62 Pac. 242, holding that in trial for burglary witness may testify that defendant pointed out place where goods taken were concealed.

Cited in notes in 6 A. S. R. 246, 249, on admissibility of confessions; 53 L.R.A. 404, 407, on admissibility of evidence obtained by aid of involuntary or inadmissible confession; 18 L.R.A.(N.S.) 811, 867, as to when confession is voluntary.

2 COLO. 213, WYMOND v. AMSBURY.

Pleading and awarding of exemplary damages.

Cited in *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614, holding that under statute allowing exemplary damages, where they are essentially unliquidated, common law practice may be followed in declaring for and awarding them.

Remedy against one disregarding exemption rights.

Cited in note in 75 A. D. 645, 646, 648, 651, 652, on remedy of debtor whose exemption rights have been disregarded.

2 COLO. 218, GOOD v. MARTIN, Affirmed in 95 U. S. 90, 24 L. ed. 341.

Liability of one writing name on back of note before delivery to payee.

Cited in *Byers v. Tritch*, 12 Colo. App. 377, 55 Pac. 622; *Court Valhalla No. 16 F. A. v. Olson*, 14 Colo. App. 243, 59 Pac. 883; *Kiskadden v. Allen*, 7 Colo. 206, 3 Pac. 221,—holding that one who indorses note at time it is made, and before delivery to payee, is joint maker and cannot set up want of consideration moving to him; *Kealing v. Vansickle*, 74 Ind. 529, 39 Am. Rep. 101, to the point that one who indorses note before its delivery to payee is considered joint maker.

Cited in notes in 91 A. D. 711, on liability of stranger indorsing note before delivery; 4 Eng. Rul. Cas. 550, on presumptive order of liability among parties to bill or note.

2 COLO. 225, EYSTER v. GAFF.

Who may appeal.

Cited in note in 119 A. S. R. 759, on right to appeal as a party interested or injured.

2 COLO. 226, UNION GOLD MIN. CO. v. THE BANK.

Effect of corporate seal and signature of proper officer on validity of instrument.

Cited in *Bliss v. Harris*, 38 Colo. 72, 87 Pac. 1076, holding that mortgage acknowledged by secretary of corporation is prima facie proof that it was signed by proper officer and that seal attached to mortgage is seal of corporation; *Catron v. La Fayette County*, 106 Mo. 659, 17 S. W. 577, holding that signature of proper officers and seal of court empowered to issue county bonds constitute proof that they were issued in accordance with law.

Cited in *Cook, Corp.* 6th ed. 2338, on presumption of proper execution raised by fact of affixing of seal; *Cook, Corp.* 6th ed. 2335, on presumption of seal being properly affixed on proof that instrument was signed by corporate officers and that seal is corporate seal; *Cook, Corp.* 6th ed. 2334, on implied power of officer or agent to affix corporate seal to instrument.

Cited in note in 23 Am. Dec. 745, on evidence of authority to affix corporate seal.

2 COLO. 228, EYSTER v. GAFF, Affirmed in 91 U. S. 521, 23 L. ed. 403.**2 COLO. 248, UNION GOLD MIN. CO. v. ROCKY MOUNTAIN NAT. BANK, Later appeal in 2 Colo. 565 which is affirmed in 96 U. S. 640, 24 L. ed. 648, 1 Mor. Min. Rep. 432.**

Implied agency from conduct.

Cited in *G. V. B. Min. Co. v. First Nat. Bank*, 36 C. C. A. 633, 95 Fed. 25, holding that corporation is liable to third persons dealing with president as general manager for such length of time as to justify such persons in belief that he had authority to act; *First Nat. Bank v. G. V. B. Min. Co.* 89 Fed. 439; *Robert E. Lee Silver Min. Co. v. Omaha & G. Smelting & Ref. Co.* 16 Colo. 118, 26 Pac. 326; *Robinson Reduction Co. v. Johnson*, 10 Colo. App. 135, 50 Pac. 215,— holding that corporation was liable to third parties for acts of agent who exercised general management, with knowledge of officers; *Oro Min. & Mill. Co. v. Kaiser*, 4 Colo. App. 219, 35 Pac. 677, holding that corporation is liable to third persons dealing with one who is delegated to act as general manager of mining operations, in absence of knowledge by such persons of limitations upon his powers; *Roman Catholic Congregation v. O'Leary*, 24 Colo. 228, 49 Pac. 422, holding that church congregation is bound by contracts of priest who had control of affairs where it received benefits from contracts; *Breed v. First Nat. Bank*, 4 Colo. 481, 1 Mor. Min. Rep. 467, holding that superintendent of mine, by virtue of his employment merely, has no authority to borrow money on principal's credit.

Distinguished in *Albro Min. & Mill. Co. v. Chinn*, 20 Colo. App. 238, 77 Pac. 1097, holding that no presumption arises that treasurer of

mining company who operated mine, was by virtue of his office authorized to act for corporation.

Ratification of unauthorized acts of agent.

Cited in *Ilfeld v. Ziegler*, 40 Colo. 401, 91 Pac. 825, to the point that silence of principal after unauthorized sale by agent, if no change in condition of parties can result from delay, in disapproving, is evidence of ratification but does not work estoppel; *Smyth v. Lynch*, 7 Colo. App. 383, 43 Pac. 670, holding principal not estopped to deny authority of one assuming to act as his agent, unless, after knowledge of facts, he has ratified such person's acts; *Ketchem v. Marsland*, 18 Misc. 450, 42 N. Y. Supp. 7, holding that ratification of agent's acts may be inferred from retention of bills rendered for services contracted for by agent; *Breed v. First Nat. Bank*, 6 Colo. 235; *Lynch v. Smyth*, 25 Colo. 103, 54 Pac. 634; *St. Louis Gunning Advertising Co. v. Wanamaker & Brown*, 115 Mo. App. 270, 90 S. W. 737; *Thompson v. Laboringman's Mercantile & Mfg. Co.* 60 W. Va. 42, 6 L.R.A.(N.S.) 311, 53 S. E. 908,—holding that failure on part of principal to repudiate unauthorized act of agent, within reasonable time, is evidence of ratification; *Edwards v. Carson Water Co.* 21 Nev. 469, 34 Pac. 381, to the point that if corporation receives benefit of unauthorized contract of officers, it will not be allowed to deny indebtedness; *Edwards v. Carson Water Co.* 21 Nev. 469, 34 Pac. 381 (dissenting opinion), on estoppel of corporation by laches to deny liability on renewal note given without authority by trustees.

Cited in note in 79 A. D. 388, on ratification of unauthorized acts by silence.

Communications between parties as evidence to establish agency.

Cited in *Arthur v. Gard*, 3 Colo. App. 133, 32 Pac. 343, holding that communications between principal and agent in which authority of latter is admitted are admissible to establish agency.

Necessity for objecting at trial.

Cited in *Denver & R. G. R. Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79, holding that matters not objected to in court below cannot be assigned for error.

Conclusiveness of decision on first appeal.

Cited in *Lee v. Stahl*, 13 Colo. 174, 22 Pac. 436, 16 Mor. Min. Rep. 152, holding that upon retrial of same case, law governing same, as declared on appeal is *res adjudicata*.

Power of corporation to borrow money.

Cited in *Cook, Corp.* 6th ed. 2562, on right of corporation to borrow money from director.

Cited in note in 111 A. S. R. 312, 317, 325, on implied power of corporations to borrow money and give evidence of indebtedness and security therefor.

Liability of corporation to repay money borrowed without authority.

Cited in *Cook, Corp.* 6th ed. 2563, on liability of corporation without power to borrow money to repay money actually received by it.

Imputing officer's knowledge to corporation.

Cited in note in 36 Am. Dec. 195, on imputing to corporation notice to officer or agent.

2 COLO. 273, HAYES v. NEW YORK GOLD MIN. CO.**When title to land passes upon sale under execution.**

Cited in *Willis v. Pounds*, 6 Tex. Civ. App. 512, 25 S. W. 715, holding that on foreclosure of attachment lien, interest acquired by defendant between levy and sale passed by sheriff's deed; *Turner v. Sawyer*, 150 U. S. 578, 37 L. ed. 1189, 14 Sup. Ct. Rep. 192, 17 Mor. Min. Rep. 683; *Manning v. Strehlow*, 11 Colo. 451, 18 Pac. 625; *Paxton v. Heron*, 41 Colo. 147, 124 Am. St. Rep. 123, 92 Pac. 15,—holding that legal title to property sold on execution remains in judgment debtor until delivery of sheriff's deed.

What are fixtures.

Cited in *Colorado Fuel & Iron Co. v. Pueblo Water Co.* 11 Colo. App. 352, 53 Pac. 232, holding that water mains, pipes and hydrants, of water company, laid in streets are realty for purpose of taxation; *Couch v. Welsh*, 24 Utah, 36, 66 Pac. 600, 21 Mor. Min. Rep. 619, holding that tenant of mine may remove things which he has affixed to freehold for purpose of operating mine.

Cited in note in 84 A. S. R. 884, on fixtures retaining by agreement the character of personal property.

2 COLO. 281, ROGERS v. NUCKOLLS.**2 COLO. 284, McCRAW v. WELCH.****Requisites where officer justifies under execution.**

Cited in *Wyatt v. Freeman*, 4 Colo. 14, holding that sheriff justifying, under execution and seeking to attack title of plaintiff in replevin on ground of fraud, such plaintiff being stranger to judgment, must show unsatisfied judgment.

Sufficiency of affidavit for attachment.

Cited in *Cook v. Burnham*, 3 Kan. App. 27, 44 Pac. 447, holding that affidavit for attachment may state disjunctively different phases of same fact which is alleged as ground for attachment; *Dawley v. Sherwin*, 5 S. D. 594, 59 N. W. 1027; *Johnson v. Emery*, 31 Utah, 126, 86 Pac. 869, 11 A. & E. Ann. Cas. 23,—holding that affidavit alleging that defendant had assigned, disposed of, or concealed or was about to assign, dispose of, or conceal his property, alleged but single ground for attachment.

Amendment of writs of attachment.

Cited in note in 61 A. D. 131, on amendment of writs of attachment and of papers on which they are based.

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Necessity that plaintiff in replevin show title at commencement of action.

Cited in *Dillrance v. Murphy*, 1 Neb. (Unof.) 298, 95 N. W. 608, holding that plaintiff in replevin cannot recover on strength of title acquired subsequently to commencement of action.

Necessity for objecting at trial.

Cited in *Cowell v. Colorado Springs Co.* 3 Colo. 82, holding that objections not raised at trial are not available upon appeal; *Tracey v. People*, 6 Colo. 151; *Gumaer v. Sowers*, 31 Colo. 164, 71 Pac. 1103,—to the point that objections to admission of evidence should be distinctly presented at time evidence is offered.

2 COLO. 292, GOOD v. MARTIN.

2 COLO. 294, BARNES v. DE FRANCE.

2 COLO. 295, BUTLER v. PEOPLE.

Power of court to punish for contempt.

Cited in note in 15 Eng. Rul. Cas. 159, on power of courts to punish for contempt.

Right of supreme court to issue writ of error in contempt cases.

Cited in *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961; *State v. Knight*, 3 S. D. 509, 44 Am. St. Rep. 809, 54 N. W. 412, 9 Am. Crim. Rep. 221,—holding that criminal contempt proceedings are properly brought to supreme court by writ of error.

2 COLO. 298, TALPEY v. DOANE.

When cost bond must be filed.

Cited in *Sutro v. Simpson*, 14 Fed. 370, 4 McCrary, 276; *Edgar Gold & S. Min. Co. v. Taylor*, 10 Colo. 110, 14 Pac. 113,—holding that cost bond required of non-resident before commencing suit, is too late, if tendered after action brought; *Filley v. Cody*, 3 Colo. 221, holding that non-resident must give bond for costs upon suing out writ of error.

Writ of error as new action.

Cited in *Ohio-Colorado Min. & Mill. Co. v. Elder*, 47 Colo. 63, 99 Pac. 42, holding that writ of error is new suit.

2 COLO. 300, MURLEY v. ENNIS, 12 Mor. Min. Rep. 360.

Parol partnership to deal in real estate.

Cited in note in 4 L.R.A.(N.S.) 429, on validity of parol partnership to deal in real property.

—Agreement to prospect for mining claim.

Cited in *Moritz v. Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803, 16 Mor. Min. Rep. 236; *Meylette v. Brennan*, 20 Colo. 242, 33 Pac. 75; *Hirbour v. Reeding*, 3 Mont. 15, 11 Mor. Min. Rep. 514; *Raymond v. Johnson*, 17 Wash. 232, 61 Am. St. Rep. 908, 49 Pac. 492,

19 Mor. Min. Rep. 56,—holding that agreement between two parties to prospect together and share benefits of discovery of mining properties is not within statute of frauds; *Mack v. Mack*, 39 Wash. 190, 81 Pac. 707, holding that contract whereby defendant grubstaked plaintiff, who did work upon mining claim, is not within statute of frauds; *Meagher v. Reed*, 14 Colo. 335, 9 L.R.A. 455, 24 Pac. 681; *Treat v. Hiles*, 68 Wis. 344, 60 Am. Rep. 858, 32 N. W. 517,—to the point that agreement between two or more to explore and locate and work lodes on government lands is not within statute of frauds.

Agreement to engage in prospecting partnership.

Cited in *Cascaden v. Dunbar*, 84 C. C. A. 566, 157 Fed. 62; *Lawrence v. Robinson*, 4 Colo. 567, 12 Mor. Min. Rep. 387,—holding that under agreement to engage in business of prospecting for lode mining property, each party becomes agent of the other; *Doyle v. Burns*, 123 Iowa, 488, 99 N. W. 195, to the point person admitted by locator to interest in mining claim holds jointly or otherwise with locator according to agreement.

Transfer in writing of unpatented mining claim as abandonment.

Distinguished in *Butte Hardware Co. v. Frank*, 25 Mont. 344, 65 Pac. 1, 21 Mor. Min. Rep. 368, holding that judgment lien on unpatented mining claim is not lost by transfer in writing of claim by judgment debtor as such transfer is not abandonment.

Right to initiate mining claim through agent.

Cited in *Schultz v. Keeler*, 2 Idaho, 333, 13 Pac. 481, holding that person may initiate mining claim through agent; *Eberle v. Carmichael*, 8 N. M. 169, 42 Pac. 95, to the point that locator of mine may locate for joint benefit of himself and one who is to share expense.

Parties to grubstake contract not named as equitable owners.

Cited in *Hendrichs v. Morgan*, 92 C. C. A. 558, 167 Fed. 106; *Cascaden v. Dunbar*, 2 Alaska, 408,—holding that each party to grubstake contract not named in location is equitable owner and tenant in common with those named.

Discovery as essential to location of mining claim.

Cited in *Behrends v. Goldsteen*, 1 Alaska, 518, to the point that discovery is essential to valid location of mining claim.

Right of locator to reasonable time to comply with law.

Cited in *Union Mill. & Min. Co. v. Leitch*, 24 Wash. 585, 85 Am. St. Rep. 961, 64 Pac. 829, holding that locator of mining claim is entitled to reasonable time in which to mark boundaries after its discovery; *Elwood v. Dickinson*, 26 Wash. 631, 67 Pac. 370, holding that holder of fishing license who locates site for fish trap or pound net has reasonable time to comply with statute, as against subsequent locator.

Cited in notes in 7 L.R.A. (N.S.) 817, 818, 885, on location of mining claim; 68 L.R.A. 846, on relocation of mining claim as abandoned or forfeited.

Cotenants in mines.

Cited in note in 91 A. S. R. 836, 867, 881, 883, on cotenants in mines.
Default justifying abandonment of contract.

Cited in note in 30 L.R.A. 39, on right to rescind or abandon contract because of other party's default.

2 COLO. 307, ROOP v. DELAHAYE.**2 COLO. 313, MARTIN v. DAVIS.**

Sufficiency of allegation of complaint on bond.

Cited in *Jacobs v. Curtiss*, 67 Conn. 497, 35 Atl. 501, holding that allegation in complaint upon joint and several bond that "defendants bound themselves by a writing under seal" is sufficient averment of delivery thereof.

Cited in *Abbott's Pleadings*, 2d ed. 321, on sufficiency of allegation in complaint of delivery of joint and several bond.

2 COLO. 316, CRUMP v. PEOPLE.**2 COLO. 320, ELDRED v. MALLOY, 25 AM. REP. 752.**

Invalidity of wagering contracts.

Cited in *Beattie v. Hoyt*, 3 Mont. 140; *Schoenberg v. Adler*, 105 Wis. 645, 81 N. W. 1055,—to the point that wagering contracts are not enforceable; *Maher v. Van Horn*, 15 Colo. App. 14, 60 Pac. 949, holding that wager contracts on result of election are void; *Bernard v. Taylor*, 23 Or. 416, 18 L.R.A. 859, 37 Am. St. Rep. 693, 31 Pac. 968, holding that wagers are inconsistent with established interests of society, and void on grounds of public policy.

Cited in notes in 12 Eng. Rul. Cas. 406, on enforceability of wagering contracts; 42 A. R. 367, on agreement to pay on contingency; 37 A. S. R. 699, on wagers and their validity; 119 A. S. R. 173, on defenses to obligations given for gambling debts.

Distinguished in *Boughner v. Meyer*, 5 Colo. 71, 40 Am. Rep. 139, holding that check given in payment of wager is not void in hands of bona fide holder for value.

Recovery back of money paid on illegal contract.

Cited in note in 6 Eng. Rul. Cas. 491, on right to recover back money paid under illegal contract.

What instruments are negotiable.

Cited in notes in 14 Am. Dec. 423, on what instruments are negotiable; 4 Eng. Rul. Cas. 192, on negotiability of note or bill of exchange; 125 A. S. R. 193, on agreements and conditions destroying negotiability.

Necessity for certainty as to time of maturity.

Cited in *Carnahan v. Pell*, 4 Colo. 190; *Jennings v. First Nat. Bank*, 13 Colo. 417, 16 Am. St. Rep. 210, 22 Pac. 777; *Joseph v. Catron*, 13 N. M. 202, 1 L.R.A.(N.S.) 1120, 81 Pac. 439,—holding that to con-

stitute a negotiable instrument fact of maturity of instrument at some time must be morally certain; *McGuffin v. Coyle*, 16 Okla. 648, 6 L.R.A.(N.S.) 524, 85 Pac. 954, holding that note payable to officer of railroad in his personal capacity on condition that road would be built to certain point by certain time, is void as against public policy.

2 COLO. 323, LOGAN v. CLOUGH.

Sufficiency of pleading in action to enforce trust.

Cited in *Francis v. Wells*, 2 Colo. 660 (dissenting opinion), on sufficiency of pleading in action founded upon a trust; *Kilham v. Western Bank & S. D. Co.* 30 Colo. 365, 70 Pac. 409, to the point that in action by beneficiary of trust, it is not necessary to set out every fact which makes up trust.

Jurisdiction of equity to enjoin threatened sale.

Cited in *Bell v. Murray*, 13 Colo. App. 217, 57 Pac. 488, holding that courts of equity have jurisdiction to restrain threatened sale of plaintiff's property without regard to statute.

2 COLO. 330, BLACK v. DRAKE.

Authority of attorney.

Cited in note in 132 A. S. R. 174, on implied authority of attorney in conducting litigation.

2 COLO. 335, WESTCOTT v. BOCK.

Necessity for specific objections to charge of court.

Cited in *Martin v. Hazzard Powder Co.* 2 Colo. 596; *Hoyt v. Macon*, 2 Colo. 502,—holding that general assignment that court erred in instructions to jury, is insufficient, and will not be considered.

Nonsuit as bar to new suit.

Cited in *Denver & R. G. R. Co. v. Iles*, 25 Colo. 19, 53 Pac. 222, holding that judgment of nonsuit, in personal injury action is not bar to new suit; *Rodgers v. Levy*, 36 Neb. 601, 54 N. W. 1080, holding that judgment of dismissal of action of replevin because plaintiff had not legal capacity to sue is not bar to future action.

2 COLO. 338, PACKARD v. JEFFERSON COUNTY.

Right of taxpayer to sue to enjoin fraudulent disposition of county funds.

Cited in *Carman v. Woodruff*, 10 Or. 133, to the point that taxpayer may sue in equity to annul fraudulent disposition of county funds when necessary to prevent loss to county; *McIntyre v. El Paso County*, 15 Colo. App. 78, 61 Pac. 237, holding that taxpayer may sue to enjoin erection of county court house on park of city.

Conclusiveness of decision of county commissioners as to regularity of proceedings to issue bond.

Cited in *Hutchinson & S. R. Co. v. Kingman County*, 48 Kan. 70, 15 L.R.A. 401, 30 Am. St. Rep. 273, 28 Pac. 1078, holding that town-

ship is estopped from showing, in mandamus to compel issue of bonds to railroad, that requisite number of taxpayers did not sign petition, where county commissioners had found that such number had signed. **Strict pursuit of authority to levy tax.**

Cited in *Cooley, Tax*. 3d ed. 215, on necessity that municipality strictly pursue special authority to levy taxes.

Notice of meeting of municipality to vote for corporate stock.

Cited in *Cook, Corp.* 6th ed. 343, on necessity that notice of meeting be duly posted for time provided in act to validity of municipal subscription to stock.

2 COLO. 351, JONES v. PEOPLE.

Waiver of right to challenge juror for cause.

Cited in *Brown v. People*, 20 Colo. 161, 36 Pac. 1040; *State v. Pickett*, 103 Iowa, 714, 39 L.R.A. 302, 73 N. W. 346,—holding that right to challenge juror for cause as to his competency is waived by failure to challenge or examine him.

Pre-existing opinion as affecting qualifications of juror.

Cited in *Babcock v. People*, 13 Colo. 515, 22 Pac. 817; *Kumli v. Southern P. Co.* 21 Or. 505, 28 Pac. 637; *State v. Megorden*, 49 Or. 259, 88 Pac. 306, 14 A. & E. Ann. Cas. 130,—holding that pre-existing opinion of juror is not sufficient to sustain challenge for actual bias unless court is satisfied that juror cannot try cause impartially.

Cited in note in 36 Am. Dec. 527, on bias or opinion as ground for challenge to jurors.

Conclusiveness of finding of court upon trial of challenge to favor.

Cited in *Minich v. People*, 8 Colo. 440, 9 Pac. 4, 5 Am. Crim. Rep. 20, to the point that finding by court, upon challenge to favor as to juror's indifference is not reviewable on appeal.

Right of jurors to disregard testimony of witness.

Cited in *Trimble v. Territory*, 8 Ariz. 273, 71 Pac. 932; *Faulkner v. Territory*, 6 N. M. 464, 30 Pac. 905; *State v. Bartlett*, 50 Or. 440, 19 L.R.A.(N.S.) 802, 126 Am. St. Rep. 751, 93 Pac. 243,—holding that jurors may disregard testimony of witness who has sworn falsely to particular matter, except in so far as it may be corroborated by other evidence; *State v. Kyle*, 14 Wash. 550, 45 Pac. 147 (dissenting opinion), on jurors as not authorized to discredit whole testimony of witness unless they believe it to be wilfully false in some particular.

Cited in *Sackett, Instruct. Jur.* 3d ed. 277, 281, on right to disregard entire testimony of witness swearing falsely on any material point.

Impeachment of party's own witness.

Cited in *Gottlieb v. Thatcher*, 151 U. S. 271, 38 L. ed. 157, 14 Sup. Ct. Rep. 319, on right of party calling witness to afterwards assail his general character for truth.

Cited in notes in 21 L.R.A. 418, 423, 427, on right to impeach one's own witness; 73 A. D. 766, on practice upon impeaching witnesses.

2 COLO. 360, PEOPLE EX REL. DENVER & R. G. R. CO. v. PUEBLO COUNTY.

Defenses to municipal bonds.

Cited in note in 98 A. D. 671, on municipal bonds and defenses thereto.

2 COLO. 367, HUGUNIN v. McCUNIFF, 14 Mor. Min. Rep. 463.

Remedies for injuries to realty held adversely.

Cited in note in 85 A. D. 323, on remedies for injuries to real estate held adversely.

Possession of surface of mining claim as possession of vein.

Cited in Montana Min. Co. v. St. Louis Min. & Mill. Co. 42 C. C. A. 415, 102 Fed. 430, 20 Am. St. Rep. 507, holding that possession of surface of mining claim is possession of vein having apex within surface lines, although, in extending downward, such vein may pass beyond vertical side lines of claim.

2 COLO. 373, MASON v. PEOPLE.

Waiver of right to instructions by failure to ask for.

Cited in Mickle v. United States, 6 Ind. Terr. 557, 98 S. W. 349, holding that if party fails to ask for additional instructions he cannot take advantage of omissions of court; Carroll v. State, 45 Ark. 539, holding that accused has right to have court instruct as to what constitutes accomplice, but must ask it in order to take advantage of omission.

2 COLO. 375, TAYLOR v. McLAUGHLIN.

2 COLO. 376, FORD v. ROCKWELL.

Who may appoint commissioner to take depositions.

Cited in Glenn v. Brush, 3 Colo. 26, to the point that clerk of district court had power to appoint commissioners to take depositions.

Authority to administer oath to witness.

Cited in Markey v. State, 47 Fla. 38, 37 So. 53, upholding authority to administer oaths to witnesses of one authorized to take testimony.

2 COLO. 378, CLAYTON v. SPENCER.

Passing of legal estate in town site lot by conveyance by trustee.

Cited in Smith v. Pipe, 3 Colo. 187, to the point that conveyance by probate judge of town site lot, though in violation of duty, passed legal estate.

Necessity for occupancy in order to gain title to town site lots.

Cited in Filmore v. Reithman, 6 Colo. 120; Anderson v. Bartels, 7 Colo. 256, 3 Pac. 225; Aspen v. Aspen Town & Land Co. 10 Colo. 191, 15 Pac. 794,—holding that no claimant of lots comprising town site is beneficiary of trust without proof of actual occupancy, either by

claimant or his grantor; Greiner v. Fulton, 46 Kan. 405, 26 Pac. 705, holding bona fide occupant of town site entitled to have his possession protected; Adams v. Binkley, 4 Colo. 247, holding that actual occupant at date of entry of town site, under statute, is entitled thereto as against one who claims under conveyance from third party, but who never had been in possession.

Time for determination of rights of beneficiaries under town site act.

Cited in Pascoe v. Green, 18 Colo. 326, 32 Pac. 824, holding that rights of parties as beneficiaries under town site act must be determined as of date of entry.

2 COLO. 381, ATKINSON v. ATKINSON.

Necessity of exception to judgment upon agreed facts.

Cited in Whitehead v. Jessup, 7 Colo. App. 460, 43 Pac. 1042, holding that where facts are agreed upon exception to judgment is unnecessary.

2 COLO. 383, SKINNER v. BESHOAR.

Amendment of affidavit for attachment.

Cited in note in 31 L.R.A. 422, on right to amend affidavit for attachment.

Presumption as to regularity of court proceedings.

Distinguished in Black v. Bent, 20 Colo. 342, 38 Pac. 387, holding that it will be presumed that special term of court, at which proceedings under review were had, was legally convened.

When decision may be reviewed on error.

Cited in Vance v. Rockwell, 3 Colo. 240; Cooper v. American Cent. Ins. Co. 3 Colo. 318; Bean v. People, 6 Colo. 98,—holding that writ of error lies from supreme court to review proceedings on mandamus issued by district judge; Martin v. Simpkins, 20 Colo. 438, 38 Pac. 1092, to the point that error will lie to review what assumes to itself force of adjudication in law; O'Brophy v. Era Gold Min. Co. 36 Colo. 247, 85 Pac. 679, holding that judgment amended by judge outside of court, which was rendered in open court, may be reviewed on error; People ex rel. McGaffey v. District Ct. 23 Colo. 150, 46 Pac. 681, holding that district court had jurisdiction to determine as to authority of secretary of state to act, and to review his decision upon contest as to right of political party to use certain emblem.

2 COLO. 388, ARCHIBALD v. THOMPSON.

Right to amend pleadings or process.

Cited in Goodman v. Ft. Collins, 91 C. C. A. 98, 164 Fed. 970, holding that summons issued upon complaint which is wanting in requisite jurisdictional allegations is amendable; McArthur v. Boynton, 19 Colo. App. 234, 74 Pac. 540, holding that attachment directed to sheriff of one county cannot be amended so as to be served by sheriff of another county after attempted levy in such other county; Talpey v. Doane,

3 Colo. 22, holding that attachment writ made returnable on day other than first day of term is not void and may be amended; Webber v. Wannemaker, 39 Colo. 425, 89 Pac. 780, to the point that courts favor amendments when justice can be advanced or promoted.

Cited in Lewis, Em. Dom. 3d ed. 996, on right to amend petition for condemnation of land.

2 COLO. 392, TILTON v. COFIELD, Reversed in 93 U. S. 163, 23 L. ed. 858.

Limitation by petition of amount of judgment in attachment.

Cited in Gum-Elastic Roofing Co. v. Mexico Pub. Co. 140 Ind. 158, 30 L. R. A. 700, 39 N. E. 448, to the point that plaintiff in attachment proceedings is not entitled to judgment for greater sum than he demands by petition.

Dissolution of attachment by amendment.

Cited in Stewart v. Anderson, 70 Tex. 588, 8 S. W. 295, holding that attachment is dissolved as to creditors where petition is amended setting up new cause of action and taking judgment thereon.

Right to sell property in custody of law.

Cited in note in 1 L.R.A.(N.S.) 1063, on right to sell property while in custody of law.

2 COLO. 411, TAMELING v. UNITED STATES FREEHOLD LAND & EMIGRATION CO. Affirmed in 93 U. S. 644, 23 L. ed. 998.

2 COLO. 424, SULLIVAN v. HENSE, 9 Mor. Min. Rep. 487.

Necessity for compliance with miner's rules.

Cited in Beek v. Pugh, 9 Colo. 589, 13 Pac. 906, 15 Mor. Min. Rep. 304, holding that in order to constitute valid mining location, compliance with miner's rules and statutes on subject is essential; Consolidated Republican Mountain Min. Co. v. Lebanon Min. Co. 9 Colo. 343, 12 Pac. 212, 15 Mor. Min. Rep. 490, holding that in 1865 manner of locating lode claims in certain districts was governed by miner's rules and customs.

Cited in note in 7 L.R.A.(N.S.) 769, 773, 775, 777, 880, on location of mining claim.

Judicial notice.

Cited in Poujade v. Ryan, 21 Nev. 449, 33 Pac. 659, holding that court cannot take judicial notice of existence in particular district of rule requiring mining claims to be recorded.

Cited in Sutherland, Stat. Const. 2d ed. 869, on judicial notice of local customs or by-laws of corporations.

Cited in notes in 89 A. D. 665, on judicial notice; 49 A. R. 206, on what will be judicial notice; 124 A. S. R. 56, on facts of which courts will take judicial notice.

2 COLO. 431, WALLING v. WARREN.

Conclusiveness of verdict upon conflicting evidence.

Cited in *Barker v. Hawley*, 4 Colo. 316; *Schleier v. Luedeke*, 6 Colo. 242,—holding that verdict based on conflicting evidence will not be disturbed, where it is not clearly against weight of evidence.

Right to recover under contract partially performed.

Cited in *Cochran v. Balfe*, 12 Colo. App. 75, 54 Pac. 399, holding that recovery on entire contract cannot be had upon part performance thereof unless it is shown either that contract was rescinded or rendered impossible of performance by wrongful act of defendant; *Lombard v. Overland Ditch & Reservoir Co.* 41 Colo. 253, 92 Pac. 695, holding that recovery on contract to dig ditch will be allowed, though there has not been exact compliance therewith, if it has been substantially performed and work accepted.

2 COLO. 442, KANSAS P. R. CO. v. MILLER.

Degree of care required of carrier of passengers.

Cited in *Kansas P. R. Co. v. Lundin*, 3 Colo. 94; *Pershing v. Chicago, B. & Q. R. Co.* 71 Iowa, 561, 32 N. W. 488,—holding that railroad in carrying passenger is bound to use highest degree of care that is reasonably consistent with practical conduct of its business.

Cited in *Farnham Waters*, 2810, on liability of railroad for injury due to washing away of portion of roadway because of insufficient passageway for water during flood.

Repairs after accident as admission of former negligence.

Cited in *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408, holding that in action for personal injuries from negligence it may be shown that repairs were made after accident.

Cited in notes in 57 A. R. 183, on subsequent repair as admission of negligence; 11 Eng. Rul. Cas. 247, on admissibility of evidence of subsequent repairs or precautions.

Disapproved in *Georgia Southern & F. R. Co. v. Cartledge*, 116 Ga. 164, 59 L.R.A. 118, 42 S. E. 405, holding that making of repairs after accident resulting in personal injury cannot be considered as admission of former negligence.

Opinion evidence as to age.

Cited in *State v. Grubb*, 55 Kan. 678, 41 Pac. 951, holding that witness should be allowed to give opinion as to age of absent person, after stating means of knowledge.

Discretion of court as to order of receiving evidence.

Cited in *Smith v. Mayer*, 3 Colo. 207, holding that it is within discretion of court, to receive rebuttal evidence which in strictness ought to have been produced in chief.

Presumption of death.

Cited in notes in 92 A. D. 708; 104 A. S. R. 211,—on presumption of death; 8 Eng. Rul. Cas. 552, 553, on presumption of death from absence.

— Of simultaneous death in common disaster.

Cited in Supreme Council, *R. A. v. Kacer*, 96 Mo. App. 93, 69 S. W. 671; *Walton v. Burchel*, 121 Tenn. 715, 130 Am. St. Rep. 788, 121 S. W. 391,—holding that survivorship is not presumed on account of age, sex, strength, or activity of those perishing in common disaster.

Cited in note in 51 L.R.A. 870, on presumption of survivorship among those perishing in common calamity.

Common experience as factor in estimating damages by jury in negligence action.

Cited in *Florida C. & P. R. Co. v. Foxworth*, 41 Fla. 1, 79 Am. St. Rep. 149, 25 So. 338, holding that in action to recover for death by negligence, jury in estimating damages should make use of knowledge and experience possessed by them in relation to matters of common knowledge.

Presumption of negligence from accident.

Cited in *Galveston, H. & S. A. R. Co. v. Fales*, 33 Tex. Civ. App. 457, 77 S. W. 234, holding that railroad is prima facie guilty of negligence where passenger is injured by derailling of train.

Cited in notes in 62 A. D. 685, on presumption of negligence where passenger is injured; 15 L.R.A. 36, on presumption of negligence from occurrence of accidents; 113 A. S. R. 1022, on presumption of negligence from happening of accident causing personal injuries.

Measure of damages for death.

Cited in note in 8 Eng. Rul. Cas. 426, on measure of damages for death of relative.

Right to exemplary damages in action for tort.

Cited in *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 366, 5 Pac. 119, holding that in civil actions for injury resulting from torts, where offense is punishable under criminal laws, exemplary damages cannot be awarded.

— Causing death.

Cited in *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348, holding that under act of 1877 exemplary damages could not be given in action for death by wrongful act; *Kansas P. R. Co. v. Cutler*, 19 Kan. 83, on right to recover exemplary damages in action for death by wrongful act.

Cited in *Hutchinson*, Car. 3d ed. 1686, on right to recover punitive damages in action for death by negligence; *Sutherland*, Dam. 3d ed. 3706, on right to recover exemplary damages for negligence resulting in death.

Recovery for mental anguish in action for wrongful death.

Cited in *Smith v. Chicago, M. & St. P. R. Co.* 6 S. D. 583, 28 L.R.A. 573, 62 N. W. 967; *Webb v. Denver & R. G. W. R. Co.* 7 Utah, 17, 24 Pac. 616,—holding that no recovery could be had for mental anguish caused relative of deceased, in action for death brought by decedent's administrator.

Cited in Sutherland, Dam. 3d ed. 3704, on inability of beneficiaries of deceased to recover for mental suffering.

Right of action for wrongful death.

Cited in Hutchinson, Car. 3d ed. 1669, as to when existence of kin must be shown in order to maintain action for wrongful death.

Cited in note in 70 A. S. R. 677, on actions for death of human being.

Necessity for alleging facts.

Cited in Roach v. Imperial Min. Co. 7 Fed. 698, holding that in action for death by wrongful act, if proof is to be given of injury to kindred, facts in relation thereto must be averred.

2 COLO. 470, PURMORT v. TUCKER LUMBER CO.

Effect of repeal of statute upon logger's lien.

Disapproved in Garneau v. Port Blakely Mill Co. 8 Wash. 467, 36 Pac. 463, holding that statutory lien given loggers, is such part of contract as to be unaffected by repeal of statute pending enforcement of lien.

2 COLO. 473, WILCOXEN v. MORGAN.

Fraudulent assignment, as against subsequent creditors.

Cited in House v. Johnson, 19 Colo. App. 524, 76 Pac. 743, holding that under section 2030 Mills' Anno. Stats., party need not have been existing creditor at time fraudulent conveyance was executed in order to move to set aside conveyance; Arnett v. Coffey, 1 Colo. App. 34, 27 Pac. 614, holding that voluntary conveyance to grantor's wife is not void as to subsequent judgment creditor unless it be shown that debt existed prior to transfer or was made to defraud such creditors; Mulock v. Wilson, 19 Colo. 296, 35 Pac. 532, holding that voluntary conveyance with intent to defraud creditors, is void as to subsequent creditors, if grantee has knowledge of fraud; Wells v. Schuster-Hax Nat. Bank, 23 Colo. 534, 48 Pac. 809, to point that if fraudulent conveyance is in nature of gift it is not necessary to show participation in fraud by grantee.

Cited in note in 34 A. S. R. 403, on vendee's knowledge as affecting validity of fraudulent conveyance.

Right to show, in ejectment, that conveyance relied upon was fraudulent.

Cited in Knox v. McFarra, 4 Colo. 586, holding that in action of ejectment it is competent to show that conveyance relied upon was made to defraud creditors.

Title of purchaser, with notice from fraudulent grantee.

Cited in Tibbetts v. Terrill, 44 Colo. 94, 96 Pac. 978, holding that purchaser, with notice, from fraudulent grantee takes title subject to all infirmities affecting it in hands of grantee.

2 COLO. 480, FREAS v. LAKE.

2 COLO. 481, CHASE v. PEOPLE.

Sufficiency of excuse to obviate forfeiture of bail bond.

Cited in *State v. Sandy*, 138 Iowa, 580, 116 N. W. 599, holding that fact that defendant forgot date he was to appear is not sufficient excuse to obviate forfeiture of bail bond.

2 COLO. 484, SUMMERHAYS v. KANSAS P. R. CO.

Liability of master for injury caused by negligence of coservant.

Cited in *Kindel v. Hall*, 8 Colo. App. 63, 44 Pac. 781, holding that employer is not liable to servant for injuries caused by negligence of coservant, unless latter was incompetent or habitually careless and he had knowledge of fact; *Warmington v. Atchison*, T. & S. F. R. Co. 46 Mo. App. 159, holding carelessness and incompetency of switch engineer assumed by brakeman if known by him; *Unfried v. Baltimore & O. R. Co.* 34 W. Va. 260, 12 S. E. 512, to the point that employer is not liable to servant for injuries caused by negligence of coservant unless latter was incompetent or habitually careless and he had knowledge of fact.

Cited in *Cooley*, Torts, 3d ed. 1058, on nonliability of master for injury to servant caused by negligence of coservant.

Cited in note in 25 L.R.A. 711, on liability of master for injuries to servant by incompetency of fellow servant.

Who are fellow servants.

Cited in *Denver, S. P. & P. R. Co. v. Driscoll*, 12 Colo. 520, 13 Am. St. Rep. 243, 21 Pac. 708, holding that superintendent of work of extending railroad, who has foremen and workmen under him is not fellow servant with workmen.

Cited in notes in 67 A. D. 595, on who are fellow servants; 50 L.R.A. 430, 431, as to what servants are deemed to be in common employment, apart from statutes, where no questions as to vice principalship arise.

Burden of proof in negligence action.

Cited in *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770; *Ohio & M. R. Co. v. Dunn*, 138 Ind. 18, 36 N. E. 702,—to the point that it rests with plaintiff in negligence action to prove every fact essential to existence actionable negligence; *Chicago & E. I. R. Co. v. Beatty*, 13 Ind. App. 604, 42 N. E. 284 (dissenting opinion), on necessity of plaintiff in negligence action proving existence of every fact essential to actionable negligence; *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 156, 33 N. E. 353, holding that in action for personal injury to servant caused by defective engine burden of showing negligence is on servant.

2 COLO. 489, FREAS v. TRUITT.

Failure to object to account rendered as evidence of account stated.

Cited in *Fleischner v. Kubli*, 20 Or. 328, 25 Pac. 1086; *Jones v. De*

Muth; 137 Wis. 120, 118 N. W. 542,—holding that failure to object within reasonable time to account rendered may be deemed prima facie admission of its correctness.

Cited in Abbott's Facts, 2d ed. 91, as to what constitutes reasonable time in which to object to account rendered in order to prevent its becoming account stated.

Cited in notes in 27 L.R.A. 823, on what constitutes an account stated; 1 Eng. Rul. Cas. 432, on what may be recovered on a stated account.

Necessity that objection for variance be taken at trial.

Cited in Fryer v. Breeze, 16 Colo. 323, 26 Pac. 817, holding that technical variance between pleading and proof, will not be considered in appellate court for first time.

Necessity that bill of exceptions bring bill of particulars up for review.

Cited in Saxton v. Musselman, 17 S. D. 35, 95 N. W. 291, holding that bill of particulars of account sued on is not part of complaint and cannot be made part of record on appeal without bill of exceptions.

2 COLO. 496, SOPRIS v. LILLEY.

2 COLO. 500, BUCK v. SMITH.

Effect of verified plea denying execution of note executed in firm name.

Cited in Abbott's Pleadings, 2d ed. 1144, on verified plea denying execution of note made in firm name as denial of partnership.

2 COLO. 502, HOYT v. MACON.

Necessity for specific assignment of error in charge to jury.

Cited in Martin v. Hazzard Powder Co. 2 Colo. 596, holding that assignment of error covering entire charge to jury will not be considered on appeal.

Invalidity of contracts founded upon illegal consideration.

Cited in Roy v. Harney Peak Tin Min. Mill. & Mfg. Co. 9 L.R.A. (N.S.) 529, 110 N. W. 106, holding that agreement not to file protest against application for land patent is void as against public policy; Young v. Thomson, 14 Colo. App. 294, 59 Pac. 1030, holding that agreement to suppress testimony is void as against public policy and good morals; Wells v. Caywood, 3 Colo. 487, holding that agreement by which person was to enter under pre-emption laws certain tract of land and convey same to other party to agreement is void; Brown v. Kennedy, 12 Colo. 235, 20 Pac. 696, holding that contract based upon illegal consideration is not enforceable; Currier v. Clark, 19 Colo. App. 250, 75 Pac. 927, holding that entire contract is void where it is based partly upon illegal consideration and illegal part cannot be separated from balance of contract.

Cited in notes in 94 A. D. 376, on contracts for production or discovery of evidence; 117 A. S. R. 498, on contracts consideration for which has partly failed or is partly illegal; 9 L.R.A.(N.S.) 530, on validity of contract not to protest against application for land patent.

2 COLO. 509, CHASE v. PEOPLE.

Sufficiency of affidavits upon application for continuance.

Cited in *Holland v. People*, 30 Colo. 94, 69 Pac. 519, holding that accused who has had ample time to prepare for trial must on application for continuance set out in detail facts relied upon.

Sufficiency of information for carrying on gambling without license.

Cited in *State v. Gray*, 19 Mont. 206, 47 Pac. 900, holding that information for crime of carrying on gambling without license is not demurrable because it also alleged that defendants kept place as employees where keeping of such place without license was sufficiently alleged.

Information as proper procedure for violation of gambling laws.

Cited in *Danforth v. Charles*, 1 Dak. 285, 46 N. W. 576, to the point that district attorney may elect to proceed by information or indictment, in cases of gambling.

2 COLO. 514, HANAUER v. BARTELS.

Carrier of goods as agent of seller.

Cited in *A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co.* 54 Neb. 321, 40 L.R.A. 534, 74 N. W. 670 (dissenting opinion), on carrier as agent of seller where contract requires delivery at distant place.

Cited in note in 22 L.R.A. 421, on passing of title to property by delivery to carrier for transportation to consignee or vendee.

Measure of damages for conversion of property.

Cited in *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 32 L. ed. 854, 9 Sup. Ct. Rep. 458, holding that measure of damages for conversion of cattle intended for consumption is interest on value; *Greeley, S. L. & P. R. Co. v. Yount*, 7 Colo. App. 189, 42 Pac. 1023, to the point that measure of damages for detention of property is value thereof from time of conversion to trial; *Tucker v. Parks*, 7 Colo. 62, 1 Pac. 427, holding that measure of damages for conversion is interest on value of property from time of taking to time of trial; *Omaha & G. Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 5 L.R.A. 236, 16 Am. St. Rep. 185, 21 Pac. 925, 16 Mor. Min. Rep. 184, holding that measure of damages for conversion of one taken from mine by trespasser is value of ore sold to defendant, less cost of raising it from mine after it was broken; *Johnson v. Bailey*, 17 Colo. 59, 28 Pac. 81, holding that measure of damages in replevin of working animals is interest on value at time of taking until judg-

ment, where plaintiff received them in pledge under express contract to sell same and account for proceeds

Interest in unliquidated damages.

Cited in note in 28 L.R.A.(N.S.) 30, 42, on interest on unliquidated damages.

2 COLO. 525, FISHER v. MARTIN.

Conclusiveness of verdict upon conflicting evidence.

Cited in *Barker v. Hawley*, 4 Colo. 316, holding that verdict upon conflicting evidence will not be reversed unless manifestly against weight of evidence.

2 COLO. 526, KEATING v. PEDEE.

Reversal of judgment because against weight of evidence.

Cited in *Abbott v. Smith*, 3 Colo. App. 264, 32 Pac. 843, holding that judgment will be set aside where evidence does not tend to support finding; *Hockaday v. Goodwin*, 1 Colo. App. 90, 27 Pac. 875; *Wachsmuth v. Heil*, 1 Colo. App. 196, 28 Pac. 17; *Denver & R. G. R. Co. v. Morton*, 3 Colo. App. 155, 32 Pac. 345,—holding that judgment will be reversed where there is entire absence of proof of fact which must be established to entitle plaintiff to recover; *Barker v. Hawley*, 4 Colo. 316, holding that verdict upon conflicting evidence will not be set aside unless manifestly against weight of evidence.

2 COLO. 528, CHASE v. PEOPLE.

Time for appearance under recognizance.

Cited in *State v. Breen*, 6 S. D. 537, 62 N. W. 135, holding recognizance to appear is deemed to require defendant to appear at any term succeeding first, to which case upon his application or by his consent, has been continued.

Recognizance by justice of the peace as record of district court when certified there.

Cited in *Haney v. People*, 12 Colo. 345, 21 Pac. 39, to the point that when recognizance taken by justice of the peace is certified to district court, upon default, it becomes a record of latter court.

Sufficiency of description of offense in recognizance.

Cited in *United States v. Rice*, 1 Alaska, 676; *Marmaduke v. People*, 45 Colo. 357, 101 Pac. 337; *United States v. Eldredge*, 5 Utah, 161, 13 Pac. 673,—holding that recognizance of defendant is sufficient as to description of offense, if it describes offense in language of statute.

What excuses bail from producing principal.

Cited in note in 99 A. D. 221, on what excuses surety or bail from producing principal.

Scire facias.

Cited in note in 122 A. S. R. 100, on scire facias.

2 COLO. 532, SELLAR v. CLELLAND.

Availability on appeal of matters not assigned for error.

Cited in *Patrick Red Sandstone Co. v. Skoman*, 1 Colo. App. 323, 29 Pac. 21, holding that matters not assigned for error are not available on appeal.

What constitutes actual fraud.

Cited in *Beard v. Bliley*, 3 Colo. App. 479, 34 Pac. 271, holding that actual fraud consists in deception practised in order to induce another to part with property or to surrender some legal right.

Cited in *Cooley*, Torts, 3d ed. 906, as to what must be shown in order to render deception actionable.

Right to rely on representations.

Cited in note in 87 L.R.A. 610, on right to rely upon representations made to effect contract as basis for charge of fraud.

When intention to deceive may be inferred from false representations.

Cited in *Goodale v. Middaugh*, 8 Colo. App. 223, 46 Pac. 11; *Lahay v. City Nat. Bank*, 15 Colo. 339, 22 Am. St. Rep. 407, 25 Pac. 704; *Connell v. El Paso Gold Min. & Mill. Co.* 33 Colo. 30, 78 Pac. 677,—holding that intention to deceive is inferred when one makes false representations positively, and matters misrepresented are peculiarly within knowledge of speaking party, and unknown to other party; *Mayo v. Wahlgreen*, 9 Colo. App. 506, 50 Pac. 40, holding that deceit cannot be predicated upon seller's extravagant statements of value of property sold; *Colorado Springs Co. v. Wight*, 44 Colo. 179, 96 Pac. 820, 16 A. & E. Ann. Cas. 644, holding that plaintiff must show, in action for damages for misrepresentation as to width of street on which he had purchased land, that representations were made with knowledge of their falsity, or with intent to have plaintiff act thereon; *Northwestern L. Ins. Co. v. Montgomery*, 116 Ga. 799, 43 S. E. 79, holding that false statement in application for insurance, known to be false by applicant, but not known to company avoids policy, though insured did not intend to prejudice rights of company.

Failure to read instrument as precluding defense of false representations.

Cited in *Heck v. Missouri P. R. Co.* 147 Fed. 775, holding that person who signs release of cause of action for personal injury without reading same, is precluded from avoiding same because of misrepresentations by defendant's agent, unless he shows excuse for failure to read paper signed.

Admissibility of evidence to show false representations on sale.

Cited in *Hauptman v. Pike*, 77 Neb. 105, 108 N. W. 163, holding that defendant is entitled to trace negotiations to their inception where evidence tends to show false representations upon sale of property.

Colo. Ann.—6.

Performance of executory contract after notice as waiver of fraud.

Cited in *Baltimore & O. R. Co. v. Jolly Bros.* 71 Ohio St. 492, 72 N. E. 888, holding that performance of executory contract procured by fraud, and acceptance of payment after knowledge of fraud, is waiver of fraud.

Discretion of court as to order of testimony.

Cited in *Wyatt v. Freeman*, 4 Colo. 14, holding that admission of further testimony by plaintiff after having rested and motion for nonsuit is made rests in court's discretion.

Measure of damages for fraud.

Cited in *Sutherland*, Dam. 3d ed. 3413, on extraordinary elements of damages allowable in action on case for deceit; *Sutherland*, Dam. 3d ed. 3480, on expenditures and loss of time occasioned by fraud which induced one to enter into contract as element of damages; *Sutherland*, Dam. 3d ed. 1212, 1893, on admissibility of evidence of market value at other places, with cost of transportation, to establish market value at place of delivery which has no market value.

What considered by jury in determining issues.

Cited in *Sackett*, *Instruct. Jur.* (3d ed.) 337, as to what jury should consider in determining issues.

2 COLO. 552, DANIELS v. DENVER.

2 COLO. 553, EX PARTE BROWNE.

Right of court to strike attorney's name from roll.

Cited in *People ex rel. Colorado Bar Asso. v. Weeber*, 26 Colo. 229, 57 Pac. 1079, holding that court has right to strike attorney's name from rolls for other misconduct than commission of crime.

Cited in notes in 95 A. D. 344, on disbarment or suspension of attorneys; 2 A. S. R. 861, on summary jurisdiction over attorneys.

Reinstatement of attorney after disbarment for failure to pay money.

Cited in *People ex rel. Whittmore v. Ryalls*, 8 Colo. 332, 7 Pac. 290, to the point that attorney may not be permitted to again subscribe to rolls after disbarment for failure to pay over money, by payment of such money merely.

2 COLO. 559, KANSAS P. R. CO. v. TWOMBLY, Later appeal in 3 Colo. 125.

Necessity for taking exceptions to rulings of court at trial.

Cited in *Cone v. Montgomery*, 25 Colo. 277, 53 Pac. 1052; *Holland v. People*, 30 Colo. 94, 69 Pac. 519,—holding that unless exception is taken to ruling of court on objection to admission of testimony, errors based thereon will be considered waived.

Right to hear motion for new trial at subsequent term.

Cited in *Filley v. Cody*, 4 Colo. 109, holding that motion for new trial may be heard and determined at term of court subsequent to term at which case was tried.

Right to hear exceptions on appeal without motion for new trial.

Cited in *Patton v. Coen & T. B. Carriage Mfg. Co.* 3 Colo. 265, to the point that in cases tried by jury party may have errors excepted to at trial considered by appellate court without motion for new trial; *Loloff v. Sterling*, 31 Colo. 102, 71 Pac. 1113, holding that objections made and exceptions taken to rulings of trial court in condemnation proceedings may be reviewed on appeal, though not incorporated in motion for new trial by bill of exceptions.

Right to settle bill of exceptions while motion for new trial is undetermined.

Cited in *Stocking v. Morey*, 14 Colo. 317, 23 Pac. 343, holding that undetermined motion for new trial operates to reserve case and continue jurisdiction beyond term for purpose of settling bill of exceptions.

What may be incorporated into bill of exceptions.

Distinguished in *Monteith v. Union P. D. & G. R. Co.* 13 Colo. App. 421, 58 Pac. 338, holding that evidence on a former trial cannot be incorporated into the bill of exceptions.

2 COLO. 565, UNION GOLD MIN. CO. v. ROCKY MOUNTAIN NAT. BANK, Affirmed in 96 U. S. 640, 24 L. ed. 648, 1 Mor. Min. Rep. 432.**Authority of corporate officers.**

Cited in notes in 29 A. S. R. 96, on agent's power to borrow money; 91 A. D. 616, on corporate power being vested in trustees; 14 L.R.A. 359, on powers of president and vice-president of corporation.

Right of stockholders of corporation to make contract.

Cited in *Colorado Springs Co. v. American Pub. Co.* 38 C. C. A. 433, 97 Fed. 843, holding that stockholders cannot make contracts where such power is vested by statute in directors, unless all stockholders are present or represented; *Tabor v. Bank of Leadville*, 35 Colo. 1, 83 Pac. 1060, holding that mere stockholder cannot bind corporation by his acts or by acts of his attorney.

Cited in *Cook, Corp.* 6th ed. 2223, on repudiation of unauthorized contracts by agent being duty of directors instead of stockholders.

Corporate records as evidence.

Cited in *Cook, Corp.* 6th ed. 2266, on inadmissibility of corporation's records, where it is disproving agency, in absence of proof that they were kept by proper officer.

Proof of agency.

Cited in *Higgins v. Armstrong*, 9 Colo. 38, 10 Pac. 232, holding that agency may be proved by habit and course of dealing; *Extension Gold Min. & Mill. Co. v. Skinner*, 28 Colo. 237, 64 Pac. 198; *Castner v. Rinne*, 31 Colo. 256, 72 Pac. 1052,—holding that relationship of principal and agent cannot be established by declarations of alleged agent; *Burnell v. Morrison*, 46 Colo. 533, 105 Pac. 876, holding that agency and extent of authority may be proven by circumstances; *Breed v. First Nat. Bank*, 4 Colo. 481, 1 Mor. Min. Rep. 467, holding that super-

intendent of mine, by virtue of his employment merely, has no authority to borrow money.

Ratification of unauthorized act.

Cited in Cook, Corp. 6th ed. 2321, on binding effect of contract by general manager or superintendent when ratified by company.

Cited in notes in 79 A. D. 388, 389, on ratification of unauthorized acts by silence; 29 A. S. R. 97, on ratification of agent's act in borrowing money; 6 L.R.A.(N.S.) 313, on implied ratification of unauthorized loan affected by agent.

Construing entire charge together.

Cited in Thatcher v. Rockwell, 4 Colo. 375; McClelland v. Burns, 5 Colo. 390; Cheesman v. Nicholl, 18 Colo. App. 174, 70 Pac. 797; Finerty v. Fritz, 6 Colo. 136,—holding that in construing charge to jury, each instruction is to be considered in connection with entire charge; Denver Tramway Co. v. Owens, 20 Colo. 107, 36 Pac. 848, holding that abstract propositions do not necessarily vitiate charge where whole charge considered together advises jury clearly and in the concrete.

Pre-existing opinion as disqualifying juror.

Cited in Babcock v. People, 13 Colo. 515, 22 Pac. 817, holding that previously expressed opinions of juror are not conclusive of his qualifications to serve as juror.

Cited in Abbott's Civ. Tr. 2d ed. 63, on opinion as not necessarily disqualifying juror.

2 COLO. 578, JENNESS v. BLACK HAWK.

2 COLO. 588, CENTRAL CITY v. SEARS.

Necessary formalities in enacting municipal ordinances.

Cited in Rumsey Mfg. Co. v. Schell City, 21 Mo. App. 175, holding that municipal ordinance must be in writing, duly adopted by legislative body and sanctioned by approval of designated officials.

Sufficiency of municipal council's acts as to form.

Cited in Long v. Portland, 53 Or. 92, 98 Pac. 1111, to the point that action of municipal council relating to subjects which are temporary may be adopted by resolution; National Bank v. Grenada, 44 Fed. 262, holding that election for funding municipal indebtedness providing for issue of bonds should be called by ordinance; State ex rel. Davis v. Newton County, 165 Ind. 262, 74 N. E. 1091, 6 A. & E. Ann. Cas. 468, holding that under statute county council cannot authorize issue of county bonds by motion, order or resolution, but only by ordinance.

2 COLO. 591, McKAY v. BATCHELLOR.

Distress for tax.

Cited in Cooley, Tax. 3d ed. 851, on collection by distress of school tax when by division of district property liable is found to be in new district.

Place for taxation of property.

Cited in note in 56 A. D. 524, on place for taxation of property.

When lien on personalty for school tax attaches.

Cited in *Palmer v. Pettingill*, 6 Idaho, 346, 55 Pac. 653, holding that tax levied on personal property is not lien thereon until seizure; *Re Fremont & B. H. Counties*, 8 Wyo. 1, 54 Pac. 1073, to the point that there was no lien upon personalty until seizure under tax levy.

Cited in *Cooley*, Tax. 3d ed. 855, as to time when lien attaches under tax levy.

When replevin lies.

Cited in *Cooley*, Tax. 3d ed. 1518, on replevin as lying for property taken on valid warrant if seizure was made out of jurisdiction.

2 COLO. 595, DANIELS v. DENVER.

2 COLO. 596, MARTIN v. HAZZARD POWDER CO. Motion for new supersedeas bond on writ of error denied in 93 U. S. 302, 23 L. ed. 885.

Recitals in instrument as proof of consideration.

Cited in *White Sewing Mach. Co. v. Fowler*, 28 Nev. 94, 78 Pac. 1034, holding that bond reciting that it is for value received, and showing that it is to enable principal to obtain extension of credit, is on sufficient consideration.

Cited in *Brandt, Suretyship*, 3d ed. 201, on words "value received" in writing as sufficient expression of consideration to satisfy statute of frauds.

Cited in note in 60 A. S. R. 438, on necessity and sufficiency of expression of consideration of contract.

Mode of putting execution of written guaranty in issue.

Cited in *Abbott's Pleadings*, 2d ed. 1134, on necessity for plea verified by affidavit in order to put execution of written guaranty in issue.

Conclusiveness of verdict based on conflicting evidence.

Cited in *Barker v. Hawley*, 4 Colo. 316, holding that verdict founded on conflicting evidence will not be disturbed unless manifestly against weight of evidence.

Presumption as to law of sister states.

Cited in *Pattilo v. Alexander*, 96 Ga. 60, 29 L.R.A. 616, 22 S. E. 646, holding that in suit on contract made and to be executed in another state, court will presume that rules of common law prevail there.

Cited in *Parmeles Whart. Conf. L.* (3d ed.) 1556, on right to allow rate of interest prescribed by law of forum without proof of foreign law on subject; *Parmeles Whart. Conf. L.* (3d ed.) 1544, on presumption that rate of interest in sister state is same as that allowed here.

Cited in notes in 113 A. S. R. 877, on proof of foreign laws and their effect; 67 L.R.A. 42, 44, on how case is determined when proper foreign law is not proved.

2 COLO. 602, MARLOW v. KUHLENBECK.**2 COLO. 604, BECKWITH v. TALBOT.**

Power of court to amend record.

Cited in *State ex rel. Beckman v. Estes*, 34 Or. 196, 52 Pac. 571; *Whipple v. Preece*, 18 Utah, 454, 56 Pac. 296,—holding that judge may make necessary corrections in bill of exceptions, upon notice, at subsequent term; *Denver City Tramway Co. v. Roberts*, 43 Colo. 522, 96 Pac. 186, holding that supreme court will allow filing of supplemental bill of exceptions only to make clearer and more complete original bill though time for filing original bill has expired; *Seeley v. Taylor*, 17 Colo. 70, 28 Pac. 461, holding that record may be amended showing personal service of summons where judgment was entered prematurely as upon constructive service.

2 COLO. 605, BYERS v. MARTIN, 25 AM. REP. 755.

What constitutes libelous publication.

Cited in *Boehmer v. Detroit Free Press Co.* 94 Mich. 7, 34 Am. St. Rep. 318, 53 N. W. 822, to the point that individual juror had right of action upon charge that jury had perjured themselves; *Augusta Evening News v. Radford*, 91 Ga. 494, 20 L.R.A. 533, 44 Am. St. Rep. 53, 17 S. E. 612, holding that newspaper article charging constable with unbecoming conduct merely to get fees, is libelous.

Cited in notes in 15 A. S. R. 365, on newspaper libel; 116 A. S. R. 815, on what words are libelous per se; 86 A. D. 91, on what publications libelous to candidates are justifiable.

2 COLO. 608, CHAPIN v. GOODELL.

Power of court to order remittitur.

Distinguished in *F. M. Davis Iron Works Co. v. White*, 31 Colo. 82, 71 Pac. 384, holding that court in personal injury action, cannot order remittitur as to part of verdict which it deems excessive, but must order new trial.

2 COLO. 612, BOYLSTON v. CHASE.**2 COLO. 614, MARTIN v. SKEHAN.**

Sufficiency of request to sue principal in order to discharge surety.

Cited in *Bowling v. Chambers*, 20 Colo. App. 113, 77 Pac. 16, holding that expression of surety that he wished the debt settled is not sufficient to discharge him upon debtor's insolvency.

Cited in *Brandt, Suretyship*, 3d ed. 516, on right of surety to compel creditor to proceed against principal.

Cited in notes in 11 Am. Dec. 589, on discharge of surety; 115 A. S. R. 93, on duty owed by creditor to surety.

Necessity for filing verified plea.

Cited in *Central v. Wilcoxon*, 3 Colo. 566, holding that affidavit of merits cannot be substituted for verified plea.

Invalidity of affidavit taken before attorney for party.

Cited in *Frybarger v. McMillen*, 15 Colo. 349, 25 Pac. 713, holding that affidavit in application for service by publication cannot be taken before attorney for plaintiff.

2 COLO. 620, TIERNEY v. WHITING.**Right of covenantee to surrender possession to holder of paramount title.**

Cited in *Seyfried v. Knoblauch*, 44 Colo. 86, 96 Pac. 993, to the point that covenantee in conveyance of land cannot surrender possession to holder of paramount title before suit brought.

Measure of damages for breach of covenant.

Cited in *Sutherland*, Dam. 3d ed. 1812, on value of life estate for time purchaser is kept out of enjoyment as measure of damages where incumbrance is life estate.

Cited in note in 99 A. D. 78, on measure of damages for breach of covenant.

2 COLO. 625, HARRISON v. SMITH.**Effect of repeal of statute giving right to appeal.**

Cited in *Smith v. District Ct.* 4 Colo. 235, holding that repeal of statute conferring jurisdiction takes away all right to proceed in suits pending under repealed statute, unless there is saving clause; *Callahan v. Jennings*, 16 Colo. 471, 27 Pac. 1055, holding that statutory right to have cases reviewed on appeal may be taken away by repeal of statute.

Effect of repeal of statute granting new trials in ejectment.

Cited in *Campbell v. Iron-Silver Min. Co.* 27 C. C. A. 646, 55 U. S. App. 150, 83 Fed. 643, holding that statute giving two new trials in ejectment may be repealed and right taken away except where verdict is standing which party is entitled to have set aside at time of repeal.

Invalidity of statute taking away right acquired under existing laws.

Cited in *Day v. Madden*, 9 Colo. App. 464, 48 Pac. 1053, to the point that statute which takes away right acquired under existing law is unconstitutional.

Cited in *Sutherland*, Stat. Const. 2d ed. 1222, on effect on right of appeal of repeal of statute permitting it while such appeal is pending.

2 COLO. 628, PUEBLO COUNTY v. CENTRAL COLORADO IMPROV. CO. Reversed in 95 U. S. 259, 24 L. ed. 405.**Taxability of land.**

Cited in *Cooley*, Tax. 3d ed. 138, as to when land confirmed to private owner under treaty with foreign country becomes taxable.

2 COLO. 637, DAVIS v. WANNAMAKER.

Amount of judgment on penal bond.

Cited in *Allen v. King*, 4 Colo. App. 319, 35 Pac. 1061, holding that under present statute judgment on penal bond for amount of damages is proper.

Cited in note in 62 L.R.A. 448, on form of judgment on penal bonds.

Necessary parties plaintiff on injunction bond.

Cited in *Montana Min. Co. v. St. Louis Min. & Mill. Co.* 19 Mont. 313, 48 Pac. 305, holding that in action for debt on injunction bond all obligees are necessary parties.

2 COLO. 639, BECKWITH v. TALBOT, Affirmed in 95 U. S. 289, 24 L. ed. 496.

Sufficiency of memorandum to satisfy statute of frauds.

Cited in *Crystal Palace Flouring Co. v. Butterfield*, 15 Colo. App. 246, 61 Pac. 479, holding that letters and telegrams sent between parties to sale of wheat may be sufficient memorandum in writing within meaning of statute of frauds.

What constitutes partnership.

Cited in *Baldwin v. Patrick*, 39 Colo. 347, 91 Pac. 828, holding that essential elements of partnership are community of loss, of expense, of title, and common right to dispose of property for firm purposes; *Waggoner v. First Nat. Bank*, 43 Neb. 84, 61 N. W. 112, to the point that interest in profits because of services rendered or capital loaned, is not sufficient to make person partner; *W. D. Wilson Printing Ink Co. v. Bowker*, 27 Abb. N. C. 153, 15 N. Y. Supp. 293, holding that person is not partner merely because he stipulates that in return for hire of chattel he shall receive part of profits earned by use of chattel.

Cited in note in 18 L.R.A.(N.S.) 993, 1040, on effect of agreement to share profits to create partnership.

Interest as damages for conversion.

Cited in *New Dunderberg Min. Co. v. Old*, 38 C. C. A. 89, 97 Fed. 150, holding that interest may be recovered in action for conversion though damages sued for are unliquidated.

Conflict of laws as to measure of damages.

Cited in note in 91 A. S. R. 738, on conflict of laws as to measure of damages.

Assessment list as evidence of value.

Cited in *Indiana Union Traction Co. v. Benadum*, 42 Ind. App. 121, 83 N. E. 261, holding assessment lists admissible as tending to show value of property listed.

2 COLO. 651, PERRIGO GOLD MIN. & TUNNELING CO v. GRIMES.

Waiver of error in sustaining demurrer by filing new pleading.

Cited in *Enright v. Midland Sampling & Ore Co.* 33 Colo. 341, 80 Pac. 1041, holding that by taking leave to file and filing amended

complaint, plaintiff waived any error committed in sustaining demurrer to former complaint.

Liability of sureties on replevin bond where issues are arbitrated.

Cited in *Lee v. Grimes*, 4 Colo. 185, to the point that submission of replevin action to arbitrators does not discharge sureties on replevin bond; *Donovan v. Aetna Indemnity Co.* 10 Cal. App. 723, 103 Pac. 365, holding that sureties on replevin bond are liable though judgment is entered on stipulation of facts.

2 COLO. 660, FRANCIS v. WELLS.

Who may enforce vendor's lien on land.

Cited in *Simily v. Adams*, 88 Mo. App. 621, holding that person to whom purchase money for land is payable has lien on land; *Bray v. Booker*, 6 N. D. 526, 72 N. W. 933, on right of assignee of purchase money claim to enforce vendor's lien; *Föstoria Gold Min. Co. v. Hazard*, 44 Colo. 495, 99 Pac. 758, to the point that vendor's lien may be enforced in favor of assignee of purchase money.

Enforcement of vendor's lien in federal courts.

Cited in *Slide & S. Gold Mines v. Seymour*, 153 U. S. 509, 38 L. ed. 802, 14 Sup. Ct. Rep. 842, holding that federal courts will enforce vendor's liens, if in harmony with jurisprudence of state where action brought.

Effect of variance between pleading and proof.

Cited in *Soden v. Murphy*, 42 Colo. 352, 94 Pac. 353, holding that plaintiff cannot recover on cause of action he does not plead.

2 COLO. 669, DANIELS v. DENVER.

Liability of municipality for injuries.

Cited in *Farnham, Waters*, 1048, on extent to which streets shall be used for drains or sewers as discretionary with municipal authorities; *Farnham, Waters*, 908, on nonliability of municipality for injury from surface water while surface is left in natural condition.

Cited in notes in 61 L.R.A. 678, on duty and liability of municipality with respect to drainage; 65 L.R.A. 252, on municipal rights and duties with respect to surface water.

Distinguished in *Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705, holding municipal corporation liable for failure to keep streets and bridges in repair, to person injured by neglect.

Liability of officers.

Cited in note in 16 Eng. Rul. Cas. 624, on liability of officers for permitting or failing to abate nuisance.

2 COLO. 672, HEIDERER v. PEOPLE.

Right of appeal as statutory right.

Cited in *Lockhaven Trust & S. D. Co. v. United States Mortg. & T. Co.* 19 Colo. App. 28, 73 Pac. 409, holding that right to appeal does

not exist unless statute creates it; *Randall v. Rocky Ford Ditch Co.* 29 Colo. 430, 68 Pac. 240, holding that right to appeal from proceedings to adjudicate water rights exists only as given by statute.

Right of appeal from judgment of justice of the peace.

Cited in *Loloff v. Heath*, 31 Colo. 172, 71 Pac. 1113, to the point that no appeal is provided by statute from judgment of justice of the peace in criminal case against prosecuting witness.

2 COLO. 673, DENVER & S. R. CO. v. DENVER CITY R. CO.

Right of private person to enjoin railway from using streets.

Cited in *Seattle Gas & Electric Co. v. Citizens' Light & P. Co.* 123 Fed. 588, holding that private party suffering special injury may enjoin gas company from unlawfully laying mains in city streets; *Chicago & W. I. R. Co. v. General Electric R. Co.* 79 Ill. App. 569, holding that equity may enjoin construction of street railway at suit of private person who suffers special injury.

Cited in *High*, Inj. 4th ed. 794, on right of street railway to enjoin construction of another line; *Lewis*, Em. Dom. 3d ed. 1608, on right to injunction to prevent infringement on exclusive right to operate street railway.

Right to construct street railway as franchise from state.

Cited in *McPhee & McG. Co. v. Union P. R. Co.* 87 C. C. A. 619, 158 Fed. 5; *State ex rel. Fullerton v. Des Moines City R. Co.* 135 Iowa, 694, 109 N. W. 867,—holding that right to construct and operate street railway is franchise derived from state.

Cited in *Lewis*, Em. Dom. 3d ed. 415, on dummy railroad upon street as interference with exclusive privilege of operating horse railroad.

Cited in note in 50 L.R.A. 144, on privilege of using streets as a contract, within constitutional provision against impairing obligation.

Extent of authority of city to grant vested rights in streets for railway.

Cited in *Detroit v. Detroit City R. Co.* 56 Fed. 867, holding that city had no power to grant vested interest in streets to own and operate street railway therein, for time longer than life of grantee corporation.

City's permission as necessary before using streets for railway.

Cited in *Indiana R. Co. v. Calvert*, 168 Ind. 321, 10 L.R.A.(N.S.) 780, 80 N. E. 961, 11 A. & E. Ann. Cas. 635, holding occupancy of street by street railway company without permission, a nuisance; *Longnecker v. Wichita R. & Light Co.* 80 Kan. 413, 102 Pac. 492, holding that street-car company has no authority to lay tracks in city streets without authority from city.

Estoppel by consent to railroad in street.

Cited in note in 7 L.R.A.(N.S.) 1190, on acquiescence or consent by town or municipality to railroad in street or highway as an estoppel.

Construction of special franchise of corporation.

Cited in *Indianapolis Cable Street R. Co. v. Citizens' Street R. Co.*

127 Ind. 369, 8 L.R.A. 539, 24 N. E. 1054, holding that grant of special franchise to corporation is to be strictly construed against corporation.

What are nuisances.

Cited in notes in 107 A. S. R. 247, on what are public nuisances; 1 L.R.A.(N.S.) 61, on effect of legislative authority upon liability for private nuisance.

— Occupancy of street by railway without permission as.

Cited in *Indiana R. Co. v. Calvert*, 168 Ind. 321, 10 L.R.A.(N.S.) 780, 80 N. E. 961, 11 A. & E. Ann. Cas. 635, holding that occupancy of street, without permission, by street railroad company, constitutes nuisance.

Cited in *Cooley*, Torts, 3d ed. 1294, on street railroad constructed without authority as nuisance.

Municipal control over nuisances in streets.

Cited in note in 39 L.R.A. 612, on municipal control over public nuisances upon streets and highways created by street railroads and other electrical companies.

Power of supreme court to issue writ of error.

Cited in *Vance v. Rockwell*, 3 Colo. 240, on power of supreme court to issue writ of error to decrees in equity.

2 COLO. 685, DRAKE v. ROOT.

Right of owner in fee to convey homestead.

Cited in *Wright v. Whittick*, 18 Colo. 54, 31 Pac. 490, holding that owner in fee of homestead may convey same by deed absolute.

When homestead rights become effective.

Cited in *Re Youngstorn*, 82 C. C. A. 232, 153 Fed. 98; *Wells v. Caywood*, 3 Colo. 487,—holding that entry of word "homestead" on margin of recorded title under statute is effective only from time of such entry.

Deed as conclusive evidence of grantee's right to immediate possession.

Cited in *Cheesman v. Nicholl*, 18 Colo. App. 174, 70 Pac. 797; *Highland Park Co. v. Walker*, 13 Colo. App. 352, 57 Pac. 759,—to the point that parol evidence to show that grantee in deed was not to have immediate possession was inadmissible; *Omaha & G. Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 5 L.R.A. 236, 16 Am. St. Rep. 185, 21 Pac. 925, 16 Mor. Min. Rep. 184, holding that parol evidence to show agreement that immediate possession of land conveyed by deed was not to be given was inadmissible under statute.

Mortgage as conferring right of entry.

Cited in *Dallemand v. Mannon*, 4 Colo. App. 262, 35 Pac. 679, to the point that mortgage confers no right of entry upon mortgagee until forfeiture.

Necessity that verdict in ejectment state right upon which it was founded.

Cited in *Taylor v. Parenteau*, 23 Colo. 368, 48 Pac. 505, 18 Mor.

Min. Rep. 534, to the point that verdict in ejectment must state by what right plaintiff was entitled to ground he obtained.

2 COLO. 694, JENSEN v. BROWN.

Right of subcontractor to mechanics' lien.

Cited in McIntire v. Barnes, 4 Colo. 285, holding that subcontractor may have lien for materials furnished, but not exceeding amount due or to become due contractor; Epley v. Scherer, 5 Colo. 536, holding that materialman to maintain mechanic's lien must aver and prove that at time of notice a payment was due or to become due from owner to contractor; Henry & C. Co. v. Evans, 97 Mo. 47, 3 L.R.A. 332, 10 S. W. 868, holding that under statute subcontractor may have mechanic's lien for materials furnished contractor, though contract price has been paid to contractor; Tabor v. Armstrong, 9 Colo. 285, 12 Pac. 157, holding that subcontractor's lien may be paid out of moneys that may become due contractor for labor or materials furnished by other persons subsequent to subcontractor's lien notice, but under same principal contract.

Cited in note in 20 L.R.A. 562, on payment to contractors or subcontractors as affecting liens of subordinate claimants.

Right to personal judgment in mechanics' lien action.

Cited in Volker-Scowcroft Lumber Co. v. Vance, 24 L.R.A.(N.S.) 321, 103 Pac. 970, holding that no personal judgment can be entered upon failure to establish mechanic's lien, if not asked before cause submitted; Cannon v. Williams, 14 Colo. 21, 23 Pac. 456 (dissenting opinion), on right to personal judgment upon failure to establish mechanic's lien.

Necessity for compliance with statute in enforcement of mechanics' lien.

Cited in Greeley, S. L. & P. R. Co. v. Harris, 12 Colo. 226, 20 Pac. 764, holding that statute relating to enforcement of mechanic's lien must be substantially complied with.

Power of supreme court to issue writ of error in equity cases.

Cited in Vance v. Rockwell, 3 Colo. 240, on right of supreme court to issue writ of error to decrees made by district court.

2 COLO. 698, THATCHER v. KAUCHER, Affirmed in 131 U. S. cxlvi, Appx. and 24 L. ed. 511.

Necessity for confining instructions to matters in issue.

Cited in Hunter v. Ferguson, 8 Colo. App. 287, 33 Pac. 82, holding that it is error to give instructions in regard to fraud where there is no evidence upon which they can be predicated.

Admissibility of opinion of witness as to value.

Cited in Central R. & Bkg. Co. v. Skellie, 86 Ga. 686, 12 S. E. 1017, holding that witness may testify to market value of article, if he had ample opportunity for forming correct opinion, though he is not expert; National Bank v. New Bedford, 175 Mass. 257, 56 N. E. 288, holding

that expert may use hearsay as ground of opinion as to value of articles.

Cited in Sutherland, Dam. 3d ed. 1212, 1900, on competency of witness to give his opinion as to value.

2 COLO. 703, CENTRAL v. BROWN.

Necessity for filing verified plea to complaint.

Cited in Centra. v. Wilcoxon, 3 Colo. 566, holding that defendant must file verified plea, where he would deny execution of instrument sued upon.

Effect of verified plea to action on city warrants.

Cited in Parkison v. Boddiker, 10 Colo. 503, 15 Pac. 806, to the point that in action on city warrants, where execution of warrant was denied by plea verified by affidavits, signatures of officers and their authority to issue warrants were put in issue.

Effect of admission or denial of execution of contract.

Cited in Abbott's Pleadings, 2d ed. 1145, on admission or denial of execution of contract by corporation as involving admission or denial of authority of officer.

2 COLO. 705, PEOPLE v. MELLOR.

Invalidity of bail taken by court without jurisdiction.

Cited in San Francisco v. Hartnett, 1 Cal. App. 652, 82 Pac. 1064; Haney v. People, 12 Colo. 345, 21 Pac. 39,—to the point that bail taken by court having no jurisdiction is void.

Who has power to let to bail.

Cited in Rupert v. People, 20 Colo. 424, 38 Pac. 702, holding that power to let to bail one committed by examining magistrate is conferred upon a judge or two justices of the peace.

2 COLO. 709, BUCK v. FISCHER.

2 COLO. 711, HALL v. KING.

Conclusiveness of verdict on conflicting evidence.

Cited in Barker v. Hawley, 4 Colo. 316, holding that verdict on conflicting evidence will not be disturbed.

2 COLO. 719, HART v. FRANCIS.

Recoupment.

Cited in note in 40 Am. Dec. 324, on recoupment in case of breach of contract.

REPORTS
OF
CASES AT LAW AND IN CHANCERY
DETERMINED IN THE
SUPREME COURT
OF
COLORADO TERRITORY
AND IN THE
SUPREME COURT
OF THE
STATE OF COLORADO.

By L. B. FRANCE

VOLUME III

CONTAINING THE CASES DECIDED AT THE FEBRUARY TERM, 1876,
THE APRIL TERM, 1877, THE SPECIAL OCTOBER TERM, 1877, AND
CERTAIN CASES DECIDED AT THE DECEMBER TERM, 1877.

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JUSTICES OF THE SUPREME COURT
OF THE
TERRITORY OF COLORADO.

During the February Term, 1876.

MOSES HALLETT, C. J.

ANDREW W. BRAZEE, J.

AMHERST W. STONE, J.

JOHN W. WEBSTER,

CLERK.

JUSTICES OF THE SUPREME COURT
OF THE
STATE OF COLORADO.

During the April Term, 1877.

HENRY C. THATCHER, C. J.

SAMUEL H. ELBERT, J.

EBENEZER T. WELLS, J.*

During the October Special Term and the December Term, 1877.

HENRY C. THATCHER, C. J.

SAMUEL H. ELBERT, J.

WILBUR F. STONE, J. †

KEYES DANFORTH,

CLERK.

*Resigned September 1st, 1877.

†Elected October, 1877, to fill the vacancy caused by the resignation of Justice Ebenezer T. Wells.

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CASES AT LAW AND IN CHANCERY

DETERMINED IN THE

SUPREME COURT

OF

COLORADO TERRITORY.

WIDNER v. BUTTLES.

When a time is fixed by order of the court, within which to prepare and present a bill of exceptions, and it becomes necessary to attest and prove the same by affidavit under the statute, the record should show that the attesting and proof was within the time limited by the order.

Error to the Probate Court of Boulder County.

Messrs. BECK & WRIGHT, for plaintiff in error.

Mr. ORRIS BLAKE, for defendant in error, now moved to strike the bill of exceptions from the transcript of record.

Per Curiam. The order of the court gave the defendant until the 6th day of February, 1875, inclusive, to prepare and present his bill of exceptions. It was presented to the judge late in the evening of that day, but not signed.

On the 16th day of July following, the judge certifies his refusal to sign with his reasons therefor.

On the 22d day of July, the attorneys for the plaintiff file their affidavits under the statutes, that the bill of exceptions is correct and true.

On the neglect or refusal of the judge to allow, sign and seal such bill of exceptions, and it becomes necessary to attest and prove the same by affidavit under the statute, the record should show that the attesting and proof by affidavit was within the time limited by the order of the judge.

The motion to strike out the bill of exceptions is

Allowed.

MARR v. WETZEL.

1. In an action brought upon a judgment rendered in another State, the jurisdiction of the court, rendering such judgment, over the person of the defendant and the subject-matter of the controversy may be questioned. But whether this shall be done by general or special plea *quære*.
2. That a defendant was not allowed to maintain two pleas setting up the same defense is not a ground for reversal.
3. A dedimus or commission issued pursuant to statute (R. S., p. 311), to take the deposition of a non-resident witness, confers full authority upon the commissioner to whom it is directed to take such deposition. *Ford v. Rockwell*, 2 Col. 376.
4. In the matter of names, orthography is not important if the sound is the same. The pronunciation of Lewis and Louis is the same.
5. In taking evidence upon interrogatories attached to a dedimus or commission, the rule which requires that the witness shall answer the question put, without more, should be somewhat strictly applied.
6. When it is probable, from the record, that the admission of evidence not pertinent to the issue has affected the result, the judgment will be reversed.

Error to the Probate Court of Arapahoe County.

ACTION of debt brought in the probate court of Arapahoe county, upon a judgment recovered in the circuit court of St. Louis county, State of Missouri, by August Wetzel against James Marr. In the court below, Marr, the plaintiff in error, moved to suppress the deposition of Louis

Swain, a non-resident witness, because it did not appear by the certificate or caption that the commissioner to whom the dedimus was directed was qualified or authorized by law to take depositions to be used in the trial of causes in the courts of Colorado. Also that it did not appear by the caption or certificate that said commissioner was authorized or qualified by the laws of Missouri, where the deposition was taken, to administer oaths or take depositions. Objection was also made to the following interrogatory propounded to said witness, on the grounds of irrelevancy and incompetency :

4th Interrogatory : " If in answer to the third interrogatory above, you say that you were acquainted with the defendant, James Marr, between the 19th day of May, A. D. 1868, and the 16th day of January, A. D. 1871, state whether or not you saw the said defendant during said time? And if yea, state when and where you saw the said defendant and give the time, place and circumstances with particularity."

Objection was also made to the answer, which was as follows :

" I did see the defendant, James Marr, between the 19th day of May, 1868, and the 16th day of January, 1871, several times ; the particular days when, and places where, I saw him in the city of St. Louis between the dates named in the interrogatory, I have no means of fixing now with certainty, except that in the month of November, 1868, I was acting as deputy sheriff for John McNeil, then sheriff of the county of St. Louis, and recollect that as sheriff, he had a summons to serve on James Marr, the defendant, and I was looking for him for the sheriff, and on the 25th day of November, 1868, I found him at or near the north-west corner of Pine and Fifth streets, in the city of St. Louis, where, according to the best of my recollection, service of the writ was made on him."

The grounds of objection urged being that the answer was irrelevant and incompetent, and also that all of the answer

commencing at the word "except," to and including the words "service of the writ on him," was not responsive to the interrogatory. Objection was also made to the deposition upon the ground that the notice was given and the dedimus issued to take the deposition of Lewis Swain, while the deposition returned was that of Louis Swain.

Objection was made also to the introduction in evidence of the transcript of the record of the judgment of Wetzel against Marr, upon the ground of variance. The declaration consisted of one count, and alleged a recovery of "four hundred and seventy-nine and fifty one-hundredths of dollars," also that the judgment was "by reason of the non-performance by the said defendant of certain promises and undertakings." * * * * The judgment offered and received in evidence was for the definite sum of "four hundred and seventy-nine and $\frac{50}{100}$ dollars," and also that "the defendant is indebted to the plaintiff * * * on account of the instrument in writing on which this action is founded. It is therefore considered by the court that the plaintiff recover of the defendant aforesaid the debt aforesaid, in form aforesaid." * * *

The plaintiff contended that entire accuracy is necessary in describing a record. That if any amount was alleged in the declaration as having been recovered, it was a different amount from that disclosed by the transcript of the judgment offered in evidence. That the declaration described a judgment in assumpsit, but that the judgment offered in evidence was not a judgment in that form of action, and that if the judgment was in some form of action unknown to the common law, it should have been described according to that form, and that such description was necessary to its identity. The objections were all overruled and judgment rendered in favor of Wetzel. The other material facts in the case are sufficiently set forth in the opinion of the court.

Messrs. FRANCE & ROGERS, for plaintiff in error.

Messrs. HORNER & HARMAN, and Mr. V. A. ELLIOTT, for defendant in error.

HALLETT, C. J. This action was founded upon the record of a judgment recovered in the State of Missouri. The defendant pleaded *nul tiel record*, *nil debet*, and a special plea denying that the court in Missouri had jurisdiction of his person at the date of rendering the judgment. A demurrer to the plea of *nil debet* was sustained, and it is contended that this ruling was erroneous. Of this, however, there is some doubt, for it was held in *Mills v. Duryee*, 7 Cranch, 481, that this plea could not be admitted in actions of this kind.

Later cases affirm the doctrine that the jurisdiction of the court in which the judgment was rendered as to the person of the defendant and the subject-matter of the controversy, may be questioned in an action on the judgment, but whether this shall be done by general or special plea is not declared. *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas-light & Coke Co.*, 19 id. 58.

If, however, *nil debet* is a good plea to a declaration on a judgment, the ruling of the court excluding it was not injurious to plaintiff in error. Upon the authorities cited he could only impeach the judgment upon the want of jurisdiction in the court which pronounced it, and this defense was allowed him under the special plea. That he was not allowed to maintain two pleas setting up the same defense is not a ground for reversal. Authority to take the deposition of Louis Swain was conferred upon the commissioner by the *dedimus* or commission to him directed, pursuant to Rev. Stat. 311, and none other was necessary. This is according to the practice which has prevailed in our courts from the organization of the Territory, and if there be any thing wrong or mischievous in it, the remedy is with the legislative assembly.

As to the name of the witness, the fact that it was spelled *Lewis*, in the commission and interrogatories, is not material. In the matter of names, orthography is not important, if the sound is the same, and whether this name is spelled in one way or the other, the pronunciation is the same.

The fourth interrogatory in this deposition, called for

testimony upon a point which was clearly in issue, and therefore the objection that it was immaterial is untenable.

Defendant alleged that he was not in the State of Missouri at the date when the suit in which the judgment was obtained was begun, or at the date of the alleged recovery, and that service of process in that action was not had upon him.

The inquiry as to where he was at the time when the summons in the suit appeared to have been served was thus made material, and the question was not objectionable in form. In answer to the question, the witness very properly gave the circumstances which enabled him to fix the day on which he saw the defendant in St. Louis, but he was not asked to state whether he served a writ on defendant at that time, and his answer that he did so was not responsive to the question.

This objection was taken on the motion to suppress the deposition, and that portion of the answer which relates to the service of a writ on defendant should have been excluded. Although the witness did not particularly describe the writ which he served, from the language used it may be inferred that he was speaking of the writ upon which the judgment in controversy was entered, and this evidence may have had an important influence in determining the issue in the cause. In taking evidence upon interrogatories attached to the *dedimus* or commission, the rule which requires that the witness shall answer the question put, without more, should be somewhat strictly applied. In such case the party against whom the deposition is to be used has no opportunity to cross-examine, except that which is afforded by filing cross-interrogatories to be attached to the commission. In drawing them he must often be governed entirely by the direct interrogatories filed by his adversary, and if these last give no light as to the subject upon which the witness is to be examined, he will be unable to cross-examine. Of this the deposition in the record affords an illustration.

In the direct interrogatories there is nothing calling for

the witness' knowledge as to the service of the process on the defendant in the State of Missouri, and yet such evidence was elicited. As to this the defendant had no opportunity to cross-examine, and therefore he cannot be concluded by it.

In examinations at the bar of the court in the presence of counsel, whatever falls from the witness may, within limits defined by other rules, be made a subject of cross-examination, and therefore greater latitude may then be indulged in applying the rule under consideration.

At the trial the defendant testified in his own behalf that he was not served with process in the suit in the State of Missouri; and gave some account of his residence, and the places where he had been at different times. Upon cross-examination he was asked whether he had not in the year 1871 conversed with Mr. Horner, one of the attorneys for plaintiff, concerning a note which was shown him. An objection to this was overruled, and the witness admitted the conversation, but denied that he had then said that he supposed judgment had been entered against him on the note, or any thing of that kind. Mr. Horner was then called by the plaintiff to contradict the testimony of the defendant respecting the judgment, and he stated in substance, that the defendant admitted, in the conversation with him, that suit had been brought on the note in St. Louis. This conversation occurred more than two years after the alleged service of process in the suit in Missouri, and the utmost effect that can be given to the admissions imputed to the defendant is, that at the time of the conversation he knew that suit was pending, or perhaps that judgment had been entered against him in Missouri. That this was not an admission that process had been served on him in that suit two years and more prior to the conversation, is plain enough without argument. Knowledge of the fact said to have been admitted, might have been obtained by defendant in many ways other than the service of process, and the admission did not prove, or tend to prove, the issue. It is equally plain that the cross-examination was not pertinent

to the matters drawn out in the examination-in-chief, but that of itself is not serious error.

The substantial objection to the evidence is that it was not pertinent to the issue, and that the court allowed the plaintiff to contradict it, apparently for the purpose of discrediting the witness.

We cannot know what weight was given to this testimony in determining the issue, but the fact that the court received it, notwithstanding the objection urged against it, and afterward refused to strike it out, justifies the conclusion that the court regarded it as of some value. Upon the facts disclosed in the record, it is probable that the evidence, thus improperly admitted, affected the result, and this is fatal to the judgment. It will not be necessary to advert to the effort which was made to amend the bill of exceptions, at a term subsequent to that in which judgment was given, or to the alleged variance in the declaration. The judgment was well enough described, and the objections to receiving it in evidence were properly overruled.

The judgment of the probate court is reversed with costs, and the cause remanded for new trial. *Reversed.*

TWO PLEAS SETTING UP SAME DEFENSE cannot be maintained: *Colorado Cent. R. R. v. Blake*, 3 Colo. 418.

IN ACTION ON FOREIGN JUDGMENT, jurisdiction of the court in the state where the judgment was rendered, over the person and subject-matter, may be questioned: *Wilson v. Hawthorne*, 14 Colo. 331.

SLOAN SAW MILL AND LUMBER CO. v. GUTTSHALL.

1. A plea in bar must deny, or confess and avoid the allegations in the declaration. A plea which amounts merely to the general issue is bad on demurrer.
2. It is not ground for reversal where special pleas have been improperly stricken out, if from an inspection of the whole record it appears that the defendant has been permitted to litigate all that he alleged in such special pleas.
3. The best evidence of which the case in its nature is susceptible must be produced.
4. The presumption is that the judgment of the district court is proper, and the onus is upon the plaintiff in error to show the contrary.
5. The right to re-examine a witness extends only to the same matters upon which he was cross-examined.

6. A part performance of a verbal contract by delivery by the vendor, and part payment by the vendee, will take the case out of the statute of frauds.

Appeal from the District Court of Arapahoe County.

ASSUMPSIT. To the declaration, which is substantially set forth in the opinion of the court, the defendant filed six pleas: First, the general issue; second, payment; third, set-off. The fourth, fifth and sixth pleas were in substance as follows:

4th. Failure and refusal on part of plaintiff to deliver to the defendant at the place mentioned, or at any place, said lumber, as the same should average, without selection or separation; said plea avers that said lumber was separated, and the clear lumber culled out by plaintiff, and the common lumber tendered to defendant, and that the plaintiff failed to tender the clear lumber to the defendant.

5th. Failure on part of plaintiff to furnish said lumber to defendant at the time and place mentioned in the *narr.*; that said lumber was not furnished as fast as sawed, and defendant was forced to purchase lumber elsewhere, to its loss, etc.; that plaintiff sold the lumber bargained to be delivered to defendant, to others, contrary to the terms of said contract.

6th. That in consideration that defendant would purchase four hundred thousand feet of lumber of plaintiff, he, plaintiff, would guarantee said lumber would average thirty-five per cent of clear or flooring lumber, and that no lot of said lumber, so to be delivered, should average less than twenty-five per cent of clear lumber; that at, and after the time said contract was entered into, clear or flooring lumber was in great demand; that no lot of lumber so delivered or tendered by plaintiff averaged to exceed ten per cent of clear or flooring lumber.

The plaintiff demurred to the fourth, fifth and sixth pleas, alleging that said fourth, fifth and sixth pleas, so pleaded, were "only a partial defense, and were otherwise informal and uncertain." The demurrer to the fourth and fifth

pleas was sustained because those pleas amounted to the general issue, merely, and to the sixth plea because the matters stated in that plea were insufficient in bar of the action. This ruling is assigned as error: The defendant asked that the following instructions be given to the jury, but they were refused by the court, and the refusal is also assigned as error:

"If the jury believe, from the evidence, that the plaintiff sold and delivered lumber to the defendant, the plaintiff is entitled to recover for the reasonable market value of the same at the time it was delivered, and if they further believe that the defendant paid to plaintiff, at various times, moneys aggregating a sum of money equal to or greater than the reasonable market value of the lumber sold and delivered, they will find for the defendant."

"The court instructs the jury that they must disregard and exclude from their consideration all evidence concerning the alleged contract between plaintiff and defendant, by which plaintiff was to sell and defendant to buy four hundred thousand feet of lumber at the price of fourteen dollars per thousand feet; and the court further instructs the jury that the plaintiff cannot recover upon such alleged contract."

The jury rendered a verdict in favor of the appellee for \$1,044.90, for which sum judgment was entered.

Messrs. SAYRE, WRIGHT & BUTLER, for appellant.

Mr. CHARLES S. THOMAS, and Mr. THOMAS M. PATTERSON, for appellee.

A. W. STONE, J. This was an action of assumpsit brought by the appellee against the appellant.

The declaration alleges that on the 1st day of May, A. D. 1873, the defendant bargained for and bought of the plaintiff four hundred thousand feet of lumber to be sawed by plaintiff and sold to defendant, as the same should average, without separating the clear from the common lumber, at fourteen dollars per thousand; lumber to be delivered as

fast as sawed at saw-mill of plaintiff, in El Paso county; to be paid for by the thousand feet as fast as delivered; that plaintiff promised to accept said lumber as aforesaid.

That plaintiff delivered between the 1st of May, and the 28th of July, of said year, at the saw-mill and yard of plaintiff, two hundred and seventy-four thousand feet of said lumber which defendant accepted, but refused to pay for the same.

And that between July 28th and August 4th of said year, plaintiff tendered at said mill the balance of said lumber and requested the defendant to accept it which he refused to do; and that he had been deprived of the benefit of the sale, and was compelled to resell the balance of said lumber on the 8th day of August of said year for a less sum of money, to wit: Two dollars per thousand feet less; and the defendant, although requested to pay said deficiency, being two hundred and fifty-six dollars, refuses to pay it, or any part of the same.

The common counts for goods, wares and merchandise sold and delivered, money lent, money had and received, and for interest, are also contained in the plaintiff's declaration.

Upon the trial the jury found a verdict for the plaintiff, and assessed his damages at \$1,044.90. A motion for a new trial was made and refused.

And the first error assigned is in sustaining the demurrer to the fourth, fifth and sixth pleas of the defendant. The demurrer was properly sustained.

The fourth and fifth pleas amount to the general issue, and the sixth plea is not a substantial and conclusive answer to the action. It does not deny the averments in the declaration, nor does it admit them to be true and allege new facts which obviate or repel their legal effect. It has none of the requirements of a good plea in bar.

But admitting that the pleas were improperly stricken out, it is evident from the inspection of the whole record that no harm resulted to the defendant therefrom; he was permitted

to prove all that he alleged in his special pleas which were stricken out, and the supreme court of the United States has held that when a plea has been improperly stricken out but no harm resulted therefrom, it is not cause for reversing the judgment. *Grand Chute v. Winegar*, 15 Wall. 355; *Chambers County v. Clews*, 21 id. 817.

The second, third, fourth and fifth errors assigned relate to the admitting of certain evidence offered by the plaintiff.

It is objected that the evidence is irrelevant, immaterial, and incompetent. The relevancy, materiality and competency of evidence depends upon its correspondence with the allegations and points in issue, and is admissible if it bears upon or tends to prove the substance of the issue, or constitutes a link in the chain of proof. Applying the rule to the evidence received, we are of opinion that it was relevant, material and competent, and properly admitted.

It is objected that the conversation witness Rice had with Donnellan was improperly admitted because it is not shown that Donnellan knew that witness had any power to act for the plaintiff, and there is nothing to show that Donnellan had any authority to bind the defendant. Rice is asked to give the conversation he had with Donnellan. Whether Rice was acting for plaintiff or not, or had authority to act or not, is wholly immaterial. It was proper for him to relate a conversation with Donnellan if Donnellan was the agent of the defendant and had authority to act for it. That he did have such authority clearly appears from Donnellan's own testimony subsequently given in the case.

It is not necessary that the relevancy or competency of testimony should appear at the time when it is offered. It is in the discretion of the court, and if rendered material by other evidence, it will stand; if not, it is to be ruled out.

Donnellan, a witness for defendant, in his examination stated "he had been about three years in the lumber business, and only knew the average per centage of clear and flooring mill run by the assurance of mill men." He is asked to state what it is. This was objected to, and the

objection sustained, and this is alleged as error. The rule is that the best evidence of which the case in its nature is susceptible shall be produced. Clearly what mill men had told witness was not the best evidence. The mill men could have been produced. The ruling of the court was right.

The same witness stated he "had a conversation in reference to the grade and amount of lumber he received." He is asked what that conversation was. It does not appear with whom he had that conversation, whether with the plaintiff, defendant, or some outside party, and that not appearing, it will be presumed that it was properly rejected by the court. The presumption is that the judgment of the district court was proper, and it lies on the plaintiff in error to show the contrary. 13 Peters, 447.

The witness Lockhard is asked upon his re-examination to state if he knows the amount, the sum total of the bill Mr. Guttshall was owing, if any thing, to the defendant, for lumber sold and delivered to him. He stated he could not remember what the balance was, the books would show. He is then asked what the balance was. To this an objection was made and sustained.

The right to re-examine extends only to the same matter upon which he was cross-examined, and all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be doubtful, and also the motive by which the witness was induced to use those expressions, but counsel examining has no right to introduce new matter. 1 Greenl. Ev., § 467.

The question asked was as to new matter, not elicited by the cross-examination, and was properly rejected.

The next error assigned is the refusal of the court to permit the witness to answer the question, "If I should enumerate the figures, could you tell? Was not the amount that you received 267,347 feet?" The answer to the question was properly rejected. The question was clearly leading.

The only question remaining to be considered is whether

the contract was obligatory upon the defendant within the statute of frauds, or as being a case not reached by the statute.

The plaintiff in error insists that the plaintiff below was only entitled to recover for the reasonable market value of the lumber delivered to the defendant at the time of delivery, deducting therefrom the amount paid; that the contract alleged should be wholly disregarded, being within the statute of frauds and void.

Instructions were asked to this effect, and the refusal of the court to give them is assigned as error.

The view we take of the case renders it unnecessary to examine and determine the vexed question whether in a contract like the one presented in this record the statute applies or not.

The distinction between contracts for an article to be entirely manufactured, and an article already existing, but to be fitted for delivery by the application of work and labor, has received different constructions by the courts in this country and England, and by the courts in the different States of the Union.

In many recent authorities it has been held that when the purchase is of articles, such as the vendor regularly manufactures from time to time, and has for sale in the ordinary course of his business, the contract is held to be within the statute, but if he manufactures to order, out of materials in his possession, it is not within the statute.

The evidence in this case we think clearly shows a contract, and a part performance of it, by the delivery by the vendor, the acceptance and payment of a part of the lumber by the vendee. That the acceptance and receipt of some part of the thing sold will take the case out of the statute is now well settled, if any doubt ever existed upon the subject, and that the acceptance and receipt may take place subsequent to the making of the verbal agreement.

If the verbal contract is proved, and a delivery in pursuance of it, the requisites of the statute are fulfilled. Brown

on Statute of Frauds, §§ 322-337, and cases cited; *Chapman v. Rogers*, 1 East, 192; 1 Parsons on Contracts, 51.

The judgment is

Affirmed.

STRIKING OUT SPECIAL PLEAS is not reversible error if from the record it appears that the defendant has been allowed to litigate all that he alleged in such pleas: *Brown v. People*, 3 Colo. 129.

SCHAEFER et al. v. GILDEA et al.

1. Under the general issue to the common counts in assumpsit for work and labor, the defendant may recoup damages.
2. A party may not stand by and see work in the erection of a building progress to completion, and then for the first time object that the work was not done in strict accordance to the plan, refuse payment and charge the builder with the cost of reconstruction. The builder is, in such case, entitled to recover what the work is reasonably worth.
3. When work is done under a contract, the terms of the contract should settle the amount to be paid, unless it is shown that in consequence of variations from the plan, the compensation agreed upon should be diminished, and the proper measure of damages in such case is the diminution of the value of the building resulting from the variation.
4. The declarations of one acting as the agent of both parties to a contract, if made within the scope of his authority, are properly receivable in evidence in an action between the parties to the contract.
5. The recalling a witness is a matter within the discretion of the court below and cannot be assigned for error.

Error to the Probate Court of Arapahoe County.

Messrs. SAYRE, WRIGHT & BUTLER, for plaintiffs in error.

Messrs. JACOBSON & LE FEVRE, for defendants in error.

BRAZEE, J. The defendants in error were the plaintiffs below, and declared in assumpsit upon common counts for work, labor and services, laying their damages at \$1,500. The plea was the general issue. The cause was tried by the court, a jury being expressly waived. The court found for the plaintiffs below \$953.50, for which judgment was given with costs.

The evidence shows a parol contract between the plaintiffs and defendants, by which the plaintiffs below agreed

to buy for the defendants the brick in constructing the walls of a building three stories high, including the basement, according to a ground plan, fifty feet wide and ninety feet deep, with a partition wall running through the center of the building; the defendants below agreeing to pay eight dollars and fifty cents per thousand for laying the brick.

The only dispute about the terms of the agreement arising upon the evidence is, whether the walls were to be so constructed as to admit of their being carried up another story. In our view, this disputed point of fact was well disposed of in the court below.

The principal questions of law in the case have reference to damages claimed by reason of the misplacement of the side and center walls of the building.

One question was whether under pleadings as in this case, common counts and the general issue, damages can be recouped; we think they can where a case for damages is made out by a defendant, upon principle and under authorities cited in 5th Robinson's Practice, page 271, etc. The reason for the rule seems to be this, that on a *quantum meruit* for work and labor, the plaintiff should only recover what he deserves, and where the work sued for has become useless or of less value through the plaintiff's fault in executing it, such negligence and the resulting damages may be shown under non-assumpsit.

The evidence discloses the fact that the lines of the outer walls were located by an engineer in the employ of the defendants below, by stakes in accordance with which the cellar, which was co-extensive in area with the building, was dug under the direction of the defendants below, and one of them was present when the corners of the foundation walls were adjusted in the excavation according to the lines the defendants below had thus established. Therefore the misplacement of the outer walls was not the fault of the plaintiffs below, nor can they be charged with damages resulting therefrom.

As to the partition, the following facts appear. When

the walls were up to the top of the first story, or to a point where the floor of the second story was to be laid, the variation of the line of the partition wall three inches from the center line of the building where the plan showed it should have been, was discovered by the defendants below. They did not, however, object to the work going on, nor demand that the partition wall should be taken down then and there and rebuilt upon the line indicated by the plan; on the contrary, by their acts they accepted that wall as it was; they changed the length of their joists to conform to the difference in width of the two compartments of the building, laid the floors, put up the iron front, roofed the building, finished it off and painted it, accommodating their work to the change from the plan.

These acts on their part with knowledge of the variation from the plan amount to an acceptance and assent to the change or waiver of strict performance.

It would be manifestly unjust to allow the owner, under such circumstances, to stand by and see the walls progress to completion, lay the joice, floor and roof his building, put up the front, paint and finish the whole and when pay for laying the walls is demanded, for the first time object that the walls are not placed according to the plan by a few inches, refuse payment and charge the builder with the cost of reconstruction.

Whether, under the circumstances of this case, the defendants might have been allowed damages resulting from the variance or not, we do not express an opinion, but assuming that in respect to the partition wall a case on the part of the defendants below was presented entitling them to damages, the questions put by their counsel did not afford the true rule.

These questions assumed that the damages would be the cost of paring off one side wall where it had been built too far upon the adjoining land, and taking down the partition wall and rebuilding it upon the center line, involving displacement, it may be, of the roof, floors and front. This would involve the reconstruction of the building to a great

extent, and an amount of damages far in excess of what would have necessarily resulted from the error in location of the partition when the defendants below discovered it. That error could then have been corrected at the comparatively small expense of rebuilding a part of the division wall if it had been insisted upon then. If the defendants below were entitled to any damages, it would be the difference in the value of the building as constructed and what it would have been worth if it had been constructed according to the plan.

Because the contract was not strictly complied with in respect to the location of the walls, it is urged that the plaintiff below was not entitled to recover any thing, or, if any thing, not the full contract price. It may be conceded that the position would be sound, if in respect to the outer side walls, the defendants below had not, as we have seen, been in fault, and had not waived a strict performance in respect to the partition wall.

Under these circumstances the plaintiffs below, if not entitled to recover according to the contract, were entitled at least to what their work was reasonably worth. *Pike v. Nash*, 1 Keyes, 335; *Dermott v. Jones*, 2 Wall. 9.

The questions overruled touching the matter of damages were properly overruled, and the assignments of error as to the overruling of these questions are not well taken.

The work was done under a contract, and the terms of the contract should settle the amount to be paid, unless it is shown that in consequence of the variations from the plan the compensation agreed upon should have been diminished. As we have seen, the proper measure of damages was the diminution in value of the building, resulting from the variation from the original plan, and the defendants below should have furnished the evidence of it, but failing to do so, the finding for the plaintiff was proper.

One Gill, a brick maker, who had a brick kiln, was to furnish the brick for the building, and the parties agreed to take his count in determining the number of brick laid by the

plaintiffs below. Gill was called as witness by the plaintiffs below and testified that in the fall of 1871 he sold the defendants a lot of brick to complete their building, and furnished them about 409,000; that he rendered them an account; understood when he began furnishing that they were to get the brick laid kiln count, though he gave both an account of the brick. He was then asked:

Question. "How much did you tell the plaintiffs that there was?" This was objected to as hearsay by the defendants below, the objection was overruled and they excepted.

Answer. "I could not tell exactly, but I think it was somewhere between 370,000 and 380,000, when they had the building up, but I am not positive. I told Hibschiele at the time they got through putting up the building."

He further testified under the same objection — "It was Lambert or Gildea that asked me about how many brick I had furnished up to that time, and what I told them was correct. I made the same statement to Hibschiele, I think about the same time."

We think that Gill was the agent of both parties, and his declarations within the scope of his authority, which was to count and determine the number of brick, and declare the same to the parties, were properly receivable as evidence.

Gill's relation to the parties was analogous to that of an arbitrator. The decision of an arbitrator is binding after publication, and a parol award is good. 5 Cow. 383; and *French v. New*, 28 N. Y. 147. A parol award delivered to one party in the absence of the other is binding. *Cocks v. Macclesfield*, 2 Dyer, 218 b; *Russell's Power and Duty of Arbitrators*, 235.

Again, the number of brick was an element of the contract to be ascertained by Gill. He became the agent of the parties to make or determine the contract, in this respect he was authorized to declare the evidence of it. For instance, a power of attorney authorizing an attorney in fact to convey all right, title and interest of an owner of certain

real estate, carries with it the power to execute the proper deed to convey the title which then becomes evidence of title in the grantee. So the authority given by the owner of personal property to an agent to sell it, empowers the agent to furnish the evidence of sale, and the declaration of the agent at the time of the sale, or a bill of sale there executed by him, is the evidence of it; whether the evidence of the sale rests in parol or in writing it is the declaration of the agent that binds the owner.

According to this principle in the case of *Mead v. McDowell*, 5 Binn. 195, the supreme court of Pennsylvania held, that where one confides to another the power of making a contract, he confides to him the power of furnishing the evidence of that contract, and if the contract is by parol, subsequent declarations of the party are evidence though not conclusive. Inasmuch as Gill was empowered by both parties to determine the number of the brick in respect to their contract, his declarations were competent evidence of the fact which he was authorized to determine within the principle of the above decision.

After Gill had been examined and it became apparent that he did not remember the number of brick furnished for the building in question, the witness Lambert was recalled. The defendants below objected to his being recalled, and the objection was overruled. This objection went to a matter clearly within the discretion of the court, viz.: whether to allow Lambert to be re-examined or not, and in respect to the ruling of the court in such matters error cannot be assigned.

Lambert then, without further objection, testified that he had a conversation with Gill, who told him the number of brick furnished was 375,000, at the time the building was done, and at that time told Hibschiele what Gill had informed him that he had delivered up to that time, to which Hibschiele made no reply. This evidence was not objected to on the ground of incompetency, and if it had been we think it was clearly admissible. The circumstance of Hibschiele's silence when this communication was made to him shows an ac-

quiescence in the correctness of the statement of the number of brick. More than this, there was no evidence showing that Gill's statement was in any respect incorrect, nor was it in any way controverted. We think that Gill's declarations were properly given in evidence and the motion for nonsuit was properly overruled.

Objections were made to evidence tending to show how the number of brick in a wall, by the custom of bricklayers, might be ascertained after the wall had been completed. This was irrelevant in this case, after it appeared the parties had agreed to abide by Gill's count. No computation by this custom was shown, and it is perfectly plain that the court was not governed by it in determining the amount found for the plaintiff below, as it seems to us. The number of brick, according to Gill's statement, was 375,000; 4,000 remained after the walls were completed, which deducted from 375,000, left 371,000 as the number that were laid in the walls of the building; the laying of which at \$8.50 per thousand, gives \$3,153.50, as the amount the laying of the brick came to; \$2,200 was paid upon the contract, which deducted from the amount, at the contract price, leaves \$953.50, the precise sum found for the plaintiffs below. It is therefore apparent that the evidence of the custom had no effect upon the finding whatever, and was therefore harmless.

There are sixty-one assignments of error, respecting rulings on the admissibility of evidence. What we have passed upon are all that are material to consider. The others do not appear to be erroneous, nor would it be profitable to discuss them.

The judgment is

Affirmed.

HALLETT, C. J., dissenting:

Declarations of the witness Gill, as to the number of brick used in the building, made to defendants in error, after the building was completed, were not, as I think, competent evidence, and were improperly received. Upon that ground I am for reversing the judgment.

TALPEY, impl., etc., v. DOANE et al.

1. An attachment writ made returnable on a day other than the first day of the term is not void, and may, therefore, be amended.
2. The defendants, in an attachment, entered a special appearance only. The plaintiffs and interpleading claimants stipulated to change the venue in the matter of the interplea, to another county than that in which the attachment was pending. A judgment was subsequently rendered against the defendants by default, in the court to which the cause had been removed. *Held* to be erroneous.

Error to the District Court of Arapahoe County.

DOANE & Company, the defendants in error, began a suit by attachment in the district court of Weld county against Oliver S. Glenn and Rufus E. Talpey, who entered a special appearance for the purpose only of quashing the writ. A herd of cattle was seized under the writ, and Lockhart T. Glenn and George O. Talpey filed an interplea, under the statute, claiming to be the owners of the property attached. The interpleaders stipulated with Doane & Company to change the venue for the trial of the interplea. The district court of Weld county, in making the order changing the venue, directed the original cause, as well as the matter of the interplea, to be sent to the district court of Arapahoe county, and transferred all the papers to that court. Subsequently, Doane & Company took a default in the district court of Arapahoe county, against Oliver S. Glenn and Rufus E. Talpey; a jury was also impaneled and damages assessed against them in the sum of \$8,621.69, upon which judgment was entered in favor of Doane & Company. To reverse this judgment Rufus E. Talpey sued out this writ of error.

The plaintiff, in support of the position that a writ of attachment made returnable *dies non* is void, cited among other authorities, *Porter v. Foley*, 21 How. 393, and *Ins.*

Co. v. Mordecai, id. 195. A number of errors were assigned, but they are not discussed in the opinion of the court.

Messrs. FRANCE & ROGERS, for plaintiff in error.

Messrs. CHARLES & DILLON, for defendants in error.

A. W. STONE, J. On the 22d day of September, A. D. 1870, a writ of attachment in favor of defendants in error, against the plaintiffs in error, was issued out of the district court of Weld county, returnable at a district court, to be holden at Evans, in the county of Weld, on the *third* Tuesday of December next.

The time fixed by law for holding the district court in Weld county was the *second* Tuesday in December.

Counsel for defendants entered a special appearance, and moved to quash the supposed writ of attachment. Counsel for plaintiffs made a cross-motion to amend the writ.

The motion to quash was overruled, and the motion to amend was allowed; and the writ was amended by striking out the words "third Tuesday," and inserting "second Tuesday."

The right to make this amendment was fully considered and decided by this court in the case of *Archibald v. Thompson*, 2 Col., and we think the decision in that case correct. It is supported by a large number of respectable authorities, and is not in conflict with any decisions of the supreme court of the United States. The substantial rights of parties litigant are not thereby affected, and its allowance best tends to the furtherance of justice.

On the 17th day of December a stipulation was entered into between counsel for plaintiffs and counsel for Lockhart T. Glenn and George O. Talpey which was entered of record. The stipulation is in the following words:

"In the matter of the interplea filed by Lockhart T. Glenn and George O. Talpey in the attachment cause now pending in said court, wherein John W. Doane and others

are plaintiffs, and Oliver S. Glenn and Rufus E. Talpey are defendants, it is hereby stipulated by the attorneys for J. W. Doane & Co., and by France and Rogers, the attorneys for Lockhart T. Glenn and George O. Talpey, that the interplea, and the issues joined therein, may be tried at the January term, A. D. 1871, of the Arapahoe county district court; this stipulation to affect the interplea only, and to be in nowise considered as affecting the defendants in the attachment.

“CHARLES & ELBERT, for J. W. Doane *et al.*

“FRANCE & ROGERS, for Lockhart T. Glenn and George O. Talpey, interpleaders.”

On the same day the court ordered the venue in this cause changed from the district court of Weld county to the district court of Arapahoe county. The order of the court was based upon the stipulation and must be considered with and interpreted by it. The stipulation is not of doubtful import; it is plain and unambiguous, and was an agreement to change the venue in the cause of J. W. Doane *et al.* and Lockhart T. Glenn and George O. Talpey, interpleaders. No other parties were before the court. Oliver S. Glenn and Rufus E. Talpey had not then been served with any process, and had only appeared specially to make a motion to dismiss the writ of attachment.

The order of the court for the change of venue was in the cause of *J. W. Doane et al. v. Lockhart T. Glenn and George O. Talpey*, over which it had acquired jurisdiction by the interplea filed and the stipulation of the parties. That counsel for plaintiff so considered it at the time is evident from the fact of the issuing the *alias* writ of attachment. If Oliver S. Glenn and Rufus E. Talpey, or either of them, had appeared, the *alias* writ was useless.

The order for a continuance is general. “Now, on this day, come the said parties by their attorneys, and thereupon this cause was ordered to be continued. What cause? If the venue had been changed as to the defendants in the attachment as well as to the interpleading claimants, there

was no cause in that court to continue. It was wholly out of that court. If it referred to the cause of *J. W. Doane et al. v. Oliver S. Glenn and Rufus E. Talpey*, as a cause then remaining in that court, which we think is correct, it not having been removed, it is clear the judgment against them in the district court of Arapahoe county was erroneous. The defendants Oliver S. Glenn and Rufus E. Talpey were not parties to the stipulation, and were not before the court at the time the order for the change of venue was made.

The *alias* writ of attachment, issued on the 14th day of December, 1870, required them to appear at a court to be holden at Evans, for the county of Weld, on the 2d Tuesday of December, 1871. It was sufficient for them to obey the order of the court.

From the beginning to the end of this case it does not appear that the defendants, Oliver S. Glenn and Rufus E. Talpey, or their counsel, asked any thing or did any thing; they consented to no change of venue; made no motion to continue, and did no act showing an intention to submit themselves to the jurisdiction of the court, and have not had their day in court. The most that can be said is, that an order of court was made continuing the case without any objection. It was not made on their motion, and was not prejudicial to them; it was not an appearance by them. *Crary v. Barber*, 1 Col. 172.

The judgment of the court is reversed with costs, and the cause is remanded to the district court of Arapahoe county with instructions to cause the record in the cause of *J. W. Doane et al. v. Rufus E. Talpey and Oliver S. Glenn* to be transmitted to the district court of Weld county, where the cause is now pending.

Reversed.

GLENN v. BRUSH.

1. In an affidavit for a continuance, facts must be set forth with sufficient certainty to enable the court to determine the materiality of the evidence, and to enable the opposite party, if he thinks proper, to admit them and go to trial.
2. It is not error to refuse to strike out pleas which are merely cumulative, and which tender the same issue tendered by an objectionable plea subsequently filed; neither is the filing of such subsequent plea a waiver of the objectionable pleas.
3. The statute (R. S. 311) authorizes the clerk of the district court to appoint commissioners to take depositions, and does not require that the place of taking a deposition shall be named in the notice, but the time and place shall be fixed by the officer taking the same. A substantial compliance with the statute in this regard is all that is necessary.
4. It is not necessary that the issues be made up in a cause prior to the issuing of a dedimus and taking depositions. All that is necessary is that the cause be pending.
5. In an action of replevin against a sheriff the latter may prove special property in himself by showing that he holds the property under a writ of attachment.
6. In such an action the plaintiff will not be permitted to prove declarations made by the sheriff to contradict the return as to the time the writ of replevin was levied.
7. Where a judgment is offered in evidence to show title, and it appears that such judgment is pending in a court of review upon a writ of error operating as a supersedeas: *Held*, that such judgment is suspended for all purposes, and is therefore inoperative as evidence of title.

Error to the District Court of Arapahoe County.

THIS was an action of replevin, brought in August, 1871, by Lockhart T. Glenn and George O. Talpey against Jared L. Brush, sheriff, in the Weld county district court, to recover possession of a herd of Texas cattle, numbering between seven hundred and eight hundred head, a number of calves, being the increase of the herd, six horses, two yoke of work oxen, a wagon, etc.

This property had been seized upon and detained on a writ of attachment issued out of the Weld county district court, on the 22d day of September, 1870, at the suit of *J. W. Doane et al. v. Oliver S. Glenn and Rufus E. Talpey.*

Lockhart T. Glenn and George O. Talpey, who claimed to

be the owners of the property, and in whose possession it was at the time of the levy of the attachment writ, filed their interplea under the statute, and demanded a trial of the right of property. Issue was joined on the interplea, and by consent the cause was brought to Arapahoe county, tried at the regular June term, 1871, of the district court; the trial resulted in a verdict for the interpleaders—the plaintiffs in this case—and the court rendered judgment on the verdict.

On the 25th of August, 1871, the plaintiffs sued out their writ of replevin, having made demand of Brush, and served him with notice of the judgment. The writ was served upon Brush, August 28th, 1871, and on the 30th day of August, 1871, the coroner, who had the writ to execute, obtained possession of the property and turned it over to the plaintiffs, Lockhart T. Glenn and George O. Talpey.

In the meantime, that is, on the 29th of August, the attorneys for Doane *et al.* placed in the hands of Brush another attachment writ at the suit of *J. V. Farwell et al. v. Oliver S. Glenn and Rufus E. Talpey*. This writ Brush assumed to execute by levy upon this same property, which had already been adjudged in the plaintiffs in this suit, and after service upon him (Brush) of the replevin writ.

The declaration in replevin contained two counts,—in the *cepit* and *detinet*.

The defendant pleaded: First,—*non cepit*; Second,—*non detinet*; Third,—*Actio non*, because, he says that heretofore, to wit: on the 23d day of September, in the year of our Lord one thousand eight hundred and seventy-one, Hugh T. Munson was the sheriff of the said county of Weld and Territory of Colorado, and that on the day and year last aforesaid, a writ of attachment came into the hands of said Hugh T. Munson as such sheriff, issued by the clerk of the district court of the first judicial district of Colorado Territory, within and for the county of Weld, bearing date on the 22d day of September, A. D. 1870, in a certain suit wherein John W. Doane, Patrick J. Towle and John Roper, partners under the firm name and style

of J. W. Doane & Co., were plaintiffs, and Oliver S. Glenn and Rufus E. Talpey, partners under the name and style of Glenn & Talpey, were defendants, for the sum of seven thousand one hundred and four dollars and twenty-eight cents, which said writ of attachment was directed to the said Hugh T. Munson as sheriff of Weld county to execute, and being in full force and effect, was placed in the hands of the said Hugh T. Munson as such sheriff to execute, and the said defendant avers that by virtue of said writ of attachment the said Hugh T. Munson, as said sheriff aforesaid, did, on the said 23d day of September, A. D. 1870, and in the life-time of the said writ of attachment, at the county aforesaid, take the said goods and chattels in the said declaration mentioned, and levy upon the same by virtue of the said writ of attachment, as the property of the said Oliver S. Glenn and Rufus E. Talpey, the defendants in said suit, and the said Munson took the said goods and chattels into his possession, according to the statute in such cases made and provided, to answer and abide the judgment of the court in said suit. And the said defendant further avers that afterward, to wit, on the 3d day of November, A. D. 1871, the said Hugh T. Munson turned the said goods and chattels over to this defendant as his successor in office, according to the provisions of the statute in such cases made and provided, the said Munson's term of office having expired prior to the turning over, as aforesaid, of the said goods and chattels, in the said declaration mentioned, being duly elected and qualified sheriff of said Weld county. And the said defendant further avers that at the time of the commencement of this suit and of the service of the writ of replevin issued therein on the defendant, the said suit between the said J. W. Doane & Co., and the said Oliver S. Glenn and Rufus E. Talpey still remained undetermined, and that he held the said goods and chattels in the said declaration mentioned, as sheriff of said county, to answer and abide the judgment in said suit.

And the said defendant further avers that the said goods and chattels in the said declaration mentioned was the prop-

erty of the said Oliver S. Glenn and Rufus E. Talpey, and were subject to be levied upon by said writ of attachment; without this that the property of the said goods and chattels, or any part thereof, at the same time when, etc., was in the said plaintiffs, as by their said declaration is above supposed, and this the said defendant is ready to verify. Wherefore he prays judgment, etc.

Fourth,—a similar plea to the third, setting up in the inducement, the *alias* attachment issued in the case of Doane *et al.*; and fifth, a plea also like the third, setting up in the inducement, the writ of attachment in the case of *Farwell et al. v. Oliver S. Glenn and Rufus E. Talpey*. Subsequently the defendant filed a sixth plea, "*actio non*," because the property in the goods and chattels, when, etc., was in Rufus E. Talpey and Oliver S. Glenn, without this, that," etc. The plaintiff contended that the last plea presented the same issue tendered by the third, fourth and fifth pleas, to wit: that the property was not in the plaintiffs, but in Oliver S. Glenn and Rufus E. Talpey, and that if the defendant desired to justify he should have done so by way of confession and avoidance, not by way of special traverse, that the pleas were cumulative and needlessly incumbered the record. The motion to strike out the third, fourth and fifth pleas was overruled, and the overruling this motion is one of the errors assigned. Demurrers to these pleas were overruled and the plaintiff replied severally, *precludi non*, because the property in the goods and chattels was not in Oliver S. Glenn and Rufus E. Talpey; concluding to the country.

The plaintiffs also filed a motion in the district court to suppress the deposition of R. B. Foster and C. W. Kelsey, urging, among other objections, that the dedimus directed the depositions to be taken in the case of Lockhart T. Glenn and George O. Talpey against Jared L. Brush, and that it appeared by the certificate of the commissioner that the depositions were taken in a suit wherein Hugh T. Munson, John W. Doane, Patrick J. Towle, John Roper, Wolf Londoner and J. Sidney Brown were defendants, instead of

Jared L. Brush. In the caption of the depositions, however, the cause was properly entitled. The motion was overruled, the plaintiffs excepted, and error is assigned upon the overruling of this motion.

During the progress of the trial the following questions were propounded to the witness Lockhart T. Glenn :

Q. "Did you hear the description of this property that I first read from the record to the jury?" A. "Yes, sir, I heard part of it at least." Q. "Can you state whether that property described in the record is the same for which this action is brought?" which was objected to as leading, the objection was sustained and plaintiffs excepted.

The following instructions were given to the jury over the objections of the plaintiffs:

"If J. W. Doane & Co. have prosecuted a writ of error to the supreme court of the United States to reverse the judgment which was given in favor of the plaintiffs as their interpleaders in the attachment suit, and have given a bond to prosecute such writ of error, the alleged transcript of which was read in evidence, then such judgment is no longer evidence of any right in the plaintiffs, and you are to cast the same out of your consideration.

"If the jury believe, from the evidence, that the property in question belonged to Oliver S. Glenn and Rufus E. Talpey, and not to the plaintiffs, at the time of bringing this suit, then the jury should find for the defendant whether a debt was due from Oliver S. Glenn and Rufus E. Talpey to the said Doane & Co. and Farwell & Co. or not."

The jury found a verdict for the defendant upon which judgment was rendered, and to reverse said judgment Lockhart T. Glenn sued out this writ of error.

Messrs. FRANCE & ROGERS, for plaintiffs in error.

Messrs. CHARLES & DILLON, for defendant in error.

STONE, J. A motion was made for a continuance, based upon an affidavit made by one of the attorneys of the plaintiffs.

It is stated in the affidavit that one Rufus E. Talpey is a material witness for the plaintiff; that he is sick; that by him they can prove the ownership of the property in question to be in the plaintiffs.

Ownership involves the legal or rightful title, and whether one has a title to property depends upon facts: certain facts must be proven to show title. In an affidavit for a continuance, facts must be set forth with sufficient certainty to enable the court to determine the materiality of the evidence, and to enable the opposite party, if he thinks proper, to admit them and go to trial.

The affidavit fails to state a single fact which would tend to establish ownership of the property in the plaintiffs. The motion for a continuance was properly refused. *McBain v. Enloe*, 13 Ill. 78; *Moody v. The People*, 20 id. 315; *Cody v. Butterfield*, 1 Col. 379.

The second error assigned is the overruling of the plaintiffs' motion to strike the third, fourth and fifth pleas from the files. The objection is, that they are cumulative and unnecessary, and are waived by the sixth plea, which tenders the same issue, and are sham pleas.

A sham plea is a plea put in for the mere purpose of delay, of matter which the pleader knew to be false. These pleas have no such characteristics; appear to be true and capable of proof, and the jury have said by their verdict that they are true. It is said that they are cumulative and unnecessary; that the same facts can be given in evidence under the sixth plea. If we concede this, the question wherein consists the reason for objecting to them is pertinent.

The fourteenth section of the Practice Act declares that "the defendant may plead as many matters of fact in several pleas as he may deem necessary for his defense.

The defendant has done nothing more than avail himself of his privilege. In his third, fourth and fifth pleas he sets out, and we think properly, the special character of his claim to the possession of the property, the title to which is in dispute.

The plaintiffs have no just cause of complaint for being thus more fully informed by their opponent of the whole defense they have to meet. *Amos v. Sinnott*, 4 Scam. 440.

It is argued that these pleas, being in the nature of *special traverse*, and not in *confession* and *avoidance*, are bad. The only reason assigned by the learned counsel who argued the case is, that the only traversable matter tendered by the issue was the ownership of the property, and that this issue was well tendered by the sixth plea, and that these special pleas incumbered the record.

The real issue was the ownership of the property, and a plea that properly tendered that issue was certainly a proper plea by itself, and if good alone, the fact that another good plea tendering the same issue was filed, would not render bad the first plea.

Counsel admit that a special traverse, in replevin, is proper, and that these three pleas are special traverses, and in that respect are like the sixth plea, and for that reason should be stricken from the files. As we have seen, the statute allows several pleas, and the motion to strike them from the files was properly overruled. *Hunt v. Chambers*, 21 N. Y. 620; *Anderson v. Talcot*, 1 Gil. 365; *Rogers v. Arnold*, 12 Wend. 30; *The Mount Carbon Coal and R. R. Co. v. Andrews*, 53 Ill. 176; *Dayton v. Fry*, 29 id. 525; *Chandler v. Lincoln*, 52 id. 74.

The third error assigned is the overruling the motion to suppress the deposition of R. B. Foster and C. W. Kelsey.

First. Because the commissioner who took the deposition was appointed by the clerk of the district court. It was held by this court, in *Ford v. Rockwell*, 2 Col., that such appointment was authorized by the statute.

Second. That the plaintiff had no proper and sufficient notice to take the depositions. Notice was given that the defendant would sue out a *dedimus potestatum*, directed to P. C. Bush, of the town of Elizabethtown, in the county of Denton, State of Texas, as commissioner to take the depositions of R. B. Foster and C. W. Kelsey, of

said county of Denton. The commissioner certifies that the depositions were taken in the town of Elizabeth, county of Denton, State of Texas.

The statute provides that the time and place of taking the depositions shall be fixed by the officer taking the same. It does not require that the place where the deposition will be taken shall be stated in the notice. The notice given fully met the requirements of the statute ; and a substantial compliance in all that is necessary. *County of Green v. Bledsoe*, 12 Ill. 267 ; *Curtis v. Martin*, 20 id. 572. The commissioner is directed to examine R. B. Foster and C. W. Kelsey. He certifies he has examined the persons named as witnesses, and each for himself answers that his name is R. B. Foster and C. W. Kelsey, and the court will not assume they had any other name. The stipulation of counsel, made part of the record in this case, shows the *dedimus* to be under the seal of the proper court.

It is not necessary that the issues be made up prior to the issuing of a *dedimus* and taking depositions. All that is necessary is, that the cause be depending. Rev. Stat., p. 311, § 8.

Sufficient appears to show that the depositions were taken, in this case, and with reference to the subject-matter of the suit. *Rockford, R. I. and St. Louis R. R. Co. v. Coppington*, 66 Ill. 510 ; *Voice v. Lawrence*, 4 McLean, 205.

The fifth error assigned is in sustaining an objection made to the questions propounded to the witness, Lockhart T. Glenn : "Can you state whether that property described in the record is the same for which this action is brought?"

"Do you know whether or not the property described in the record is the same for which this action is brought?"

What record is referred to does not appear. The questions are not leading, but immaterial and irrelevant, and inasmuch as the facts sought were elicited from the witness by other questions, the plaintiffs were not prejudiced by the ruling of the court.

The sixth error assigned in this case is the admitting in evidence certain proceedings in attachment in suits of *John*

V. Farwell et al. and J. W. Doane et al. v. Oliver S. Glenn and Rufus E. Talpey. This evidence tends to prove a special right of property in the defendant, by showing that he held it under the writs mentioned in his third, fourth and fifth pleas, and was properly admitted. *Dayton v. Fry*, 29 Ill. 525.

An *alias* writ is a second or further writ which is issued after the first writ has expired, and is authorized by statute. Rev. Stat., p. 63, § 31 ; p. 64, § 35, and p. 501, § 6.

The *alias* writ was a good writ. What the first or original writ was does not appear in the record. The *alias* writ was properly admitted in evidence.

The seventh and eighth errors assigned are to the refusal of the court to let the plaintiffs prove a conversation between the coroner and the defendant, at the time of the levy of the writ of replevin, as to the time it was levied.

If offered for the purpose of contradicting the officer's return, it was properly rejected ; and if for any other purpose, it was not material or relevant, having no tendency to prove or disprove any issue in the case.

The ninth assignment of error relates to the admission in evidence of the depositions of Foster, Kelsey and Shipley, for the reason that such testimony contradicted the record already in evidence, of a judgment in the case of *Doane et al. v. Lockhart T. Glenn and George O. Talpey*, interpleaders. This judgment was introduced to show title to the property in the plaintiffs ; and the objection to this evidence is based upon the assumption that the judgment was in full force and effect.

The record shows that at the time the judgment was offered in evidence, the plaintiffs in that suit had sued out a writ of error to the supreme court of the United States, and had given bond and security as required by law, to make the writ of error operate as a supersedeas. That such proceedings had the effect of staying execution upon the judgment, or the right to bring action upon the judgment, is conceded by counsel in argument ; but that for all other purposes the judgment is operative.

The object of a writ of error is to review and correct an error of law, and it is no bar to further proceedings, unless bond and security is given; when that is done the writ operates as a supersedeas; the party cannot afterward proceed to execute his judgment until the appellate court has rendered its judgment thereon. The judgment of the court below in the meantime is suspended; and a suspended or inoperative judgment is not evidence of title. It is suspended for all purposes until affirmed or reversed by the supreme court. If affirmed, it is binding; if reversed, it is a nullity.

We are aware there are decisions at variance with this opinion, but it is fully sustained by authority and reason.

Woodbury v. Bowen, 13 Cal. 634; *McGarrahan v. Maxwell*, 28 id. 91; *Thornton v. Mahoney*, 24 id. 569; *Byrne et al. v. Prather*, 14 La. 663; *Turnbull v. Cureton*, 9 Martin (O. S.), 37, 68; *United States v. Pacheco*, 20 H. 263; *Ambrose v. Weed*, 11 Ill. 488-491; *Helmer v. Boone*, 6 J. J. Marsh. 353, 356; *Hayes v. Ordway*, 52 N. H. 284; *Taylor v. Shew*, 39 Cal. 536; *Sherman v. Dilley*, 3 Nev. 21; *Griffith v. Seymour*, 15 Iowa, 33; *Campbell v. Howard*, 5 Mass. 376.

The judgment being suspended was not evidence of title in the plaintiffs. The depositions were properly admitted.

The judgment not being evidence of title in the plaintiffs, the instruction of the court, that if the judgment obtained by the plaintiffs in the interplea is pending on error, operating as a supersedeas, then such judgment is no longer evidence of any right in the plaintiffs, was correct.

As the plaintiffs were in no way prejudiced by the introduction in evidence of the order of the court staying the proceedings in the cause after judgment, we express no opinion upon the legality of this order.

The gist of this action is the traverse of the property of the plaintiffs, and it devolved upon them to show a title to the property in themselves.

The court was right in giving the instructions that it did, and in refusing those asked by the plaintiffs.

The judgment is.

Affirmed.

BRAZEE, J., dissenting. The following facts are disclosed by the record.

On the 14th day of December, 1870, John W. Doane, Patrick J. Towle and John Roper sued out an attachment against the property of Oliver S. Glenn and Rufus E. Talpey, which was levied upon the property, and served personally on one defendant on the 14th of December, 1870, and on the other, the 28th day of July, A. D. 1871. At some time, but when does not appear, Lockhart T. Glenn and George O. Talpey filed their interplea in that suit, averring the writ by which the property in question had been taken, and averring that they were and had been the owners of that property from May 27th, 1870, and were entitled to the possession thereof; that it was unlawfully detained by J. L. Brush, as sheriff, and praying that the property be adjudged to them. To this interplea the plaintiffs in the suit, at the December term, 1870, plead that the property "levied upon by virtue of said writ of attachment * * * and described in the interplea was not the property of Lockhart T. Glenn and George O. Talpey at," etc., and they were not entitled to the possession, etc.

On the 22d day of July, 1871, at the trial of the attachment suit, the jury found a verdict for the interpleaders. On the 27th of July, after a motion for a new trial had been denied, judgment was rendered, "that the property taken by virtue of the writ of attachment in this cause be delivered to the said Lockhart T. Glenn and George O. Talpey, and that a writ of *retorno habendo* be awarded." On the 25th day of August, 1871, a notice of this judgment was served on Jared L. Brush, the sheriff, who was in possession of the property and is the defendant at bar, and the property was demanded of him by the interpleaders, who are the plaintiffs at bar, and was not delivered; at this time the plaintiffs' alleged cause of action, upon such demand and refusal, had its inception, and on the same day the writ of replevin herein issued at the suit of Lockhart T. Glenn and George O. Talpey, against Jared L. Brush,

sheriff, to cause the property in question to be delivered to them. This writ was served on Brush the 28th day of August.

In his fifth plea Brush seeks to justify his detention of the property under a writ of attachment sued out by John V. Farwell & Co., against the property of Oliver S. Glenn and Rufus E. Talpey, on the 29th day of August, 1871, and levied on the property in question on that day.

This he cannot do, because the Farwell writ had not been issued at the time of the demand of the property of him on the 25th, nor when that writ was served personally on him, the 28th. It is clear that the Farwell writ is plead in bar of the original detention at a point of time when it had no existence. Under this state of pleading, the Farwell writ cuts no figure, because the rights of the parties under the pleas must be adjusted according to their respective interests in the *rem* when the plaintiffs' alleged cause of action arose. The Farwell writ not being in existence then, cannot legitimately affect the rights of the parties then; it was, therefore, improperly received in evidence after objection; it may, for aught I can see, have influenced the verdict; at any rate it is not clear that it did not influence the verdict to the plaintiffs' prejudice. I think error well assigned in respect to its admission.

It remains to be considered whether Brush can justify the detention of the property, by virtue of the attachment in the Doane suit referred to. We have seen that judgment had gone in favor of the interpleaders in that suit, who are the plaintiffs at bar, and they base their claim to the property in this case upon the judgment in that. It is claimed that Brush, the sheriff, was not a party to the Doane suit, and therefore was not bound by the judgment in it. By reference to his third and fourth pleas it will be seen that he justifies the detention of the property under the attachment in that suit, and avers that he held it to abide the judgment in that suit. According to his own pleas, he is bound by that judgment. As the mere custo-

dian of the property after Doane & Co. failed to establish their right to it, and the property had been adjudged to the plaintiffs herein, there is no hardship in holding him to his plea, that he is bound by the judgment for the return of the property, unless, by the subsequent proceedings in that case, he can justify the detention.

After the judgment, by the order of the court in that case, Doane & Co. were given thirty days to procure a writ of error and supersedeas, and it was ordered "that all proceedings upon the said judgment * * * be stayed during the said thirty days." I assume this order was made the day the judgment was given, in the absence of any thing showing when it was made. It is claimed the court had no power by order to suspend its judgment. The question arising upon this claim is important. There is no statute of Colorado authorizing the practice. Has the court at common law this inherent power? At common law the mode of suspending the execution of a judgment was by a writ of supersedeas. It is true that a court of record at common law has control over its judgments during the term at which they are granted, but it will be seen that this power exists for certain purposes, viz.: correcting the judgment in respect to clerical errors, and in some cases, to alter, revise or revoke it; but in such case it must be made to appear that the entry, as made, does not conform to the intention of the court when it was ordered. A judgment may be vacated for irregularity, or because it is a nullity; and a judgment by default regularly taken, proper in form, under certain circumstances may be set aside to let in a meritorious defense at the term at which it is rendered, upon proper showing. This I believe to be the extent to which the control of a court over its judgments, independent of statutes, has ever gone. I have not been cited to any case, nor have I found one, where a court of record having jurisdiction after the regular course of procedure, after the hearing and deliberations had thereon, has given judgment proper in form, in conformity with the intention,

and then stayed proceedings upon that judgment, except in pursuance of some statutory authority. It would seem that a court stultifies itself, when in one breath it gives judgment for the *rem*, and at the same time by its arbitrary mandate, says this judgment shall not at present be executed against the wrong-doer, who holds the thing in violation of the owner's right. There would be manifest injustice, it seems to me, in thus depriving the owner of his property, in the interest, or for the convenience of an adjudged tortious possessor, without any security whatever that the *rem*, or its value, should at any time be forthcoming. During the stay the property might be removed by the wrong-doer beyond the jurisdiction, and the rightful owner be thereby deprived of his property, and justice be defeated.

An interpleader in an attachment suit, having judgment in his favor, would be without any adequate remedy, the bond in such case only running to the benefit of the original defendant. If a court may thus suspend its judgment for thirty days, it may for a longer time, and in fact indefinitely postpone its execution. It will hardly be contended that the court had the right to incorporate the stay contained in this order in its judgment, how then can it be maintained that it had authority, after judgment, to make the order suspending it. It is my opinion that the court had no power to make the order for a stay of proceedings on the judgment. If it was without authority to make such order, the order was void. What is said of a void judgment may be said with equal propriety of a void order. By it no rights are divested; from it no rights can be obtained. It neither binds nor bars any right of property. This order purported to be in force when the plaintiffs' cause of action herein is claimed to have arisen — the 25th of August, 1871 — when the property was demanded; being admitted in evidence, the jury had a right to infer that it was then in force, and that, by force of the order, the plaintiffs then had no right to the possession of the property, and therefore no right to recover the possession in this action.

The order, if void, was erroneously admitted in evidence; may have prejudiced the plaintiffs' case, and naturally tended to the plaintiffs' prejudice.

It is to be determined whether the judgment of the district court was superseded by the writ of error to that court. It is claimed that this judgment was superseded by an order upon the exceptions that the writ might operate as a supersedeas. This order was not put in evidence, and there is no evidence of the order, nor of its contents, except inference from the memorandum of the clerk indorsed on the writ, and it might, therefore, be held that there is no evidence of any order having been made by the judge upon the exceptions that the writ might operate as a supersedeas. Considering, however, that this order was made, in proper form and substance, still the case is barren of any proof that the writ of error operated as a supersedeas. Something more than the order of the judge upon the bill of exceptions was necessary to effectuate the supersedeas, to wit: a bond.

Section 48 of the Practice Act provides that "no writ of error shall operate as a supersedeas, unless the supreme court, or, if application be made therefor in vacation, some justice of the supreme court, * * shall order such writ of error to be made a supersedeas; *nor* until the party applying for such writ shall file a bond in the office of the clerk of the supreme court," etc. Now, it does not appear in evidence that any such bond was filed. Without it, under our statute, a supersedeas did not go with the writ of error. The memorandum of the clerk does not recite the filing of a bond. I do not believe the court can legitimately infer from the memorandum that the bond was filed. I do not feel at liberty by inference to interpolate in the clerk's memorandum a statement of the fact of the filing of the bond. That such inferences cannot be invoked to support like ministerial acts of a sheriff by supplying by induction omissions in his return is well settled. The proper evidence of the filing of the bond, without which no supersedeas can go

with a writ of error under our statute, is the bond itself with the file mark of the clerk indorsed, or a certified copy thereof. My conclusion is, that the execution of the judgment of the district court was not, so far as the evidence shows, superseded.

On the 26th day of March, 1872, a writ of error to the supreme court issued to remove its record and judgment in the Doane case into the supreme court of the United States. On the 5th day of November, 1873, the cause at bar was tried and judgment rendered. On the trial, the court, among other things, instructed the jury :

“If J. W. Doane & Co. have prosecuted a writ of error to the supreme court of the United States to reverse the judgment which was given in favor of the plaintiffs as their interpleaders in the attachment suit, and have given a bond to prosecute such writ of error, the alleged transcript of which was read in evidence, then such judgment is no longer evidence of any right in the plaintiffs, and you are to cast the same out of your consideration.”

This instruction was erroneous in any view I can take of the case. The writ of error to the supreme court of Colorado and the bond did not operate as a supersedeas under the statute, for the reason that there was not a scintilla of proof to show that the writ of error had been served as provided in the 23d section of the Judiciary Act of 1789, which was in force when this instruction was given. The last clause of section 22 of that act says that every justice signing a citation on any writ of error shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, etc. Section 23, referred to, enacts :

“That a writ of error, as aforesaid, shall be a supersedeas and stay executions in cases *only* where the writ of error is *served by a copy thereof being lodged for the adverse party in the clerk's office*, where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of.”

There is no evidence that the copy of the writ was ever

lodged with the clerk within the ten days. The gist of this instruction to the jury was, that if the bond had been given and the writ had issued, the judgment was thereby superseded. Such is not the law, and the instruction was therefore erroneous. This instruction assumed that there was evidence from which the jury might infer that the judgment had been superseded. The evidence did not warrant any such inference. This instruction was excepted to by the plaintiffs in error; it is assigned for error, and insisted on at the argument, though for another reason. I think this error well assigned.

In the course of the proceeding in the case at bar, a motion was made to suppress the depositions of R. B. Foster and C. W. Kelsey, which had been taken on commission in Texas. One ground of the motion was based on the contradictory character of the commissioner's return, which in its caption showed that the witnesses were sworn in the case at bar, and in the certificate at the end of the report, showed they were sworn in some other action. It is not probable they were sworn in two actions. It is impossible to say from the report of the commissioner in which action they were sworn. I cannot determine from this contradictory report that the examination of these witnesses were taken according to the provisions of the statute of this most material matter of the administration of the oath to them. Until that appeared so that it could be judicially determined, these depositions were not competent evidence in my opinion. The motion to suppress, I think, should have been granted, instead of overruled, for this reason; and the defendant's objection at the trial to their being received in evidence should have been sustained, instead of being overruled, for the same reason.

The judgment, in my opinion, should be reversed.

NOTE.—The plaintiff in error filed a motion for a rehearing in the above cause, upon the following grounds:

First. The court holds the attachment writs offered in evidence were properly admitted, because they tended to prove a special property in the

defendant, while it does not appear by the record that the defendant pleaded property in himself. *Second.* The court holds the motion to strike out the third, fourth and fifth pleas properly overruled, because they tendered the same issues as the sixth plea. While our objection to those pleas goes not only to the motion to strike out, but also to the admission of evidence under them, the evidence admitted did not tend to prove the issue tendered by these pleas. *Third.* That the court has misconceived the effect of these pleas, and that the authorities cited by the court do not militate against the position assumed by the plaintiff. *Fourth.* The court errs in saying that the plaintiff concedes the same evidence may be given under the sixth as was given under the third, fourth and fifth pleas. The plaintiff contended and still insists that the evidence in the matters of justification were not admissible under any of the pleas in the record. *Fifth.* The court errs in affirming the ruling of the court below in its instruction to cast the judgment in the interplea out of the consideration of the jury. Because the record shows the admission of the judgment without objection, that there was no motion to strike it out, and the plaintiff was not given an opportunity to produce other proof; because the exclusion of the judgment was not effected until after the case had been argued and submitted to the jury, and the plaintiff may not be charged with laches when supported by authority. *Sixth.* Because this court erred in treating the third, fourth and fifth pleas as pleas of justification, and in order to make the defenses operative, the defendant must have shown a debt from the defendants to the plaintiffs in the attachment suits, whereas the court held and instructed the jury that no debt was necessary to be proved. *Seventh.* This court erred in treating the writ of error purporting to issue from the supreme court of the United States to this court upon the judgment of the interplea as relevant and material under the issues joined, whereas if this was any defense, it arose after the commencement of the above entitled cause, and should have been so pleaded.

Motion for rehearing denied.

GIVING BOND ON APPEAL SUSPENDS JUDGMENT for all purposes pending the appeal.
Denver & E. G. Ry. Co. v. Crawford, 11 Colo. 606.

TIFFANY et al., Assignees, etc., v. MORRISON.

If a deputy collector of internal revenue, within four months next before his bankruptcy, pay over to his principal money received by him on behalf of the United States, such payment is not an unlawful preference under the Bankrupt Act. (R. S. U. S., § 5128.)

Error to the District Court of Gilpin County.

THE defendant Morrison was United States revenue collector for Colorado, Nathaniel Young was his deputy for the district embracing Gilpin and Clear Creek counties. On

the 17th of June, 1872, Young, who was doing business as a banker in Gilpin county, became insolvent, and among others was owing the defendant Morrison moneys received in the line of his duty as deputy collector. The plaintiffs alleged that the defendant was informed of Young's insolvency and contemplated bankruptcy; that on the 25th day of June, 1872, and at other times between that date and the 20th day of December, 1872, Young, for the purpose of giving a preference to the defendant, paid to him divers sums of money; that on the 20th of December, 1872, Young was adjudged a bankrupt; that on the 12th of February, 1873, the plaintiffs, Tiffany and Van Deren, were chosen assignees; that the choice was approved; and that on the 20th of February, 1873, the estate of Young was duly assigned to them as it stood on June 17th, 1872, except such property as was exempt by law. The plaintiffs, as such assignees, on the 23d day of April, 1874, brought an action in assumpsit in the district court of Gilpin county against Morrison, to recover the moneys alleged to have been paid him by Young after the 17th of June, 1872, and within four months of the adjudication in bankruptcy.

The declaration consisted of a special count formally setting out the foregoing facts, to which was added the common counts. The defendant pleaded the general issue, the cause was tried by the court, and the finding and judgment of the court was for the defendant, with costs. To reverse this judgment the plaintiffs sued out this writ of error.

Mr. L. C. ROCKWELL, and Mr. CLINTON REED, for plaintiffs in error.

Messrs. SAYRE, WRIGHT & BUTLER, for defendant in error.

HALLETT, C. J. Collectors of revenue have authority by law to appoint deputies as they shall think proper, and to revoke such appointments. Security may be taken from

the persons so appointed to secure a faithful discharge of duty, and the collector is responsible for their conduct in office.

Within their districts such deputies have the same authority to collect taxes as the collector himself, and when the collector is unable to act, or there is a vacancy in the office, his duties may be performed by one of them. R. S. U. S., p. 606, § 3148 *et seq.*

Whether a deputy collector is regarded as an officer of the government, or as the agent of the collector merely, all must agree that money received by him in virtue of his appointment belongs to the government.

To protect himself from liability, the collector has a remedy against his subordinates, but the money collected is in fact and in law due to the government from the tax payer, and the deputy collector and his principal as well, are agents of the government to receive it. If, after receiving money on behalf of the government, a deputy collector converts it to his own use, it is plain that the government may hold him directly responsible in an action for money had and received, although it has another remedy against his principal.

The circumstance that the collector is liable for money received by his deputies cannot affect the right of the government to recover its own from one who unlawfully withholds it.

If, then, the bankrupt, as deputy to defendant, collected taxes due to the United States, and afterward converted the same money to his own use, in respect to that money he was indebted to the government.

It may be conceded that after the conversion took place the bankrupt did not occupy the position of a trustee in charge of specific property, but he was nevertheless a debtor to the government for the money which he had received as its agent. The collector was authorized to receive such money on behalf of the government, and payment to him exonerated the bankrupt.

The case presented is of payment to the government of money due from an insolvent debtor within four months before the filing of a petition in bankruptcy against the latter, the agent of the government who received the money having reasonable cause to believe that such debtor was insolvent.

Assuming that such payment was made with a view to give a preference to the government, we are now to consider whether such payment was void under the 35th section of the Bankrupt Act. Upon this point it is to be observed that the act forbids only such preferences as are given to a creditor or person having a claim against the bankrupt, and it has been recently decided by the supreme court that the government is not included in the term "creditor," as used in the act. *U. S. v. Herron*, 20 Wall. 251.

The question presented in that case was, whether a debt due the United States was discharged by proceedings in bankruptcy, and after reviewing the act at length, the conclusion was reached that it was not in any way applicable to the government, except the 28th section, which regulates the order of paying debts due from the estate. The word "person," which is found in the 35th section, was obviously inserted to describe those who, not being creditors of the bankrupt, had assumed some liability for him, and does not enlarge the meaning of the term "creditor."

In this view of the law it is clear that a preference given to the government by the bankrupt was not prohibited by the 35th section of the act, because it was not given to a "creditor or person having a claim against him," within the meaning of that section.

Payments to the government, although with intent to give a preference, are not forbidden by the act, and therefore they cannot be avoided by its provisions.

This reasoning is equally applicable to the 39th section which is to be read in connection with the 35th. Other considerations support the judgment given in the court below, but it is not necessary to refer to them.

The judgment is affirmed with costs.

Affirmed.

LONDONER et al. v. STEWART.

1. In an action to recover money received by defendants for plaintiff under a written contract between the plaintiff and a third party, such writing is material and competent evidence to show the amount of money so received by defendants, and the way in which it became due.
2. But if the contract is in any way defective, defendants cannot rely upon such defects.
3. The circumstance that a writing is without the jurisdiction is not of itself sufficient to support secondary evidence of its contents; some effort should be made to obtain the writing before parol evidence of its contents is offered.

Appeal from the District Court of Arapahoe County

THE plaintiff had judgment, for the reversal of which this appeal is prosecuted. The questions discussed are upon the admission of certain evidence, which is sufficiently stated in the opinion of the court.

Messrs. MILLER, BECK & CLOUGH, for appellants.

Mr. THOMAS M. PATTERSON, and Mr. CHARLES S. THOMAS, for appellee.

HALLETT, C. J. It appears that Stewart, plaintiff below, contracted with the Kansas Pacific Railway Company to deliver to the latter 50,000 ties at the rate of forty-eight cents per tie, the same to be paid for as they should be delivered in lots of 5,000. Under this contract part of the ties were delivered to the railway company, and defendants (plaintiffs in error), acting under written authority from Stewart, collected the money, which became due therefor.

This action was brought to recover the amount so collected. At the trial plaintiff offered the contract between the railway company and himself, under which the ties were delivered, and which appeared to have been signed by a superintendent of division, in the name of the company.

Defendants objected that it was not material to the issue, and that the authority of the superintendent to sign for the company was not shown.

Upon this, it is sufficient to say that the contract was the basis of the dealings between the parties, and was necessary to explain them. It would be difficult to understand the transaction between the parties without referring to this contract, and if it was defective in any particular, defendants could not rely upon such defects in this action.

It was introduced for the purpose of showing how money became due to plaintiffs from the railway company, and the amount thereof. And if defendants received money from the company according to its terms, it is not material in this action to inquire whether it was properly signed.

Secondary evidence of the contents of the power of attorney under which defendants collected the money was offered and received, and it is contended that proper foundation therefor was not laid. Notice to produce the authority was served on defendants' attorneys the day before the trial, in answer to which defendant Wolf Londoner, to whom the writing was delivered by plaintiff, testified that it was to be, and in fact was delivered to the railway company in November, 1872; that he handed it to one Lyman, who, it seems, was an agent of the company, and the latter sent it to St. Louis; that the witness had not at any time seen the instrument since he so delivered it to Lyman.

Mr. Thomas, for plaintiff, deposed that in December, 1873, he demanded the same writing of defendant Wolf Londoner, and that he, the defendant, then declared that he had delivered the same to one Stout, upon an order from the plaintiff, a few days previously.

Upon this evidence it is clear that defendants were not in possession of the power of attorney at the time of trial, nor for a considerable time before the trial, and that plaintiff was aware of that fact. The witnesses agree upon that point, and the plaintiff afterward additionally proved it by the testimony of Mr. Fisher, who was in charge of the railway company's affairs at the time of these trans-

actions. According to Mr. Fisher, plaintiff and defendant Wolf Londoner approached him soon after the contract for ties was made, and desired to make an arrangement by which Londoner could draw pay for the ties; the witness informed them that it was necessary for them to execute a power of attorney to be filed with the agent of the company.

In the ordinary course of business, an attorney in fact will retain the letter by which he is authorized to act, but here it seems to have been understood that it should be delivered to the railway company.

Whether it was in fact so delivered, or was retained by defendants until demanded by Stout, as mentioned by the witness Thomas, is not material to our present inquiry. If it was not in defendants' keeping, and plaintiff was apprised of the fact, notice to them to produce it was entirely useless.

To search for the letter of attorney in the place where he knew that he could not find it cannot be accepted as a reasonable showing of diligence on the part of the plaintiff.

With this we may dismiss the notice to produce the letter of attorney, and add that the evidence shows that it was delivered to Mr. Stout, as the agent of plaintiff, or more probably, to the agent of the railway company, and by him transmitted to the principal office of the company in St. Louis, Mo.

No effort was made to trace it further, and of course, if it was in the hands of Stout, or the plaintiff, and within the jurisdiction of the court, it should have been produced at the trial. Assuming, however, as counsel maintained, that it was sent to St. Louis, Mo., and that it was beyond the jurisdiction of the court at the time of the trial, it is said that secondary evidence of its contents was competent without any effort on the part of the plaintiff to obtain the instrument. Adjudged cases may be found which seem to support that view, and the proposition is somewhat broadly stated in a recent opinion of the supreme court. *Burton v. Driggs*, 20 Wall. 134.

The question presented in that case was, as to a copy of a deposition, duly authenticated, the original having been lost, and it was held that such copy was properly received in evidence.

When applied to the question then before the court, the language of the opinion cannot be regarded as affirming the doctrine that a writing which is beyond the jurisdiction of the court may in all cases be proved by parol.

The cases usually cited in support of that doctrine are to the effect, that under some circumstances a copy of an instrument may be used when the original is beyond the jurisdiction, which is a very different proposition. *Shepherd v. Giddings*, 22 Conn. 282; *Bailey v. Johnson*, 9 Cow. 114; *Mauri v. Hoffman*, 13 Johns. 58; *Eaton v. Campbell*, 7 Pick. 10.

Where an effort has been made to obtain the original instrument, or from the lapse of time or other circumstances, it appears that such effort would be unavailing, it is quite reasonable and just to allow a copy to be used, or if that cannot be obtained, parol evidence. But the principle that the best evidence of an act or transaction shall be produced is of some value in the administration of justice, and it is quite as applicable to the case where a paper is beyond the jurisdiction of the court as to any other. It is true that in such case the court has no means of compelling the production of a paper in a foreign jurisdiction, but a way has been provided for taking depositions, which is usually effectual to obtain the paper, or a copy. All that the law demands in such case is that diligence should be used to obtain the original, before resorting to uncertain memory, which is often at fault, or interested in the result. *Shaw v. Mason*, 10 Kan. 184; *Townsend v. Atwater*, 5 Day, 306.

The evidence in the record shows that the power of attorney was intended to be lodged with the railway company, and plaintiff was informed of the fact. His counsel had demanded the instrument of defendants nearly a year before the trial, and had been informed that they did not

have it, and his notice to defendants to produce it was meaningless. We think that he should have made some effort to obtain the instrument, and that until he did so, parol evidence of its contents could not be received.

If the letter of attorney had been for the collection of money only, some doubt would arise as to its materiality. For in such case the authority upon which the money is received is collateral to the main question, and it may well be said that if a party has received money belonging to another, he cannot allege in his defense that he had no authority for taking it, or that his authority was not properly shown.

But here the authority was to pay out upon plaintiff's orders, as it is said, as well as to collect money, and a question is made in argument whether, by the letter of attorney, defendants were authorized to discount certain drafts or acceptances of the railway company, in plaintiff's behalf.

Upon this it seems to be impossible to adjust the rights of the parties without referring to the letter of attorney, and for that purpose we ought to have the instrument itself, if it can be obtained. 2 Phil. Ev. 513.

The weight and effect of the evidence in the cause will be considered at another trial, and it is not necessary or proper to express an opinion upon it.

The judgment is reversed with costs and the cause remanded.

Reversed.

HADLEY v. FISH.

The common law writ of error does not lie except in cases when final judgment has been rendered in proceedings after the course of the common law.

Error to the Probate Court of Clear Creek County.

UPON suggestion the only point presented was, whether in this matter a writ of error would lie to remove the

record of proceedings in this behalf out of the probate court.

Mr. CHARLES C. POST, for plaintiff in error.

Mr. HUGH BUTLER, for defendant in error.

A. W. STONE, J. A preliminary question is raised in this case as to the power of this court to entertain this writ of error.

The proceedings in the court below were commenced under section 53 of chapter 28, Revised Statutes, to contest the right of the defendant in error to hold the office of justice of the peace in the county of Clear Creek, to which office he had been declared duly elected at an election held on the 10th day of September, 1872.

The testimony was taken as required by statute, and sent to the probate court of Clear Creek county to hear and determine the contest.

The probate court dismissed the case for want of jurisdiction, exceptions were taken, and a writ of error sued out. This is a special proceeding by virtue of a new jurisdiction created by statute, and this court is not invested by the legislature with any supervisory jurisdiction of the probate court in such a case.

The probate court, when the evidence is taken by the justice of the peace, and is sent to it, is to hear and decide the contest.

It is a summary proceeding not in accordance with the course of the common law.

When a new jurisdiction is created, and the court is to act in a summary way, in a new course different from the course of the common law, a writ of error will not lie. 2 Tidd's Practice (3d Am. Ed.) 1134; *Campbell v. Strong*, Hempsted, 195.

The common law writ of error does not lie, except in cases where final judgment has been rendered in proceedings after the course of the common law. *Baxter v. Colum-*

bia Township, 16 Ohio, 57; *Savage Manufacturing Co. v. Owings*, 3 Gill, 497; *Aurentz v. Porter*, 48 Penn. St. 335; *State v. Boyle*, 25 Md. 509; *Costen v. Costen*, id. 500.

The right to a writ of error gives the right to a superse-deas; as a consequence the decision of the contest might be postponed until the term of office had expired, and the whole object of the laws be thereby defeated.

A writ of error does not lie in this case, and the case is dismissed with costs.

Dismissed.

WRIT OF ERROR DOES NOT LIE IN CASE OF SUMMARY PROCEEDINGS not according to the course of the common law: *Vance v. Rockwell*, 3 Colo. 241; *Stoan v. Stickler*, 12 Colo. 182.

GOTTLIEB v. HARTMAN.

1. Where a bailee of goods for safe-keeping merely pledges the same with intent to convert the proceeds to his own use, such pledge amounts to larceny by the pledgor, and the pledgee acquires no title as against the owner, though he dealt *bona fide* with the pledgor.
2. In an action of trover, it is not error to instruct the jury that a demand before suit brought is unnecessary, if the jury believe from all the evidence that demand, if it had been made, would have been unavailing.
3. To instruct a jury that though they are the sole judges of the credibility of a witness, yet if they believe that he has sworn falsely in any particular, they are at liberty to disregard the whole of such witness' testimony, would be error. The element of corrupt intent is essential in such case, and should be embodied in the instruction.
4. A hypothetical question must be based upon the hypothesis of the truth of all the evidence, or on a hypothesis especially framed of certain facts assumed to have been proved.

Appeal from the District Court of Arapahoe County.

UPON the trial of this cause in the district court, the plaintiff, Maggie Hartman, testified, that about the 1st of December, 1873, she deposited with one Morrison, for safe-keeping, certain diamond rings and other personal property of value; that Morrison was keeping a restaurant in Denver, and that she was staying at his house; that she never saw Morrison after the 4th of December, 1873, and had not seen the property after she gave it into his keeping; that

Morrison disappeared about the 4th of December, 1873, and upon opening his safe, the plaintiff and one Dugan, who was an employee of Morrison, found a pawn ticket, signed by the defendant Gottlieb, purporting to be for the pledge of four diamond cluster rings and a lady's gold watch and chain. The plaintiff further testified that she procured a search warrant, placed it in the hands of William A. Smith, a constable of the county, and directed "him to make search at Mr. Gottlieb's, and he did so." Smith testified to having visited defendant's store with the search warrant, that he searched the premises, but could not find the property. The witness also testified as follows: "When I got through and could not find them, I demanded them of him; I asked him where they were; he said, 'I don't know—I did have them;' I told him there would be trouble; he said, 'if you can find them, why you find them.' I think I went back next day and demanded them of him again; he said he did not have, hadn't got them, at least. This was on the same day the writ was issued—the 6th of December."

The witness Dugan, after testifying to his being in the employ of Morrison during November and December, stated: "When I went there the large diamond ring, with twelve diamonds and emerald, was up for raffle; Morrison showed me the ring; it was put up for raffle before I went there to work; I think in about two weeks after I went there the raffle was abandoned; Morrison had a safe, to which he and myself had access; the ring was kept in the safe, in the little iron box inside the safe; I supposed the ring was given back to Mrs. Hartman after the raffle was abandoned; that was my understanding." Thereupon the plaintiff's counsel asked the witness the following question, to which the defendant objected, because the same was incompetent, to wit: "What reason have you to suppose it was given back?" but the court overruled the objection; defendant excepted. Witness answered as follows: "The ring was taken out of the safe, one reason, and my impression is Morrison told me so; I know the raffle was abandoned; I never saw any

other ring in the safe; the defendant saw the ring while it was in the possession of Morrison to raffle; I showed the ring to him; another gentleman came in and wanted to see it, and while he was there Morrison came in, and they had some conversation about it; Morrison told him he could buy the ring." Defendant's counsel here moved to strike out the answer of the witness in regard to the conversation, because the same was immaterial, but the court permitted the same to stand, to which the defendant excepted."

This witness was also permitted to testify to conversations had with Gottlieb subsequent to the bringing of the action, which was objected to by defendant as incompetent, immaterial, irrelevant and improper.

It is deemed unnecessary to specify more particularly the evidence and the many objections made by the defendant to its character and materiality; many of the material matters are discussed in the opinion of the court. The plaintiff had judgment for \$1,325, from which the defendant prosecuted this appeal.

The instructions mentioned in the opinion of the court upon which errors were assigned, were as follows:

"If plaintiff was the owner of the jewelry in question, and deposited the same with Morrison for safe-keeping merely, and without other and further authority, and Morrison thereupon, pledged or pawned the same to the defendant, intending, at the time of such pledge, to convert the proceeds to his own use, such pledge amounted to a larceny by Morrison; even though the defendant was, in truth, ignorant of Morrison's want of authority in the premises, and dealt with him in good faith, defendant nevertheless obtained no *title* by such pledge; the plaintiff's right still continues, and so far as this point is concerned, plaintiff may recover."

"If at the time of such alleged service of the search warrant, if it occurred, defendant made any declaration to Smith as to the whereabouts of the property, or his knowledge thereof, you may consider all that occurred in deter-

mining whether a demand of the property, if one had been made, would or would not have been availing; and if you conclude, from the consideration of all the evidence, that the defendant would not have surrendered the property to plaintiff, if she had demanded it, then the plaintiff may, so far as this point of the case is concerned, recover, notwithstanding you should believe, from the evidence, that no demand at all was made."

In the supreme court the appellant contended that the record did not show that he had ever received the chattels declared upon; that they were not shown to have been in his possession at the time of the action brought, and that if these facts did sufficiently appear, yet there was not evidence of conversion by refusal to surrender upon demand, or otherwise; that Smith, being an officer, his warrant was his authority; all the conversation had between Smith and the plaintiff was in reference to action under the warrant; that there was no evidence that he acted in any other capacity; no evidence that Gottlieb knew Smith or thought of him in any other capacity. If Smith was the plaintiff's agent for the purpose of making a demand, such agency should have been first distinctly proved; and, secondly, the knowledge of it should have been brought home to Gottlieb. A duty was to be raised upon the part of a third person; hence it was necessary that there should have been a *previous* authority; an adoption *ex post facto* of Smith's action was not sufficient. That a demand and refusal were necessary in all cases where the defendant became lawfully possessed of the goods, unless the plaintiff could prove a *distinct actual* conversion. That when a party, lawfully coming into possession of the property of another, parts with the possession previous to demand, the remedy is case or *assumpsit*, not *trover*.

That *trover* could be maintained only on the ground that the defendant was a wrong-doer; that a defendant should not be found guilty upon inference, and that there should be a preponderance of evidence against him to find

a verdict of guilty ; that the *title* to the chattels is not necessarily involved in an action of trover, but that damages for the wrongful deprivation of possession is the gist of the action ; that the nature of the action impliedly admits some title in the defendant.

In concluding the argument, counsel for appellant used the following language :

“The maxims of the law which we have suggested as applicable to this case are not mere idle phrases, to be waived or adopted at pleasure. They are established; they mean something; they are binding as any positive enactment of the legislature ; they are discussed to a greater or less extent in nearly all the decisions in this class of cases, and we think we cannot conclude our argument in a more satisfactory way than by bringing these maxims together, with a statement of the case :

“ 1st. An owner may not be deprived of his property without his consent.

“ 2d. Possession of personal property is the criterion of title.

“ 3d. That he who, without intentional fraud, has enabled any person to do an act which must be injurious to himself, or to another innocent party, shall himself suffer the injury rather than the innocent party who had placed confidence in him.

“ 4th. A positive tortious act is necessary to support trover.

“ Mrs. Hartman gave her chattels to Morrison for safe-keeping. She retained the ownership with right of possession. Before she could sue Morrison in trover she would have to demand the goods and be refused. Morrison pledged the goods to Gottlieb. This was a distinct act of conversion on the part of Morrison, which, if proved in an action against Morrison, would do away with any necessity for a demand and refusal to show conversion. While the possession in law remained in Mrs. Hartman, the possession in fact, by her consent, was in Morrison. Morrison, so far

as third parties were concerned, was clothed with the criterion of title upon which third persons had the right to rely. Could Morrison, by his wrongful act, place Gottlieb, the other innocent party, in any different position from that occupied by Morrison before he (Morrison) committed the wrongful act? Before Morrison did the wrong he was entitled to have demand made before suit brought. Could he, by his wrong to both parties, put Gottlieb in such a position that Gottlieb would not be entitled to a demand? Certainly not. Morrison knew he had no right to pawn the goods; hence *his* act was tortious. Gottlieb did not know that Morrison had not this right, hence his act of receiving the goods could not be tortious. A positive tortious act is necessary to support trover. When did Gottlieb commit this positive tortious act? The record does not show.

“An owner cannot be deprived of his property without his consent. The plaintiff, so far as third persons are concerned, did consent to part with, and did of her own volition part with the indicia of ownership. The application of the first rule, therefore, suggested on behalf of appellee is met by the second, and the force of it materially weakened if not destroyed, or, more properly speaking, perhaps the first rule is shown to be the least applicable to this case.

“The third rule necessarily follows, being a maxim of natural justice, applicable to all dealings between men; and last, the positive tortious act must be committed by the *defendant* or by some *one under his control*.”

Messrs. FRANCE & ROGERS, for appellant.

Mr. CHARLES S. THOMAS, and Mr. T. M. PATTERSON, for appellee.

BRAZEE, J. The declaration was in trover for one diamond cluster ring, value \$900; one diamond cluster ring, value \$450; one diamond cluster ring, value \$300; one lady's gold watch, enameled case, set with precious stones,

value \$200 ; one lady's gold neck chain, value \$150. Plea, not guilty.

The evidence tends to show among other things, that the articles in question were delivered to one John Morrison by the appellee, the owner of the property, for safe-keeping, and that he pawned them with the appellant, without authority from the appellee, for \$742. 50, and that there is no evidence tending to show the contrary.

It is claimed by the appellant that the proof was not sufficient to show the title in the property and the right of possession in the appellee, and a conversion thereof by the appellant. We think the evidence in this respect sufficient to sustain the verdict.

There was evidence tending to show a demand of the property before suit, a wrongful conversion, a loss of the property by larceny, and that a demand was unnecessary.

Therefore, the exceptions to instructions given to the jury respecting the law, applicable in case they should find either a wrongful conversion of the property by appellant, or a larceny of the property by Morrison, or that a demand was made, or that a demand would have been unavailing, were not well taken.

The charge did not, as claimed by appellant's counsel, authorize the jury to *assume* any thing against the appellant.

All the requests of appellant, which were proper to be given, were substantially given by the court to the jury ; the instructions as a whole gave the case fairly to the jury, while the requests to instruct, refused by the court, were properly refused. But one of these requests requires further notice.

The court was requested to instruct the jury "that they are sole judges of the credibility of the several witnesses, and that if they believe from the evidence that one of the witnesses has spoken falsely in any particular, then the jury are at liberty to disregard all the evidence of the witness."

This request contained two distinct propositions. One, that the jury are the sole judges of the credit due the witnesses. This proposition applied to the evidence in this case is correct. The other proposition contained in the request is, that if the jury believe from the evidence that a witness has testified falsely in any particular, the jury are at liberty to entirely disregard his testimony. This is not the rule.

A witness through mistake, from imperfect memory, or through a misunderstanding, may unintentionally tell an untruth in evidence. In such case, although the jury might believe, from all the evidence, that the witness had testified falsely in some particular, they would not, therefore, be at liberty to wholly discredit the witness unless they further believed from the evidence that the witness had intentionally told an untruth.

This element of corrupt intent, the request under consideration wholly omitted; hence in this respect, the request was improper. The request containing a proper and an improper instruction could not legally be given as a whole.

The appellee was a witness on her own behalf. She was permitted to testify after appellant's objection to what she told one Smith, and Smith, under like objection, testified to the same conversation and also to what he did thereafter in demanding and searching for the jewelry.

This evidence was proper as tending to show that she authorized him to demand the property for her, and that a demand in pursuance of the authority was made.

Afterward she was recalled and asked certain questions, which were objected to on the ground that they were improper on re-examination; the objection was overruled, and she answered the questions. The ruling was excepted to, but it was within the discretion of the court to allow the witness to be re-examined, and that cannot be assigned for error.

The objection to appellant being called as a witness for appellee was not well taken. *Texas v. Childs*, 21 Wall. 480.

A witness, Dugan, was asked his reason for supposing that certain jewelry had been returned to appellee, and after objection, was properly allowed to answer, because the answer might have developed some material fact. The witness, in answering, stated an impression which was improper, but in connection with it, a material conversation and transaction at which appellant was present. The appellant moved to strike out the material conversation, which motion the court properly overruled. The testimony of the witness Dugan, to other conversations with the appellant, relative to the matter in controversy, was properly admitted.

A search warrant which Smith had, after objection by appellant, was read in evidence, but it does not appear in the record, and we are, therefore, unable to determine that it had any effect prejudicial to appellant.

The appellee, as a witness for herself, testified, among other things, in substance, that she owned a ring set with twelve diamonds, having a green emerald in the center; one ring having six quite large diamonds; one ring having nine smaller stones; a gold watch about the size of half a dollar, enameled purple and green, the case set with thirty-two or thirty-three diamonds, the smallest about the size of a pin head, three or four diamonds out; and that she owned a gold chain, a yard long, double, about as thick as a pencil, weighing near a hundred pennyweights; that she paid \$300 for the watch and chain; that Dr. Hartman had examined the watch and chain, and Hatch and Davidson had examined the rings; and other evidence tended to show that appellant had converted these articles.

Dr. Hartman testified in substance, that he had knowledge of a gold watch and chain owned by her, a lady's watch, little larger than a silver half dollar, enameled and set with diamonds; and of a gold chain owned by her, about a yard long, double, very fine, nearly a quarter of an inch thick.

C. C. Hauck testified that he was a watchmaker and jeweler, engaged in dealing in watches and jewelry, and was

acquainted with the market value of such things; he was then asked to state what, in his opinion, would be the value of a lady's gold neck chain about a yard in length, double, making two yards, about as thick as a pencil, weighing about one hundred pennyweights, an ordinary gold chain of these dimensions; this was objected to by appellant on the ground that there was no evidence to support the question, and because incompetent, immaterial and improper.

The objection was overruled, and appellant excepted. The answer was in substance,—a chain like that, a fourteen carat chain, was worth \$175, in that neighborhood. He further testified, after a like objection and exception, to a like hypothetical question, that the value of a lady's gold enameled watch, in circumference a little larger than a half dollar, thirty or thirty-two diamonds in the back, about the size of a pin head, or a little larger, two or three diamonds out, depending a great deal on fineness, would be about \$100, as near as he could get at it without seeing the goods.

The ruling of the court upon these questions, against the appellant, is assigned for error.

The cases cited by the learned counsel hardly go to the extent of showing these questions to have been improper. In 3 Douglas, 157, the question was, whether an embankment had caused the filling up of a harbor, and it was held that the opinions of scientific men were competent evidence in this question. In 45 Me. 397, the opinions of a physician, formed upon hearsay, as to the mental condition of a party, was held not to be competent, but that his opinion would have been competent, if predicated upon facts, testified to by himself or others. In 2 Comst. 514, without stating any fact upon which his opinion was based, except having seen certain cattle and the hay upon which they were fed, and without any other fact appearing, a witness was allowed to state his opinion of the amount of damage to the cattle resulting by reason of defendant not feeding them with as good hay as he had agreed, which was held to be improper. These cases go no farther than to main-

tain the general rule that the opinion, in a proper case, to be admissible, must be based upon evidence of facts, or upon facts in evidence in the case, but they do not throw any light upon the proper form of the hypothetical questions by which the opinion should be elicited, nor how the facts upon which the hypothesis are based should be determined. I have taken some pains to find a plain statement of the rule applicable, and find it more tersely stated in *Carpenter v. Blake*, 2 Lans. 206, than elsewhere. It is there held that the hypothetical questions must be based upon the hypothesis of the truth of all the evidence, or on a hypothesis especially framed of certain facts assumed to be proved for the purpose of the inquiry. Such questions leave it for the jury to decide, in the first case, whether the evidence is true or not, and in the second case, whether the particular facts assumed are or are not proved.

The questions under consideration were framed upon hypothesis assumed to be proved; there was some evidence before the jury tending to show the truth of the hypothesis, and the questions were, therefore, proper.

As to Hatch and Davidson's testimony, no question is made upon the argument, except as to the sufficient identification of the property. We think it was sufficiently identified.

There is sufficient evidence to support the verdict in respect to amount. It does not appear to be excessive.

In my opinion the judgment should be affirmed, with costs.

Affirmed.

WOLFLEY et al. v. LEBANON MINING Co.

In cases of appeal to the supreme court, the order of the court allowing the appeal, must prescribe the amount of the bond.

Appeal from the District Court of Clear Creek County.

JUDGMENT in ejectment was rendered June 30, 1875, from which the district court allowed an appeal, but the penalty of the bond was not specified in the order. Time was allowed for filing bond until the 15th day of October, 1875, the same to be approved by the clerk, and on the 9th day of that month appellants filed a bond in the sum of \$300.

Mr. H. M. TELLER now moved to dismiss the appeal upon several grounds, one of which was that the court had not prescribed the penalty of the bond.

Mr. L. C. ROCKWELL, for appellees, suggested that the court did in fact fix the penalty of the bond, and that the amount was entered in the judge's minutes, and so the clerk certified.

Per Curiam. The statute (R. S. 513) requires in cases of appeal that a bond shall be given in a reasonable sum, sufficient to cover the amount of the judgment appealed from and costs.

How this reasonable sum shall be ascertained is not stated, but it is clear that the court should fix it. If the statute prescribed the amount of the bond there would be nothing required of the court in respect to that matter, but as that has not been done in the law the order of the court is necessary.

We think that the amount of the bond is an essential part of an order allowing an appeal, and in the present case the order is fatally defective.

As, however, it is suggested that the amount of the bond was in fact fixed by the district court, we will con-

tinue the cause to enable appellants to move in the district court to amend the order.

FARLEY v. THE PEOPLE.

An appeal will not lie from a judgment of a justice of the peace in a criminal cause to the district court of Arapahoe county.

Error to the District Court of Arapahoe County.

THE only error assigned in the supreme court was the dismissal of the appeal by the district court for want of jurisdiction.

MR. T. M. PATTERSON, for plaintiff in error.

HALLETT, C. J. This was a conviction for larceny in a justice's court in Arapahoe county, from which plaintiff in error prosecuted an appeal to the district court of that county. The appeal was dismissed by the district court upon the ground that there was no jurisdiction in that court to try the case, and this is the question presented by exception.

The act upon which the proceeding is founded gave an appeal to the district court (R. S. 256), but a later act (8th Sept., '69) provides that all appeals from justices of the peace in Arapahoe county shall be taken to the probate court of that county. The last-mentioned act contains but one section upon the subject of appeals, and that is very comprehensive. After declaring that all appeals from justices of the peace in Arapahoe county shall be taken to the probate court, causes tried before the probate judge when acting as a justice of the peace are excepted, and it is declared that "in no other case shall any appeal be allowed to the district court of said county."

It is claimed that this section is applicable to civil cases only, because the act in which it is found relates to the civil

jurisdiction of the court. But that circumstance is not entitled to much weight, for it will be found that this act, and the earlier acts relating to probate courts (R. S. 521) are addressed generally to the original jurisdiction of such courts in civil and probate matters, and not to the appellate jurisdiction in cases arising in inferior courts. A single section in the act of 1864 (R. S. 526) provides that in certain counties, appeals may be taken to the probate courts; but I have not found any other clause or section in any of those acts upon that subject.

Now, the fact that the legislature has at different times defined the jurisdiction of the probate courts in civil causes, originally brought in such courts, and in such acts criminal proceedings are not mentioned, may be quite sufficient to show that original jurisdiction in criminal cases was not intended to be conferred, but as to the appellate jurisdiction of the court, it proves nothing.

To say that in defining original jurisdiction in civil cases, the legislative assembly evinced a purpose to withhold all other jurisdiction in cases appealed, is manifestly illogical.

There is not in any of these acts an express declaration that probate courts shall have jurisdiction in causes appealed from justices of the peace, whether civil or criminal; nor was any such declaration necessary.

Upon that point it is enough that the legislature has declared that appeals shall be allowed, and upon that provision it is impossible to say that the legislature referred to one class of cases more than another. The declaration that all appeals in Arapahoe county shall be taken to the probate court, except in cases which are first tried by the probate judge, together with the last clause of the section, must be taken in its ordinary sense, and to refer to all cases tried before justices of the peace, whether civil or criminal; and as this case was not within the exception, the ruling of the district court was correct.

The suggestion, which was not strongly urged, that the Organic Act limits the jurisdiction of probate courts to civil

cases, appears to be untenable. Equally with district courts, that act confers upon probate courts authority for redress of all wrongs committed against the laws of the Territory, which must embrace public wrongs, whatever may be said respecting those which are denominated private wrongs.

The judgment of the district court is affirmed with costs.

Affirmed.

APPEAL WILL NOT LIE FROM JUSTICE'S COURT to district court, but must be taken to the probate court: *Boote v. Walker*, 3 Colo. 339.

In re GARVIN.

A petition for *habeas corpus* must contain the evidence adduced before the committing magistrate.

Mr. T. B. SEARIGHT, for petitioner.

Per Curiam. The petition sets forth that petitioner has been committed to the common jail of Arapahoe county on a charge of grand larceny. He says he is not guilty of any larceny at all.

The petition does not state the evidence adduced before the committing magistrate.

The presumption is that the justice acted properly upon the evidence submitted, until the contrary appears.

A petition for *habeas corpus* should set forth the evidence before the examining officer, so that the court may act advisedly before the writ is granted. *Ex parte Klepper*, 26 Ill. 532.

Petition denied.

GREEN v. THE PEOPLE.

1. Under the statute of Colorado an assault with intent to murder is felony.
2. It is error to render a verdict in a charge of felony, the defendant being absent and under confinement in jail; his right to be present cannot be waived by counsel.

Error to the District Court of Clear Creek County.

THE case is stated in the opinion.

MR. M. S. TAYLOR, for plaintiff in error.

BRAZEE, J. This was an indictment against the defendant below for an assault with intent to murder.

The indictment was presented on the 16th day of December, 1874. Upon the same day, *capias* issued for the defendant, and on that day the sheriff returned that he had his body in jail. On the next day the defendant demurred to the indictment. The demurrer was overruled, and on the 25th day of December, 1874, the defendant was arraigned, plead not guilty, put himself upon the country, and the district attorney *similiter*; a jury was thereupon impaneled and sworn; verdict guilty.

The defendant was not present when the verdict was received; he was then in jail, as the record shows.

It is *inter alia* assigned for error that the record shows that the prisoner was not present when the verdict was rendered by the jury.

It is claimed by the plaintiff in error that the crime charged against the defendant is a felony. In considering whether it was necessary that the defendant should have been present when the verdict was rendered, we must determine whether this claim is well founded or not. Our statute does not define a felony, but it is claimed the offense charged is felony at common law. By chapter 16, Rev. Stat., the common law of England, so far as applicable, and all acts and statutes of the British Parliament, made in aid of,

or to supply the defects of the common law, prior to the fourth year of James the I., so far as applicable (with certain exceptions, not necessary to notice), are made the rule of decisions to be in full force in this Territory until repealed.

James the I. was proclaimed king of England on the 24th of March, A. D. 1603. The common law then, which we have adopted, is the common law of England, as amended by acts of Parliament applicable to our condition, and in force on the 24th day of March, A. D. , fourteen years before the landing of the pilgrims, and a year and a month before Capt. John Smith founded Jamestown, Va.

At that early day Coke and Bacon were bitter rivals in politics and practice at the bar; neither Sir Mathew Hale nor Sergeant William Hawkins had then been born, nor had the star chamber been abolished, and trial by wager of battle was lawful.

The common law was then emerging from the gloom of black letter, the mysteries of Norman-French, and the intricacies of the old feudal law, and beginning to assume under Coke and Bacon that system and symmetry which Hale and Hawkins afterward assisted in developing, and Blackstone perfected, a hundred years later, in the king's English.

The common law was not in the early days of James, what enlightened jurists have since made it.

The case of Sir Walter Raleigh furnishes an illustration of a difference in the application of the law at least. Upon a written acquisition, uncorroborated by witness or circumstance, without being confronted with his accuser, Raleigh was convicted of high treason by the verdict of a jury, upon which he was consigned to prison, and finally brought to the block.

The felonies of that day appear to have been numerous and peculiar. Besides felonies at common law, viz.: murder, larceny, robbery, arson and rape, a few of the many other high crimes created by statute may be mentioned as

illustrating the law of those old times. For a jesuit, seminary priest or ecclesiastic, born in the realm, to return to it, was high treason; persistent refusal to attend church after being admonished was felony, without the benefit of clergy; selling a horse to a Scotchman and stealing hawks were also felonies; and stealing goods above the value of twelve pence was punished with death, and worked the forfeiture of estates, and the corruption of blood.

Much difficulty has been found in finding out the law of those ancient times applicable to the case at bar, to determine the grade of the offense charged in the indictment.

Says one old writer, the ancient common law of England provided with such anxiety for the personal safety of the subject, that every act done against another, which might in its consequences have proved fatal to his existence, was construed to be felonious. Of this there are several instances in the year-books of Edward the II. and Edward the III. In the reign of Edward the IV. the maxim that *voluntas reputabatur pro facto* began to grow obsolete; and the offense of assault with intent to murder was considered a high misdemeanor, only punishable at discretion. 1 Hawk. P. C. (8th ed.) 111.

Thus the law remained for more than one hundred years after the third year of James, and until the reign of George the III.

Colorado having adopted the common law as it was during the third year of James the First, by it, assault with intent to murder is a high misdemeanor, unless the common law has been changed in this respect by the 48th section of our Criminal Code.

The indictment under consideration is found under that section which is substantially as follows: "An assault with intent to commit murder, rape, robbery or larceny, shall subject the offender to confinement in the penitentiary for a term not less than one, nor more than fourteen years. An assault with a deadly weapon, instrument, or other thing, with an intent to inflict upon the person of another

a bodily injury where no considerable provocation appears," etc., "shall be judged to be a high misdemeanor, and any person thereof duly convicted shall be fined in a sum not exceeding \$2,000 and imprisoned not exceeding one year in the county jail."

The minimum penalty for assault with intent to murder is one year in the penitentiary, and the minimum penalty for assault with intent to do bodily injury may be merely nominal—one day in jail and six cents fined—while the maximum penalty for these offenses are almost as widely apart.

The turpitude involved in the former is as much greater than in the latter, as the intent maliciously to murder by a secret deadly thrust exceeds in depravity the intent to disable an adversary by a hasty unnecessary blow with a deadly weapon, given upon slight provocation in sudden combat.

The latter by the statute is expressly made a high misdemeanor, while the former is not by the statute classed either with felony or any grade of misdemeanor.

Assault with intent to murder involves the highest depravity, and the legislature having imposed a much greater penalty for its punishment, we conclude it is as much higher offense in law than assault with intent to do bodily harm, as the depravity it manifests and its punishment exceeded the punishment to be inflicted for, and the *quo animo* that characterizes assaults with intent to injure. The latter, as we have seen, is made a high misdemeanor. Between high misdemeanor and felony there is no grade of crime known to the law. It follows by necessary implication that the statute having made assault with intent to murder a higher crime than a high misdemeanor, it is of the next grade higher, and a felony.

When the verdict was rendered, the defendant was in jail; he had a right to be present then, but of this right he has been deprived.

This right is one that cannot be waived by counsel;

whether the defendant when under bail may waive this right by remaining voluntarily absent when the verdict is rendered, we do not consider nor decide. It is settled that it is error to deprive a party charged with felony, of his right in this respect. *State v. France*, Cooper, Tenn. 343; *Id.*, Overton, 434-5; 1 Bishop's Cr. Pro. (1st ed.) 688, and cases; *Price v. Commonwealth*, 18 Penn. 6 Harris, 103; *Stubbs v. The State*, 49 Miss. 716; *The People v. Perkins*, 1 Wend. 91; *Dougherty v. The Commonwealth*, 69 Penn. 286.

Some objections are urged against the indictments, but they are untenable. The recent repeal of the statute authorizing proceedings by information render it unimportant to discuss the question whether in this particular case the prosecution should have been by indictment or information.

The verdict and judgment are reversed, a new trial is granted, and the cause is remanded. *Reversed.*

RIGHT OF ACCUSED TO BE PRESENT at trial in prosecution for felony cannot be waived (*State v. Myrick*, 38 Kan. 240), and it is error to render a verdict in his absence: *Ex parte Farnham*, 3 Colo. 546; *Smith v. People*, 3 Colo. 468.

BARTELS et al. v. ARMS.

1. One acting as a general agent under a power of attorney, and being in possession of chattels secured to his principal by mortgage, has such special property in the chattels as will enable him to maintain replevin therefor in his own name against one interfering with the possession under claim of title from the mortgagor.
2. In replevin, where the taking was wrongful, a demand previous to bringing suit is unnecessary.

Appeal from District Court of Pueblo County.

THIS was an action of replevin, brought by the appellee, John Arms, against Julius L. and Gustav Bartels, the appellants, to recover possession of a quantity of brick claimed and taken by the appellants from the appellee's

possession under a bill of sale from one Giles, to the appellants. The bill of sale bears date July 14, 1873. The brick claimed and taken were not in existence at that date, and their manufacture not begun until the 25th day of July, 1873. The declaration was in the *cepit* and *detinet*, and the pleas of *non cepit*, *non detinet*, property in the defendants and in several others, were interposed. The cause was tried at the June term, 1874, of the district court, before a jury. The appellee obtained a verdict upon which judgment was at the same term rendered in his favor, to reverse which this appeal is prosecuted. Further facts necessary to a full understanding of the case are stated in the opinion.

Mr. A. A. BRADFORD, and Mr. JAMES MACDONALD, for appellants.

Mr. WILBUR F. STONE, and Mr. H. C. THATCHER, for appellee.

A. W. STONE, J. On the 26th day of December, 1873, the appellee, as the agent of James R. Waldon, loaned to M. M. Giles \$4,038.53, and took his note therefor, payable to Waldon, and a chattel mortgage on a quantity of brick belonging to Giles. Before the maturity of the note, on the 27th day of December, 1873, Giles executed a power of attorney to Arms, the appellee, authorizing him to take possession of, and sell the same brick mentioned in the chattel mortgage, and receive the money therefor.

On the 30th day of December, 1873, Giles put Arms in possession of the brick, being the same brick mentioned in the chattel mortgage, and Arms put one Robins in charge, who continued in possession of the same until dispossessed by the appellants.

On the 19th day of January, 1874, appellants took possession of the same brick, and commenced hauling them away. The evidence fails to show any right in the appellants to said brick. The important question, and in fact the only question in the case, is, whether the plaintiff, John

Arms, can maintain the suit The title to the brick was unquestionably in Waldon ; Arms was his agent, acting under a power of attorney, which gave him, in Waldon's name, the right to loan Waldon's money generally, and upon such security as he deemed proper, and to ask, demand, recover, and receive all moneys, dues and *effects*, due, coming or payable to him, to make all contracts, orders, writings and instruments requisite and proper to carry out the power.

We think it fairly deducible from this letter of attorney, that Arms had authority to sell any chattels received by him in the usual and necessary course of his business transactions for Waldon. It is one of the means necessary to accomplish the desired end—the return of the money loaned with its use ; and in the absence of any proof to the contrary, the law would imply a promise on the part of Waldon to pay Arms what his services, in and about Waldon's business, were reasonably worth. The situation that Arms sustained to Waldon was not that of a mere servant, or naked bailee. It was more ; he was the general agent of Waldon, to do whatever Waldon could do, relative to the matters intrusted to him, which was the lending of Waldon's money. And in the transaction of Waldon's business he rightfully acquired possession of the brick, and continued in such possession until interfered with by the defendants. He had a special property in the brick, by virtue of his possession, subject only to the claim of Waldon.

It is an elementary principle, that a general or special property in the goods taken is sufficient to maintain replevin. 1 Ch. PL 163.

What constitutes such a special property, as authorizes the right of action, is not wholly free from doubt.

It has been held that a mere servant who has charge of goods, as such only, cannot maintain the action ; and that a receptor to an officer, or a bailee, cannot maintain it. The reason assigned, is, that such a bailee has no special property in the goods ; the possession of the servant being ex-

clusively that of his master, and the receiptor, that of the officer.

Possession of chattels is *prima facie* evidence of property, and the right to possession a right of property, as against all who cannot show a better title.

In the case of *White et al. v. Bascom et al.*, which was a suit involving a bailee's right of action for injuries to property in his possession, REDFIELD, C. J., says: "The general principle of law in regard to this point seems to us sufficiently settled. Ordinarily, one having possession of goods, even by finding or by tort, has a sufficient title to recover the value against a mere wrong-doer, or any one who undertakes to perform service about the goods, and fails in ordinary skill and diligence. This principle of law is of very long standing. The person who is guilty of tort, or who fails to perform his duty according to his undertaking, or the general obligation of his craft or position, cannot ordinarily dispute the title of him from whom he took or recovered possession. Naked possession is a sufficient title against all the world, except him who has a superior title, and the law will presume the possession either by finding bailment or mere tort, has the consent and title of him in whom resides the better right until he shall connect himself with the wrong-doer in some way. Until that, the wrong-doer must show a right to do as he has done. It is no justification to him to impeach the plaintiff's title. It is every day practice in the courts of common law for the bailee, who is not accountable over, to bring suits for any injury to the goods either by force or negligence." 28 Vt. 271.

It is held in Michigan, that when one is in the peaceable possession of goods, not as an intruder, trespasser or wrong-doer, but as owner, either of the whole property in them, or of some special property, he has a valid title as against all mere strangers; and that any one, who, without any right or title, takes them away from him, is a wrong-doer, and cannot retain his grasp and preclude a recovery of the possession by showing a possible or actual interest

in some third party. *Van Baalen v. Dean*, 27 Mich. 104. An auctioneer who is the agent of the owner, to whom goods have been sent for sale, may maintain replevin therefor. *Tyler v. Freeman*, 3 Cush. 261. An agistor of cattle may maintain trespass or trover against a stranger for taking them away. *Bass v. Pierce*, 16 Barb. 595. In the note to the case of *Armery v. Delamirie*, 1 Smith's L. C. 596, the learned author, after a very extended review of all the cases in England and this country, says: "The weight of authority is, that a rightful possession proves and constitutes a sufficient right of property, to sustain trover or replevin against every one who takes or withholds chattels personal without having either the right of property or the right of possession; nor will evidence that the absolute right of property is in a third person be sufficient in replevin, any more than in trover, to rebut a right founded on a rightful possession. The contest in both actions is between the plaintiff and defendant, and the rights of third persons are immaterial, unless they operate directly or indirectly in those of the parties."

This right is not inconsistent with a co-existing right for the same cause in the general owner. Though both are entitled to sue, a recovery by either will be a bar to a subsequent action by the other.

We are of opinion that Arms had such a special property in the brick as will support this action.

The taking of the brick by the defendant being wrongful, no demand was necessary.

The judgment of the district court is affirmed, with costs.

. *Affirmed.*

GOODRICH, Assignee, etc. v. MICHAEL et al.

1. Under the statute (R. S. 339, § 14), the sale of personal property, unaccompanied by immediate delivery and followed by actual and continued possession, is void as against creditors.
2. An assignee in bankruptcy represents the creditors, and a chattel mortgage void as against creditors under the Territorial statute (R. S. 102, 103) is also void as against the assignee in bankruptcy.

Error to District Court of Arapahoe County.

TROVER by an assignee in bankruptcy to recover damages for the conversion of certain chattels. The declaration contained two counts, averring property in the plaintiff as assignee, before and after the bankruptcy, and right of possession; plea of the general issue interposed. The cause was tried at the special December term, 1874, by the court, a jury being waived. The defendants had judgment to reverse which this writ of error was sued out. The facts are sufficiently stated in the opinion.

Messrs. FRANCE & ROGERS, for plaintiff in error.

Messrs. SAYRE, WRIGHT & BUTLER, for defendants in error.

A. W. STONE, J. This was an action brought by the assignee in bankruptcy of J. Fred. Zell, to recover of Michael and Healey, the value of certain property alleged to have been transferred to them in fraud of the provisions of the Bankruptcy Act.

The evidence shows that on the 13th day of February, 1873, J. Fred. Zell, the bankrupt, by his bill of sale of that date, sold to the defendants in error the furniture and fixture in his store in Denver, for the consideration expressed in the bill of sale, of \$1,004.02; that on the 31st day of May following, he was adjudged a bankrupt upon the petition of his creditors, filed the 26th day of March, 1873; that

at the time of the sale by Zell to Michael & Co., Zell was indebted to Michael about \$550 for money paid by Michael as the surety of Zell, some time in the first part of February, 1873.

Michael, in his testimony before the register in bankruptcy, testified: "I was going away and wanted security from Zell, and he gave me a bill of sale of his fixtures. I got possession of all the property on the day of the date of the bill of sale; they remained there until I sold them. which was some time in June." On the trial of this cause he testified: "I can't tell at what time I took possession of these goods. I *pretended* to have possession of them in February before; Zell did not quit using of them until about June; I sold them a few days after he quit using them; I did not do any thing with the goods during the interval; they still remained in the store; the first thing I did with the goods after Zell quit business was to sell them; I sold them a day or two after he quit business; I took the bill of sale as collateral; I was bound for no particular sum; I took this bill of sale to secure me for the indorsing of that note; when I took the bill of sale, I did not expect to take charge of these goods, or to depend on them to get any pay; Zell estimated the value; I accepted the estimate; I never took an inventory; I paid the note."

It is not pretended by the witness Michael that there was any change of possession of the property. It remained with Zell and was used by him as before the sale, until he quit using them in June, after he was adjudged a bankrupt.

It is shown by Michael's testimony that he took the bill of sale as collateral to secure him for the indorsing of Zell's note, and that he did not expect to take charge of the goods, or to depend on them to get his pay.

The agreement, whether considered as a bill of sale or a mortgage, was void against creditors. If as a mortgage, it did not provide that the property should be left with the

mortgagor, and was not recorded until after proceedings in bankruptcy had been commenced against Zell.

If a bill of sale, it was not accompanied by an immediate delivery, followed by an actual and continued change of possession of the things sold. Rev. Stat. 103, 339.

It did not create any lien upon the property, or entitle the defendant to any preference over other creditors of Zell in the event of his being proceeded against under the Bankrupt Act.

Conceding the validity of the bill of sale as between the parties, it is not valid against creditors. It had no operation against them, until the defendants took possession, and at that time Zell was a bankrupt, and their possession gave them no right as against his creditors. Transfers of personal property, situated as in this case, only takes effect as against creditors from the delivery of the property to the purchaser. *Bank of Leavenworth v. Hunt*, 11 Wall. 391; *Allen v. Massey*, 17 id. 351; *Harvey v. Crans*, 5 Bankrupt Rep. 218.

The assignee represents the creditors, and any claimed lien which would be void as against creditors generally would also be void as against the assignee. *Harvey v. Crans*, 5 Bankrupt Rep. 222.

The defendants cannot rely on the bill of sale, because it was void as to creditors. They cannot rely upon possession, because the sale was invalid and because at the time they obtained possession, Zell had been adjudged a bankrupt.

The judgment is reversed with costs.

Reversed.

SALE OF PERSONALTY, UNACCOMPANIED BY IMMEDIATE DELIVERY, followed by actual and continued possession, is void as against creditors. The same rule is applied as to an assignment for the benefit of creditors: *Ray v. Raymond*, 8 Colo. 471.

BELL v. RHODES.

The verdict being for the defendant in an action *ex delicto*, and the evidence conflicting without a decided preponderance in favor of the plaintiff, the verdict will not be disturbed upon the ground merely that it is against the evidence.

Error to District Court of El Paso County.

THE facts are sufficiently set forth in the opinion.

MESSRS. DAVIDSON & HARRISON, for plaintiff in error.

MR. J. W. DORR, and MR. ORRIS BLAKE, for defendant in error.

BRAZEE, J. Trespass was brought by plaintiff before a justice of the peace to recover for damages alleged to have been done by defendant's cattle, in destroying a portion of the plaintiff's ungathered crops. There was a trial by jury in a court of justice of the peace, and a verdict was rendered there for the defendant, and judgment given against the plaintiff for costs.

The plaintiff appealed to the district court, where a trial by jury was had, verdict not guilty; thereupon a motion for new trial was made and overruled, after which judgment went against the plaintiff.

Three actions were commenced before the same justice of the peace, for like trespass; one October 22d; one October 28th, and one October 31st, 1873. Judgments were recovered by the plaintiff, before the justice of the peace, in the first and third actions. The case at bar is the second action. At the trial in this case, the plaintiff testified that "the defendant's cattle were marked 'T. H.,' and were on the field the 24th, 25th, 26th and 27th days of October, 1873." Russell testified, that "he saw defendant's cattle on plaintiff's field on the 22d day of October." Kenyon testified, that "he saw the cattle marked 'T. H.' on plaintiff's

field, on the 23d of October, and he afterward saw them in defendant's possession." Crawley testified, that "he saw eighty-one or eighty-two head of cattle marked 'T. H.' and some marked 'G. R.' in plaintiff's field on the 24th of October, and he saw defendant's son drive them into defendant's corral on the evening of the same day."

On the part of the defendant, Marsh testified, that "after defendant was first sued, his cattle were herded." Bailey testified, "that after the lawsuit, the defendant's son was out of the house with orders to herd the defendant's cattle." Hulda Rhodes testified, "that the defendant's cattle were herded, after the plaintiff sued him; his son was in charge of them; he had orders to keep them off of Bell's field. The cattle were herded in the day time and corraled at night." Daniel Rhodes testified, that "he was defendant's son; was fourteen years old; that after his father was sued he herded his cattle, and they were not in Bell's field; after the suits were commenced, they were corraled at night." Corbin testified, that "he saw defendant's boy and the cattle near Bell's field on Tuesday before the trials." Jane testified, "she watched Bell's field, and did not think defendant's cattle were there after the commencement of the suit."

The foregoing is the substance of the evidence touching the fact of trespass, the time covered by the suit at bar. Evidence was also given tending to show the damage thereby occasioned. The plaintiff filed a motion for a new trial, "because the verdict of the jury was against the law and the evidence." This motion was overruled, and that was assigned for error.

The jury are the judges of the credit due the witnesses. The evidence was conflicting. We do not discover any such preponderance of proof in favor of the plaintiff as should invalidate the verdict. There was, therefore, no error in overruling the motion for new trial.

Judgment affirmed.

COWELL v. COLORADO SPRINGS COMPANY

1. Objections to the form of a verdict must be made in the court below and before the jury is discharged. An objection that the verdict found "the issue" instead of "the issues," or for "the plaintiff" instead of "the plaintiffs," cannot be raised in the supreme court for the first time.
2. Objections to evidence must be made on the trial, and the ground of objection must then be particularly stated if the evidence is of such a nature that its inadmissibility may be obviated by the introduction of further testimony.
3. The act of the legislative assembly of February 11, 1870, authorizing the formation of corporations for the purpose of encouraging immigration, held to be a rightful subject of legislation under section six of the Organic Act.
4. A corporation having been recognized in the exercise of its corporate functions by legislative enactments, all inquiry into its original organization is precluded.
5. One who deals with a corporation in its corporate capacity cannot afterward question collaterally the legality of the corporate existence.
6. When an instrument creating a trust does not disclose the beneficiary, it does not necessarily follow that the grantor is the beneficiary.
7. The refusal of the court to give instructions not supported by evidence in the case cannot be assigned for error.
8. A condition in a deed, granting an estate in fee, that intoxicating liquors shall never be manufactured, sold or otherwise disposed of as a beverage in any place of public resort in or upon the premises granted, or upon any part thereof, the grantor reserving the right upon condition broken to declare the deed void, and all right, title and interest in the premises in such event to revert to the grantor, and the grantee consenting to the condition and reservation; *Held* to be a valid condition, binding upon the grantee, not repugnant to the estate granted, and that upon condition broken the grantor might maintain ejectment, upon proof of the breach, without previous entry, demand or notice.
9. Where an exception goes to the whole charge, and error cannot be maintained upon a part, the exception will not avail.

Appeal from District Court of Pueblo County.

THE National Land and Improvement Company and the Colorado Springs Company were corporations authorized by law to acquire and hold lands, and to dispose of them by sale or otherwise. Charles B. Lamborn, as trustee, re-

ceived a patent from the government of the United States for certain lands situated in El Paso county, Colorado. Subsequently, and on the 13th of March, 1872, Lamborn, describing himself as trustee, conveyed the lands described in the patent to the National Land and Improvement Company of El Paso county. On the 14th of March, in the same year, the last-named company conveyed a portion of these lands to the plaintiff, the Colorado Springs Company. In May, 1873, the plaintiff conveyed to the defendant, in fee, of the lands last mentioned, two certain lots described as lot numbered one in block numbered ninety-two, and lot number twenty-one in block numbered eighty-three in the town of Colorado Springs. The deed from plaintiff to defendant contained a condition restricting the sale of intoxicating liquors upon the premises granted, which condition is set out in the opinion. The plaintiff claimed that the defendant had broken this condition and brought an action of ejectment in the El Paso district court. Among other matters it was contended by the defendant that the condition in the deed was repugnant to the estate granted. Upon a trial in the district court in El Paso the plaintiff obtained a verdict. This verdict was set aside and a new trial granted under the statute. Upon the second trial the jury failed to agree, and the venue was then changed, upon application of the defendant, to Pueblo county. Upon the trial of the cause in the district court of Pueblo county, the plaintiff again prevailed, judgment was rendered upon the verdict, and the defendant appealed.

Messrs. MILLER, BECK & CLOUGH, for appellant.

Messrs. DAVIDSON & HARRISON, for appellee.

BRAZEE, J. The appellee brought ejectment for certain premises, claiming title in fee simple. Plea, not guilty.

The evidence on the part of the plaintiff showed a certificate of its incorporation, filed in the office of the county clerk and recorder of El Paso county, June 29th, 1871. This

certificate purported to incorporate appellee pursuant to the laws of Colorado, for the purpose of aiding and encouraging immigration to the Territory, and to purchase, acquire, hold, possess, sell, convey and dispose of lands, town lots, mineral springs and other property ; to build, construct and operate ditches, wagon roads, and mills for manufacturing lumber and other articles of wood.

The plaintiffs also gave in evidence an act of the General Assembly of the State of Pennsylvania, incorporating the National Land and Improvement Company, with general corporate powers, and power to receive, hold and grant real and personal property ; explore, locate and improve lands ; transport emigrants and merchandise ; construct houses and buildings ; manufacture, trade and traffic ; colonize, organize and form settlements ; operate mineral and other lands, and improve and work the same.

The evidence further showed a patent from the United States, to Charles B. Lamborn, *trustee*, dated September 20, 1870, conveying the lands in controversy, among other lands — in all four hundred seventy-six acres and fifty-eight one hundredths of an acre ; a deed from Charles B. Lamborn, *trustee*, to the National Land and Improvement Company of El Paso county, dated March 13, 1872, conveying the lands in question with other lands, and covenanting for quiet and peaceable possession — consideration \$16,000 ; a deed dated March 14, 1872, from the National Land and Improvement Company, to the Colorado Springs Company, conveying the lands in question, among other lands, with full covenants — consideration \$30,000 ; a deed dated May 20, 1873, from the “Colorado Springs Company, a corporation duly created under the laws of the Territory of Colorado,” to the appellant, conveying the premises in controversy, with full covenants, and containing the following condition : “Witnesseth, that the said party of the first part, for and in consideration of the sum of \$250, to it in hand paid by the said party of the second part, and also for the further consideration of the agreements between the parties hereto, for themselves, their heirs, successors, and legal representa-

tives, that intoxicating liquors shall never be manufactured, sold or otherwise disposed of as a beverage in any place of public resort, in or upon the premises hereby granted, or any part thereof; and it is herein and hereby expressly reserved by the said party of the first part, that in case any of the above conditions concerning intoxicating liquors are broken by the said party of the second part, his assigns or legal representatives, then this deed shall become null and void, and all right, title and interest, of, in, and to the premises hereby conveyed, shall revert to the said party of the first part, its successors and assigns, and the said party of the second part by accepting this deed, for himself, his heirs, executors, administrators and assigns, consents and agrees to the reservations and conditions aforesaid."

Evidence was also given tending to show that after the execution and delivery of the last-mentioned deed, the defendant had sold and disposed of intoxicating liquors, as a beverage, in a place of public resort, upon the premises granted in the last-mentioned deed, and there was no evidence substantially tending to controvert the fact of such sale.

Defendant's motion for nonsuit was overruled. The jury found defendant guilty, and that the plaintiff was the owner of the premises described in the declaration. Defendant's motion for a new trial was overruled, and judgment was given upon the verdict against the defendants.

It is objected that the jury found the *defendant*, instead of the *defendants*, guilty, and that this is error. The objection is merely technical. The defendants plead jointly to the declaration, "not guilty;" this made a single issue which the jury were impaneled to try, and sufficiently identifies the parties defendant. It was competent for the court to have amended the verdict below, if the form of the verdict had been made the ground of exceptions, or to have sent the jury out to further consider the form of their verdict. The verdict would no doubt have been corrected in respect to form, in the court below, if attention had been

called to it there. This specific objection comes too late here for the first time. If separate pleas had been interposed below by the defendants respectively, our decision might have been different, but here, where there is but one defense, and the court can see that the issue has been disposed of upon the evidence, and that the jury may have used the word "defendant," as a noun of multitude to include all the parties defendant, we hold that the verdict by legal intendment is sufficient upon the issue and evidence in the case.

The objection to a verdict, that it found "the issue," instead of the "issues," was held to come too late, on error, for the first time. *Laber v. Cooper*, 7 Wall. 570. In *Henry v. Halsey*, 5 Smedes and Marshall, 573, it was held, that a verdict which found for "the plaintiff," instead of "the plaintiffs," was sufficient, where the record showed the jury were impaneled to try the issue.

There are two counts in the declaration. The verdict finds the plaintiff to be the owner in fee of the premises described in the declaration; judgment, that the plaintiff recover possession of the premises "according to the verdict of the jury" "as described in the declaration," "to wit," and then follows the description in the first count. Now appellant's counsel claim that the respective counts describe different parcels; we think they describe the same premises, but if we concede the contrary, inasmuch as the verdict covers the premises described in both counts, the plaintiff alone is prejudiced by a judgment for one parcel instead of two, and the appellant is not prejudiced thereby.

The objection to the patent, as evidence, raised in the court below, viz.: "there was no public act of the United States congress, as is referred to in said patent, and because the same is immaterial," as we shall show, are untenable, and because they are not raised on the argument, we regard them as waived. The objections urged on the argument, to the patent, were not raised below, but if raised there, might

have been obviated, and will not therefore be considered by us here.

The deed from the National Land and Improvement Company to appellee was objected to at the trial, on the ground that it "was not acknowledged as required by the laws of Colorado Territory."

The deed from appellee to appellant was objected to because the same was immaterial and that the condition could not be given in evidence.

It is urged on the argument, that the certificates of acknowledgment to the deeds respectively, show that the respective acknowledgments were those of individuals filling corporate offices, and not of the corporations, and they were, therefore, without proof of acknowledgments by the respective grantors, not entitled to record, nor admissible in evidence. Attention was not called to this ground of objection at the trial; if it had been suggested then, it might have been removed by the production of the original deeds, and proof of the corporate seals and signatures of the officers of the grantors. It is well settled that the true ground of objection to the admissibility of material evidence offered, which might be obviated, must be suggested at the trial, or it cannot be considered afterward. The ground of objection to the admissibility of these deeds, urged before us — that they were not acknowledged by the grantors — that they were acknowledged by individuals, and not by the corporations — were not suggested to, nor passed upon by the court below, they cannot be made and considered now. *Cody v. Butterfield*, 1 Col. 384; *Consolidated G. Co. v. Raber*, id. 514; *McGraw v. Welch*, 2 id. 284.

The patent and the deeds referred to were proved by certified copies without any affidavit being made that the originals were out of the power of the plaintiff, and could not be produced. It is objected on the argument, that these copies were, therefore, improperly received in evidence. This objection was not taken below, ought not to be raised here, and we have no right to consider it.

The learned counsel for the defendant is mistaken in his statement that the deeds to the companies do not embrace the lands in dispute. It is claimed by the appellant that no corporation could be created for the purpose set forth in the certificate of incorporation, under the law, and that appellee had no existence, and could neither take nor convey the title to land. Under section 1 of the act of March 2, 1867 (14 U. S. Statutes at Large, page 426), the legislature of the Territory may, by general acts of incorporation, permit persons to associate themselves together as bodies corporate, for mining, manufacturing, and other industrial pursuits. Sections 1 and 2, chapter 18 (page 117), Rev. Stat. of Colorado, of 1868, authorizes three or more persons, for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business; construct wagon roads, railroads, telegraph lines, dig ditches, build flumes, run tunnels, or carry on any branch of business designed to aid in the industrial or productive interests of the country; to make, sign and acknowledge certificates, complying with the provisions of the statute, and thereby become a body politic and corporate.

This act was amended February 11, 1870 (Laws of 1870, page 49), so as to authorize like numbers of persons to incorporate for the purpose of aiding, encouraging and inducing immigration to this Territory; and to purchase, acquire, hold, possess, sell, convey and dispose of town lots and other property, whether real, personal or mixed. The congressional act of June 10, 1872 (17 U. S. Statutes at Large, page 390), declares that the act of March 2, 1867, referred to, "so far as relates to incorporations which have been, or which may hereafter be, created and organized for the business of mining, manufacturing, or other industrial pursuits; on (or ?) the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any charitable or scientific association, and for all rightful subjects of legislation, consist-

ent with the Constitution of the United States, under the general incorporation laws of any Territory of the United States, shall be construed as having authorized, and as authorizing the legislative assemblies of the Territories of the United States by general incorporation acts to permit persons to associate together as bodies corporate" for the purposes above named.

The learned counsel for the appellant have ignored in their argument the Territorial act of February 11, 1870, amending chapter 18 of the Revised Statutes, which is important to be considered in this connection.

The incorporation of appellee, as expressed in the certificate under which it claims to have been incorporated, was among other things for the purpose of aiding and encouraging immigration to the Territory, and to purchase, acquire, hold, possess, sell, convey and dispose of lands, town lots, mineral springs and other property.

The Territorial Act of February 11, 1870, expressly authorizes corporations to be formed for these purposes.

The appellee, then, is legally incorporated for these purposes, unless the last-mentioned act is in contravention of the Constitution or laws of the United States.

Section 6 of the Organic Act enacts that the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution, and the provisions of the act. Under this provision there is no doubt that the legislature had power to provide for the creation of bodies corporate for the purposes contemplated in the organization of the appellee. The congressional act of March 2, 1867, expressly prohibited the grant of private charters and especial privileges, but allowed general incorporation acts by the Territorial legislature, authorizing bodies to incorporate for mining, manufacturing, and other industrial pursuits.

It is not necessary for us to decide whether this statute prohibited by implication the Territorial legislature from passing general laws authorizing the formation of corpora-

tions for other than mining, manufacturing and other industrial pursuits under the maxim that the expression of one thing in a statute is the exclusion of another, nor whether the Territorial act of 1870 was in contravention of the congressional act of 1867.

The congressional act of June 10, 1872, has saved us this labor. That act declares, that the act of March 2, 1867, as far as it relates to incorporations which have been created for the purpose expressed in appellee's certificate, among others, under general incorporation laws of any Territory, shall be construed as having been authorized.

Before the passage of the act of 1872, appellee was a corporation *de facto*, created under the forms of law, for legitimate beneficial purposes, inuring to the benefit of the community, as well as to the benefit of the corporators; it exercised the functions which it claimed, and whatever doubts may have hung over the legitimacy of its birth, have been removed by the act of 1872, and it is entitled to be treated as a corporation *de jure*, from the time of filing its certificate of incorporation, capable of taking and conveying the title of real estate.

This conclusion is arrived at upon authority.

In *Jameson v. The People*, 16 Ill. 258, it was held that where a municipal corporation has been recognized by acts of the general assembly, empowering it to act, by issuing negotiable obligations, all inquiry into the original organization is precluded.

In *McIntyre v. The Canal Company*, it was held that an act reciting that a corporation, trustee, had lost its right, and authorizing the purchase of its property for the State, recognized its existence and power to contract. 9 Ohio, 203.

In *The Black River and Utica Railroad Company v. Barnard*, 31 Barb., the company, while in the exercise of its corporate functions, had been recognized by act of the legislature as a corporation, and it was held that it became, by such recognition, *ipso facto*, a legal corporation.

It is claimed by the appellant's counsel, that the act of 1872 did not retroact so as to give legality to appellee prior to this act.

That act in its terms is retroactive: "shall be construed as having authorized," applied to the act of 1870, gives it effect from its inception, unless such effect is in contravention of the Constitution.

Satterlee v. Mathewson was in ejectment; the plaintiff claimed title derived from Connecticut, and the defendant under title derived from Pennsylvania. It appeared that the defendant had come into possession as tenant of the plaintiff. The court of common pleas decided in favor of the plaintiff, on the ground that the defendant was estopped, by reason of the tenancy, from setting up his title, although it was the oldest and best. Upon error, the supreme court of Pennsylvania decided that, by the law of that State, the relation of landlord and tenant could not subsist under a Connecticut title, and upon this ground reversed the judgment, and awarded a new trial. Before the retrial the legislature of Pennsylvania changed the law in this respect. The cause subsequently went to the supreme court of the United States, and it was there held that the statute which validated the void contract of tenancy, did not thereby impair the obligation of a contract — and that although retrospective in its action, it did not partake of the character of an *ex post facto* law forbidden by the Constitution. 2 Peters, 413. This doctrine was recognized in *State v. Squires*, 26 Iowa, 347.

The phrase, *ex post facto*, is held to apply to legislation respecting crimes. Sedgwick on Construction, etc., of Stat. and Con. Law, 165.

But the appellant here is not in position to question the existence of the appellee, collaterally in this action.

The Territorial legislature, by the act of 1870, had attempted to provide, by a general law, the mode by which individuals could associate and acquire corporate powers similar to those exercised and claimed by the appellee. The

language of the supreme court of the United States, in an analogous case, is applicable to this, with slight change of language. Conceding the bank (appellee) to be guilty of usurpation, it was still a body corporate *de facto*, exercising at least one of the functions which the legislature attempted to confer upon it, and in such case the party who makes a sale of real estate to it, or buys real estate of it, is not in a position to question its capacity. *Smith v. Sheeley*, 12 Wall. 361. Or we may adopt the language of the supreme court of Illinois, and say: "Here then, is a body *de facto*, which had been engaged in an undertaking involving important interests. The regularity of its organization cannot be questioned collaterally. And alleged non-compliance with the law can only be inquired into by the writ of *quo warranto* or *scire facias*. Hence it is improper in this case to discuss the right of the grantee in the deed to take, or the power of the legislature to legalize the irregularities complained of." *Thompson v. Candor*, 60 Ill. 428.

It is contended by appellant's counsel that the patent, since it is in excess of quantity authorized, is void on its face. The patent purports to have been made according to the provisions of the act of congress of April 24, 1820, entitled, "An act making further provision for the sale of public lands," and in conformity with the several acts of congress in such case made and provided. Section 1 of the act of April 24, 1820, and other acts, under certain circumstances, authorized the sale of public lands in sections, halves, quarters and half sections. See U. S. R. S., ch. 7.

There is, therefore, nothing on the face of the patent tending to show that the quantity of the land conveyed by it, was in excess of the quantity authorized by law to be conveyed.

It is claimed that inasmuch as the patent grants the land to Charles B. Lamborn, *trustee*, without declaring the trust, the land was granted in trust for the grantor. It does not necessarily result that the grantor of the land in trust in this case is the beneficiary intended by the trust.

Dillage v. Greenough, 45 N. Y. 438. Besides, Lamborn having conveyed the premises to the National Land and Improvement Company, in the absence of evidence to the contrary, we must presume that he properly conveyed in accordance with the trust, and not in violation of it. There was no evidence of fraud given upon the trial.

The requests for the court to give instructions based upon the theory that there was such evidence were, therefore, properly refused. The question of fact, whether Cowell had accepted the deed to him, and the condition, was fairly submitted to the jury. If the jury had found in favor of appellant upon the question under the instruction, the verdict would have been in his favor, but they found against him. This established the fact that he accepted the deed and the condition, and was bound by it.

Requests to instruct the jury, based upon the hypothesis of fact antecedent to the deed, were, therefore, properly refused.

The appellant's counsel contend that the condition in the deed to appellant was repugnant to the estate granted by the deed, and is therefore invalid. A condition similar to that in appellant's deed was held not repugnant to the grant, and that the grantor might recover in ejectment upon proof of the breach, without previous entry, demand or notice. We assent to the doctrine and reasoning in *Plumb v. Tubs*, 41 N. Y. 442. See, also, *Collins Manf. Co. v. Mercy*, 25 Conn. 242.

The exception to the instruction goes to the whole charge, and error cannot be maintained upon a part of it. We see no error in the instructions.

Judgment affirmed.

FOREIGN CORPORATIONS MAY CARRY ON BUSINESS within the State, in the absence of a prohibitory statute, upon the principle of comity: *Cowell v. Springs Co.* 100 U. S. 55, affirming the judgment in the principal case.

RIGHT TO HOLD REALTY.—Where a statute authorizes a corporation to hold real property for the purposes of its business, inquiry as to what real property is necessary is a question between it and the state, and does not concern third parties: *Cowell v. Springs Co.* 100 U. S. 55.

TRUST.—Where a patent to land adds to the name of the grantee the word "trustee," without mentioning any trust, such addition does not prevent the passing of the legal title. If a trust is in fact created, it is for the *cestui que trust* and no one else to complain of its non-execution: *Cowell v. Springs Co.* 100 U. S. 55, affirming the judgment in the principal case.

inform themselves of the nature of the stream and the amount of water which may reasonably be expected to flow therein, and to properly and safely locate and construct the road across such stream, as a man of the highest prudence, skillfulness and care would exercise in the like case.

They are bound to foresee not only the ordinary freshets usually occurring in the stream, but also such other freshets and floods as, though not usual, may, nevertheless, by the highest diligence and care in examination and inquiry, be anticipated, and then, so far as the highest degree of diligence and care will avail; to this, they are bound to so locate and construct the road-way as that it may not be endangered upon such occasions.

The corporation is not, however, bound to provide against such floods as are unprecedented, or that which cannot, by the degree of diligence above required of them, be foreseen."

Want of such care in the construction of the road was apparently regarded as ordinary negligence upon which the company would be liable for compensatory damages. And as to gross negligence and exemplary damages, the court charged as follows:

"If, however, you believe from the evidence that the defendant's engineer in charge of the construction of the bridge did in fact foresee that such a flood as that which is said to have occurred would or might probably occur, and that the bridge, as constructed, might probably go out, and yet, out of mere complacency to the convenience of it to the contractor Keating, permitted him to change the location of the bridge and construct a dump of unsafe and improper length at its eastern approach, then this was gross negligence, and in such case you will be warranted in allowing exemplary damages sufficient to punish the defendant for the gross negligence of its agents (which is its own negligence), and such damages should be proportioned to the degree of negligence as the same appears from the evidence

to have been exhibited by the defendant's employees, and all circumstances of aggravation or mitigation appearing in the evidence."

With reference to the measure of damages and the ground of plaintiff's recovery, the court charged as follows :

"The life of the son and his filial affection and attention is undoubtedly of some pecuniary value to the parent in all cases. It is upon this ground that the law allows the action in favor of the parent. In determining what that value was in the parent's instance, you should consider the evidence as to the relations between the parties prior to the son's death, and from the data given thereby you must deduce a rule which may seem to you to be just between these parties ; you are not, however, to award any thing for the suffering or pain, if any, experienced by the decedent, nor for the mental suffering of the father at his bereavement."

It appeared incidentally that deceased was a laborer, but the evidence was not directed to the matter of his probable earnings, his condition in life, etc., and the case was not put before the jury, in respect to damages, in the manner suggested in the opinion of the court. Other facts are sufficiently stated in the opinion. A great many points raised in the assignment of errors are not noticed by the court, and therefore no statement of them is necessary.

Messrs. SAYRE, WRIGHT & BUTLER, for appellant.

Mr. T. G. PUTNAM, for appellee.

HALLETT, C. J. Briefly stated, the facts in this case, as given in evidence at the trial below, appear to be as follows :

In July, 1872, a violent rain storm occurred on the line of appellant's road, and produced a flood in a dry ravine or arroya, called Coon creek, which falls into Big Sandy creek. Thereby an embankment leading up to a bridge at the mouth of the arroya was washed out, and a midnight train, bearing appellee's intestate as a passenger, plunged

into the chasm, and the latter, with others, was killed. Negligence is not imputed to the persons in charge of the train, but the question is, whether the road was properly constructed at the place where the accident occurred. In describing the place, the witnesses speak of an old channel of the Sandy, which, with the space intervening between that channel and the new channel of that stream, formed a semi-circular basin, which was traversed by the railroad proceeding from east to west along the course of Sandy. Into this basin, on the north side of the railroad, the dry channel of Coon creek came, and the channel of Sandy, which was almost as dry as its tributary, was on the south side of the railroad and 150 to 200 feet distant from the latter. At bottom, the basin was somewhat unequal, but the old channel was quite level; according to some witnesses, it inclined slightly to the east, but not enough probably to affect very greatly the flow of water therein. In general elevation, it was several feet lower than the surrounding country, and but little higher than the bed of Sandy. A bridge 70 feet in length was located 40 or 50 feet from the east bank of the basin, apparently, to allow water discharged out of Coon creek to pass down to the new channel of Sandy. Connecting the bridge with the rim of the basin at the east, was the embankment which washed away, and which was made of earth taken from a cut which led up to the basin. The evidence was clear to the point, that the earth or sand used in the embankment would not resist the action of water, and of course, it was not adapted to the use which was made of it. The engineer in charge of the work, when the road was constructed, directed that the bridge should be located at or near the east bank, but afterward, upon a suggestion from the person who was grading the road, he allowed it to be placed further west. Indications of water having been in the channel, existed at the time the road was built, but it was not clear that any considerable volume of water had passed through the channel. One witness, who assisted in building the bridge,

gave some account of a flood which occurred while he was at work there, but he was not certain as to the locality; and from other testimony, it is probable that he was mistaken as to the place. However that fact may be, the witness was undoubtedly in that neighborhood and his testimony is of some value, as tending to prove that storms prevailed in that region of country at the time the road was built, and that the officers of the company knew or might have known that the road would suffer from great floods. Within knowledge of the people of the vicinage, no such storm as that which caused the disaster had occurred, nor had any such volume of water been seen in the channel of Coon creek. On the night in question, it was probably five feet deep and it flowed with a rapid current.

Upon these facts, a principal question presented in the record is, whether the road at the point where the accident occurred was properly constructed to resist the action of the elements upon it. That the company was bound to exercise the highest degree of care in that respect is conceded, and if the officers of the company knew, or could have ascertained by diligent inquiry, the danger to which the road was exposed, they were bound to guard against it. This is the principle founded upon public policy which was recognized by this court in a case which grew out of the same accident (2 Col. 442), and it is supported by unquestionable authority. Floods of the volume and violence of which destroyed the road, although infrequent, were not unknown on the plains, and in the region of country where the accident occurred. One witness had some knowledge of six storms of much the same character within the Territory, and another gave an account of one which occurred near the scene of the disaster at the time when the road was built. Aside from this, the fact that such storms have visited different localities, and their destructive power is part of the history of the country, of which we are justified in taking some notice; it is true, that this peculiarity of the climate was not as well known

in the year 1870, when the road was built, as it is at present, but it was then sufficiently known to demand the attention of the company.

It is true also, as the evidence shows, that these storms are erratic, rarely recurring in the same place and usually confined to a small territory. That circumstance may be sufficient to relieve a railroad company from the imputation of negligence which might be inferred from a failure to provide a sufficient water-way in places where there is no natural channel, and nothing in the topography of the country to suggest danger from water. We shall presently show that the same circumstance will often rebut a presumption of willful misconduct in constructing the road, but it cannot avail to relieve a company from the duty of providing sufficient water ways in places where, as in the case at bar, there is a natural channel which drains a considerable territory. Experience proves that in such places large bodies of water may accumulate, and although this does not often occur, the safety of the traveling public demands that ample provision shall be made for it.

Referring to the evidence in this case, it is only necessary to say in this connection that the embankment which was washed away was manifestly inadequate to withstand a large body of water, as the catastrophe which gave rise to this suit sadly proved; and the company was negligent in placing it there. The case of *Withers v. The North Kent Ry. Co.*, 3 H. & N. 969, in which, upon facts somewhat analogous, the company was discharged, is not controlling, for in that case negligence was not shown. In a humid climate it may not be necessary to guard against such torrents as that which swept over appellant's road, but with us the necessity exists, and railroad companies should recognize it.

To these general remarks touching the liability of the company, something should be added upon the question of exemplary damages which was submitted to the jury. Of the right to such damages under the statute (9 Sess

117) it is enough to say that it was recognized in *Kansas Pacific Railway Co. v. Miller*, 2 Col. 442. But the application of the rule to cases of this kind must be with the limitations which obtain in other cases, and upon that point we have a valuable opinion from the supreme court of the United States. In *Milwaukee & St. Paul Railway Co. v. Arms*, 1 Otto, 489, degrees of negligence upon which so much learning has been expended are entirely discarded, and it is said that negligence alone is not to be visited with punitive damages. Willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences, is necessary to support a claim for such damages. Upon looking into this record we are unable to see that such misconduct or want of care in the construction of appellant's road was shown. The seventy foot bridge was shown to be sufficient to admit of the passage of all water that would in the ordinary course of nature flow down the arroya, and in view of all the evidence the fact that the location of it was changed when the road was in process of construction is not particularly significant. The channel at that point was nearly level from side to side and a projecting bank, a short distance above, afforded some protection to the eastern embankment. One engineer, who was not in the company's service, thought that the western embankment was in more danger from water than the eastern. It seems that for the water which might be expected to flow in that channel after ordinary rain storms (for at other times it had none), the bridge was as well located as it would have been if placed nearer the eastern rim of the basin.

And as to the flood which destroyed the road, the officers of the company had no greater reason to apprehend that it would fall in that place than elsewhere on their long line. True, there were indications of the action of water, but probably no greater than in many other valleys on the road, and certainly not sufficient to indicate that such torrents were of common occurrence there.

The law of these phenomena is little understood, and no one can say that a deluge will happen here or there, although there is some reason to expect it everywhere. The fault of the officers of the company appears to have been that they did not study the course of nature, and guard against her casual and fortuitous outbursts, rather than a willful and reckless disregard of duty. In this we have said there was negligence, but there was not willful misconduct, or that want of care which, in the presence of a known danger, is indifferent to consequences.

Cases may arise, presenting other features, as for instance—if no water-way should be provided in a place where one was manifestly needed, in which a different rule would be enforced, but upon the evidence in this record, we think there was no ground for punitive damages.

We come now to consider the true measure of compensatory damages in cases of this kind, a subject of great difficulty, upon which widely different opinions have been expressed. Whether the damages given by the statute are for the injury to the deceased, and such as he might have recovered, if he had lived, or for the loss sustained by the survivors in and by his death, is not entirely clear to the writer. But regarding the point as settled in favor of the latter proposition, by the decision of this court, to which reference has been made, and perhaps by the weight of authority also, there is still some difficulty in ascertaining the loss of the survivors. In many of the decisions the value of the life of the deceased is mentioned, and language of that kind is used in Miller's case, but this certainly does not mean the value of life in the abstract, for in that sense it would be simply incalculable. As a matter of sentiment, life has no pecuniary value, but considered with reference to the relations of deceased with others, it is capable of such estimate. In this sense a parent is entitled to the services of children during their minority, and to support and maintenance from them in his declining years; a husband is entitled to the assistance of his wife in the af-

fairs of life, and a wife is entitled to support from her husband; children may demand nurture and education from parents, and all these services may be compensated in some sort and degree by money. It is in this sense, with reference to the probable benefits that would have been derived by survivors from the life of the deceased, if he had lived, that the phrase should be understood in the law, for otherwise all will be left to the discretion of the jury. *Pennsylvania Railroad Co. v. Butler*, 57 Penn. St. 335. So understood there seems to be some doubt whether the recovery should be according to the needs of the survivors, and what they would have been entitled to demand from deceased if he had lived, or the probable accumulations of the latter to be appropriated to the use of the survivors. In a Georgia case a widow was allowed the present worth of a reasonable support for herself, according to the expectation of the husband's life in view of his condition and circumstances; and so also in Maryland. *Macon and Western R. R. Co. v. Johnson*, 38 Ga. 409; *B. & O. R. R. Co. v. State*, 33 Md. 542. So in California, it was held upon rehearing, contrary to the opinion first announced in the same case, that surviving children, however numerous, were entitled to support and education during minority, and this was the extent of the defendant's liability. *Taylor v. Western Pacific R. R. Co.*, 45 Cal. 332. The opposite view is maintained in North Carolina. *Kessler v. Smith*, 66 N. C. 154. And in the case before cited from 57 Penn., it is said that the loss is what the deceased would have probably earned, by his intellectual or bodily labor in his business or profession, during the residue of his life-time, and which would have gone for the benefit of his children, taking into consideration his age, ability and disposition to labor, and his habits of living and expenditure. The same rule has been adopted in Iowa. *Rose v. Des Moines Valley Ry. Co.*, 39 Iowa, 247. And in Illinois, apparently with the qualification that nothing shall be allowed, if the survivors were not in any degree dependent upon deceased for

support. *Chicago & Acton R. R. Co. v. Shannon*, 43 Ill. 399.

The authorities are, however, quite bewildering, and to review them at length would be very tiresome. The rule which gives to survivors the probable earnings of the deceased, if his life had not been cut off, is strongly supported by the consideration that it is of uniform operation and effect. Under it the recovery is the same under like circumstances, whether the beneficiary is husband, wife, child or parent, and no reason is perceived why it should not be so. This accords with what is said in *Illinois Central R. R. Co. v. Barron*, 5 Wall. 104, as to the theory of these acts; and it seems to be the better rule. Strong objections may be urged against it, but I do not perceive that any other rule is more defensible. Upon this it would seem that the view taken of the statute in the court below was incorrect. The jury should not have been required to return damages according to the filial affection and attention of deceased to his parents, for of these no pecuniary estimate could be made. The statute does not stand upon that idea, but upon the theory, that in old age, parents may rely upon children for support, in the same way as children demand the like care in infancy from their parents. The accumulations of the deceased, during the remainder of his life, having reference to his age, occupation, habits, bodily health and ability, would have furnished the true measure of compensatory damages. This is not applicable to all cases, as for instance, in the case of a child of tender years, it is not possible to show more than the age and sex, and the circumstances and condition in life of the parents. *Ihl v. Forty-Second Street R. R. Co.*, 47 N. Y. 318; *Pennsylvania R. R. Co. v. Keller*, 67 Penn. St. 305. So in the case of a wife, other data must be used, but the rule suggested seems to be applicable to adult males.

For the purpose of showing the probable duration of life, the Carlisle, or other approved tables may be used. *Rowley v. London & N. W. Ry. Co.*, 8 Exch. L. R. (1872-3)

221; *Donaldson v. Mississippi & Missouri R. R.*, 18 Iowa, 290.

If the views here expressed do not fully accord with what is said in Miller's case, it is thought necessary to modify that opinion. The evidence was stronger in that case, however, and probably we have not overruled it in any substantial point.

Several questions relating to the admissibility of testimony have been examined, but any discussion of them would be unprofitable. Without deciding whether the evidence at the trial was sufficient to prove the parentage of deceased, we think that more should have been offered. Doubtless, evidence to show that the alleged parents of deceased acknowledged the marital relation, and lived together as husband and wife, could have been obtained, and this should have been done.

The judgment of the district court is reversed with costs, and the cause remanded.

Judgment reversed.

EXEMPLARY DAMAGES, WHEN PROPER. — Exemplary damages should not be allowed for simple negligence, but only for wantonness and conscious indifference to consequences. *Denver etc. Ry. Co. v. Woodward*, 4 Colo. 8. In an action for causing death, the damages should be compensatory merely; *Denver etc. Ry. Co. v. Woodward*, 4 Colo. 168. And see *Kansas Pac. Ry. Co. v. Cutler*, 19 Kan. 99; *Murphy v. Hobbs*, 7 Colo. 582.

JAEGER v. WHITSETT et al.

1. That a deed is ineffectual to convey title as to part of the lands described is of itself no ground for setting aside the deed. Nor will a court of equity entertain a bill for compensation or damages, except as incidental to other relief, where there is an adequate remedy at law.
2. One accepting a deed of conveyance of land is bound to exercise ordinary prudence in examining the instrument, and cannot, in a suit against the grantor for alleged defects in the deed, excuse himself for this neglect upon the ground of his confidence in the grantor.

Appeal from District Court of Arapahoe County.

THIS was a suit in equity, commenced by John G. Jaeger, the appellant, in the district court of Arapahoe county, to recover money claimed to be due him by the appellees, Richard E. Whitsett and Fox Diefendorf, for an alleged

fraud practiced upon him by the appellees in the sale and conveyance of two lots in Larimer street in the city of Denver, and also to cancel the deed. The bill was dismissed upon the final hearing and a decree rendered in favor of Whitsett and Diefendorf, the defendants below, for costs. Thereupon Jaeger prosecutes this appeal. The facts are stated in the opinion.

Mr. T. G. PUTMAN, for appellant.

Mr. E. L. SMITH, for appellee.

HALLETT, C. J. The first objection is, that one of the defendants in the bill was not before the court when the decree was entered, and this, if correct, must have been because of the omission of appellant to serve him with process. Appellant was complainant in the bill, and if he proceeded to hearing and decree without bringing the proper parties into court, the error, if any was committed, is his own. The decree, however, recites that both defendants appeared, and the appeal bond was given to both of them. Upon this we are authorized to assume, in this appeal at least, that Diefendorf is a party to the decree. The bill charges that in the year 1868, appellant purchased from appellee certain lots in the city of Denver, and took from them a deed without any of the usual covenants for title. That the grantors agreed to convey by deed of general warranty, and relying upon that assurance, appellant did not read the deed, or cause it to be examined at the time it was delivered to him. That the words "warranty deed," were printed on the back of the instrument in large letters, and thereby appellant was misled as to its character. That at the time of the purchase, appellees assured appellant that they owned the whole of the lots in fee, but the fact is, that a portion of each lot was owned by a third party and not by appellees. That appellant has entered upon and improved the lots, was compelled to buy in this outstanding title at a cost of \$500. Wherefore he prays that the deed to him may be

canceled in so far as it pretends to convey the parts of lots not owned by appellees, and that the court will decree to him what shall appear to be due him. There was also a prayer for general relief. Whitsett alone answered the bill, admitting that he executed the deed, and denying that he agreed to convey with warranty, and that he made any representations respecting the title. Appellant replied to the answer, the cause was referred to a master, and upon the coming in of the report a hearing was had, resulting in the dismissal of the bill. We find some difficulty in referring the case to any distinct head of Equity Jurisdiction. Appellant has not offered to reconvey or surrender the lots purchased by him, and therefore we cannot say that he desired to rescind the contract. It is true that he asks that the deed to him be canceled, in so far as it relates to the parts of lots not owned by appellees, but this prayer, if we could grant it, would afford no relief. If the deed is now ineffectual to convey title as to parts of the lots, that, in itself, is not a reason for setting it aside, nor is it a ground upon which appellant may demand money paid by him for an outstanding title. The charge that appellees agreed to convey with warranty, and by false representations induced appellant to accept a deed without such covenant, may, if true, be a ground for reforming the instrument, but such relief is not demanded. If, however, the general prayer extends to all relief that may be properly granted upon the facts alleged, it is doubtful whether the damages which might perhaps be recovered upon a covenant of warranty in an action at law can be awarded in equity upon a bill to reform the deed. The general rule is, that courts of equity will not entertain bills for compensation or damages, except as incidental to other relief where an adequate remedy for such compensation or damages lies at law. Story's Eq. Jur., § 798. Whether under this rule upon bill to compel a conveyance with warranty damages resulting from defects in the title to the property purchased, can be recovered, is at least doubtful. And certainly in so far as relief

is grounded upon alleged false representations respecting the title to the lot, there is adequate remedy at law for the deceit. The theory of the bill appears to be that certain false representations were made by appellees respecting the deed, and also the title to the lots, upon proof of which appellant will be entitled to moneys expended in perfecting the title. That such a bill may be maintained for damages merely, is by no means certain, but we do not intend to decide the point. There would still remain the question, whether the bill may stand for specific performance of the contract in respect to the covenant of warranty, rejecting the prayer for damages, and this, together with all other questions, may be determined upon the facts, without reference to the form or nature of the remedy. As to the alleged agreement to convey the lots with warranty it is affirmed by appellant, and denied by one of the appellees, who alone testify respecting it, and the evidence does not preponderate upon one side or the other. The words printed on the back of the deed were probably misleading, and we cannot say that the use of them was consistent with the highest morality. But such words would not induce a man of ordinary prudence to accept a deed without examination. In respect to such instruments, great care is usually exercised, and the advice of counsel is taken. Indeed appellant testifies that upon another occasion he purchased property from Whitsett, and he then consulted an attorney as to the deed which he received. That he did not pursue the same course in this instance was due to his confidence in appellees. It is not enough that he had confidence in the parties with whom he was dealing, but he was bound to exercise the care that men commonly give to such matters. *Mooney v. Miller*, 102 Mass. 217; Kerr on Frauds, etc., 82 *et seq.* He admits that he could read the deed, and it was of his own neglect that he did not do so. Upon the alleged representations as to title, the parties are opposed in testimony in the same manner as upon the deed, and there are these additional circumstances. Appellant took an abstract of title, which

affords a presumption that he did not rely upon information obtained from appellees respecting it. He also testifies that another party was present on one occasion when Whitsett promised to be responsible for the title. In the conflict of testimony, it is a circumstance against him, that he did not call this third party to prove a fact so important, or at all events make some effort to obtain his testimony. This, however, is not very strong, for the witness may have removed to parts unknown; but casting this out, we are unable to say that false representations as to the title were in fact made as charged, and so the proof fails upon this point as well as upon the other.

The decree of the district court is affirmed with costs.

Affirmed.

PACKARD v. SPELLINGS.

In reserving exceptions, the correct practice is to set down the rulings and exceptions of each term in a separate bill, and procure the signature and seal of the judge at the term, or within a time fixed, and to file the bill as of the term to which it properly belongs. But a bill of exceptions may embody the proceedings in a cause had at different terms, and if perfected within the time fixed by the court, it will be allowed to stand.

Error to the Probate Court of Arapahoe County.

Messrs. PATTERSON & CAMPBELL, for defendants in error, now moved to suppress so much of the bill of exceptions in this cause as set forth the evidence and proceedings upon the trial. The grounds of the motion are stated in the opinion.

Messrs. SAYRE & WRIGHT, *contra*.

HALLETT, C. J. The cause was tried at the June term, 1875, of the probate court, resulting in a verdict against plaintiffs in error, who were defendants in that court. Ex-

ceptions taken by plaintiffs in error to certain rulings of the court, at the trial, were not then drawn up in form, but time was allowed for that purpose, extending sixty days from and after the 30th day of June. A motion for new trial was also entered at the same term, but this was not determined until the 10th day of July following, which was one of the days of the July term. On the day last mentioned, the motion was overruled, to which plaintiffs in error reserved exceptions, and sixty days were allowed for tendering a bill. Judgment having been entered on the verdict, all exceptions taken at the June term, as well as the exceptions to the ruling upon the motion for new trial at the July term, were incorporated in one bill and tendered to the judge on the 18th day of August, which it will be observed was within the time fixed by the order of June 30th, and by the order of July 10th as well. The bill was not signed until Dec. 21st, when certain objections were made to the probate judge, which it will not be necessary to notice except in so far as they are renewed in the present motion. The exact language of the motion is to suppress so much of the bill of exceptions as sets forth the evidence and proceedings upon the trial of the cause, and several reasons are assigned which will be referred to hereafter. Confusion appears to have arisen from the circumstance that the rulings and decisions of the court at the June term are embraced in the same paper with the ruling upon the motion for new trial, which was made at the July term, and the whole is entitled and was filed as of the July term. The correct practice in such case is to set down the rulings and exceptions of each term in a separate bill, and procure the signature and seal of the judge at the term or within the time fixed by the court, and file it as of the term to which it properly belongs. Anciently, the course was to authenticate each exception separately, but in modern practice, all exceptions taken during the trial are usually put into one bill which is sufficiently attested

by the signature and seal of the judge at the foot. *Pomeroy's Lessee v. Bank of Indiana*, 1 Wall. 592.

If exceptions taken at several terms are included in one bill, doubts will often arise as to the time when such exceptions were entered, and therefore exceptions taken at each term should be separately authenticated. In this instance, however, no such doubt exists, for it appears distinctly in the proceedings of the court and in the bill of exceptions also, that the trial occurred at the June term and that the motion for new trial was determined at the July term.

Upon this, we perceive that so much of the bill of exceptions as sets forth the proceedings at the trial properly belongs to the June term of court, while that which contains the ruling upon the motion for new trial, is of the July term. That the bill was not filed as of the June term is not in itself an objection, for as was said in *Eldred v. Malloy*, 2 Col. 20, if signed and sealed at the term, or within a time fixed by the court, it may be filed on a subsequent day. Objection is not made that the bill, although presented to the judge within the time specified in both orders, was not, in fact, signed until long after such time had expired, and if that should be urged, it does not appear whether the delay was occasioned by the judge or by one or both of the parties. *Underwood v. Hossack*, 40 Ill. 98.

Referring to the first and second objections, that the bill was filed and entitled as of the July term, it should be observed that, framed as this bill was, to embrace all exceptions taken at both terms, it was impossible to file it with technical accuracy. If filed as of the June term, it would be said that the ruling upon the motion for new trial was not of that term, and being filed of the July term, it is now said that the proceedings at the trial are not of that term. But these, it is believed, are matters of form rather than of substance, and since we are able to discover the true place of each exception in the record, and the bill was prepared and perfected within the time fixed by the court, we will allow it to stand. Of the same nature is the objection that

the bill was not signed and sealed, as of the term in which the cause was tried, and that it is entitled improperly. Upon what is here alleged we are warranted in assuming that the bill was signed and sealed within a time allowed for that purpose at both terms, and this we have always regarded as sufficient. Clearly distinguishable from this case, and from every other determined in this court, is the case of *Kansas Pacific Railway Co. v. Twombly, admx.*, 2 Col. 559, which it was supposed would control the decision of this motion. In that case, a motion for new trial was heard and determined at a term subsequent to that in which the trial occurred, and a principal question was, whether matters occurring at the trial, if renewed in the motion for new trial, were thereby presented for review in this court. The bill of exceptions not having been perfected at the trial term, nor within a time then allowed for that purpose, rulings and decisions of the court upon the trial of the cause were not properly presented in it, and the only matter thereby presented was the ruling upon the motion for a new trial. The evidence given at the trial and the charge of the court to the jury, was regarded as necessary to a correct understanding of the decision of the court upon that motion, and therefore these matters were properly incorporated in the bill of exceptions. The power of the court to hear and determine the motion after the trial term was not doubted, and if the motion could be heard at that time, the right of the parties to except to the rulings of the court and to demand the judgment of this court in review, upon all matters properly presented in and by that motion, was equally clear.

In such case, to limit the aggrieved party to the naked motion, and deny his right to insert the evidence and the charge of the court, without which the presumption would obtain, that the ruling was correct, would be to deprive him of the benefit of his exception. But the right to record exceptions taken at the trial, after the term has passed, when no order was allowed for that purpose, was not then affirmed, but expressly denied; and so the rule was declared in *Or-*

man v. Keith, 1 Col. 82, and in *Murphy v. Cunningham*, id. 467.

In the present case, a just regard for the same rule is maintained, for as to the exceptions entered at the June term, and that which was entered at the July term as well, the bill was tendered to the judge, within the time prescribed by the court, and if it was not then signed and sealed, that fact is not made a ground of objection.

The third ground assigned in the motion, that it does not appear in the bill of exceptions who were defendants in the cause, is hardly worthy of notice, and the other grounds have been sufficiently discussed.

The motion is

Denied.

MARTIN v. COLE.

1. The legal import of a blank indorsement upon a promissory note cannot be varied by parol.
2. Where a cause is tried by the court without a jury, exception must be taken to the judgment of the court if the party aggrieved wishes to have it reviewed in this court.

Error to the District Court of Arapahoe County.

ASSUMPSIT. On the 17th of July, 1868, Webb made his promissory note payable to Martin or order, eighteen months after date, for the sum of \$1,414.15, with interest at three per cent per month from date until paid. The note was indorsed, "Pay to the order of Luther A. Cole, value received. John H. Martin." Cole as indorsee sued Martin as indorser. The cause was tried by the court without a jury, and the plaintiff recovered judgment for \$2,478.07. Thereupon Martin sued out this writ of error.

Mr. THOMAS G. PUTNAM, for plaintiff in error.

Messrs. SAYRE & WRIGHT, for defendant in error.

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A. W. STONE, J. This is an action by an indorsee against the indorser of a promissory note. The defendant filed a special plea, setting up a parol contemporaneous agreement between himself and the plaintiff, that the indorsement was made in blank, to enable the holder to collect it in his own name, and that it should never be filled up so as to make the defendant liable in any manner upon the same. To this plea the plaintiff demurred, and the demurrer was sustained. The defendant sought to prove the facts set up in the plea, under the general issue. The judgment on the demurrer and the refusal of the court to admit the proof under the general issue, is assigned as error.

The extent and character of the undertaking by general indorsement is fixed by law. It is, that the note is due and payable according to its tenor, that the maker is of the ability to pay it when due, and that by the use of due diligence it is collectible. This legal import cannot be varied by parol. *Mason v. Burton*, 54 Ill. 349; *Beattie v. Browne*, 64 id. 360; *Campbell v. Robins*, 29 Ind. 271.

The plea and offer of proof is an attempt to make a general indorsement, a restrictive indorsement; that the contract made was different from that expressed.

This cannot be done without a violation of established principles. In the case of *Dale v. Gear*, 38 Conn. 18, the plea was substantially like the plea in this case, and a demurrer to it was sustained. The chief justice says: "It presents a naked case of an attempt to prove by parol that a clear and unambiguous contract of warranty is not such, and to contradict it in terms—to turn an indorsement without restriction before maturity, into a restricted indorsement. Such a plea cannot be sustained without a violation of essential principles."

He goes on to say: "It may be shown that there was an equity arising from an antecedent transaction, including an agreement that the note should be taken on the sole reliance and responsibility of the maker, and that it was indorsed

in order to transfer the title, in pursuance of such agreement, and that the attempt to enforce it is a fraud."

This case was again brought before the court on different pleadings, where this antecedent equity and a fraud in procuring the indorsement was plead, and the plea was sustained. 39 Conn. 89. Such cases are exceptions to the general rule.

The plea contains no averment of fact, which constitutes an exception to the general rule, and the offer of proof is but a repetition of the facts stated in the plea.

The authorities cited, when applied to the facts of the case, do not sustain the position of the learned counsel for the plaintiff in error. The motion to suppress certain interrogatories and depositions was properly overruled. Whether the evidence showed that the property of Webb, the maker of the note, was exhausted or not, it is not necessary to consider, as no exception was taken to the finding and judgment of the court. *Phelps v. Spruance*, 1 Col. 414. The judgment of the court is *Affirmed*.

LEGAL IMPORT OF A BLANK INDORSEMENT UPON NOTE cannot be varied by parol, so as to prove an indorsement without recourse: *Martin v. Cole*, 104 U. S. 30, affirming the judgment in the principal case, and *Dunn v. Ghost*, 5 Colo. 136, 137.

ASSIGNEE OF NOTE—DUTIES OF.—The statute requiring the assignee of a promissory note to exhaust the remedies against the maker before proceeding against the assignor considered: *Martin v. Cole*, 104 U. S. 30, affirming the judgment in the principal case. The question whether an execution sued out on a judgment recovered by the assignee against the maker of the note would have been unavailing is, for the purpose of fixing the liability of the assignor, determined by the finding in the principal case that the maker was insolvent: *Martin v. Cole*, 104 U. S. 30.

BROWN et al. v. THE PEOPLE, for use, etc.

1. Under an execution commanding the sheriff "to have the money ready to render to the plaintiff," upon the return day, the sheriff cannot discharge himself from liability to the plaintiff, by paying the money to the clerk and taking his receipt. Nor does such payment meet the requirements of the practice in paying money into court.
2. Where a defendant is permitted to litigate under the general issue, facts set up in a special plea, to which a demurrer has been sustained, the sustaining of the demurrer, though erroneous, is not a ground for reversal.

Appeal from District Court of Gilpin County.

ACTION of debt on a sheriff's bond. The facts are stated in the opinion.

Mr. G. B. REED, for appellants.

Mr. ALVIN MARSH, for appellees.

BRAZEE, J. The præcipe for summons in this action was filed April 13th, 1872. The declaration in debt was on the bond of Alexander K. Brown, as sheriff; damages claimed, \$2,000; the breach averred was, that said Doggett Bassett and Hills recovered a judgment, upon which execution against the goods and chattels of Deitman Schneider, the judgment debtor, for \$990.90 damages, besides interest and costs, issued, and Brown, as sheriff, levied the execution upon property which he sold, received the money therefor, and returned the execution satisfied. Pleas: 1st, *nil debet*; 2d, general performance of duty by Brown as sheriff; 3d, that said Brown, as sheriff, levied the execution, sold the goods for cash, and returned said execution into the office of the clerk of the court satisfied in full; that he paid the money received on the sale into court, and into the hands of the clerk of the court at his office in Central City, in Gilpin county, and took the clerk's receipt therefor, on the 27th day of September, 1871. The plaintiff replied generally, to the second plea, and demurred to the third plea specially, as follows: 1st, there was no authority to pay the money to the clerk; 2d, there was no authority in the clerk to receive it; 3d, the clerk is not holden on his official bond for the money so received. This demurrer was sustained, and the defendants stood by their plea; the cause was tried by the court; finding \$1,000 for the plaintiffs; judgment given for that sum, with costs.

It is assigned for error that the demurrer was erroneously sustained.

This brings up for consideration and determination, what is a payment into court, in the legal acceptance of that

phrase. In respect to the circumstance under which money may be paid into court by a defendant in an action, the general rule is, that when the sum sued for is certain, or is capable of being made certain, the defendant is at liberty to bring the money into court. 1 Burrill's Pr. (2d ed.) p. 406.

In the case at bar, the sum in controversy was certain, or capable of being made so by a simple computation of the interest, and, therefore, under the rule, the money might be paid in.

In respect to when the money may be paid into court, in a proper case, BULLER, J. (1 T. R. 711), says: "Where the defendant is entitled to pay the money into court, it is a matter of course before plea pleaded, and now, even after plea pleaded, it is perpetually done by obtaining the judge's order for that purpose." The practice in New York, when the common law practice prevailed there, in case payment into court was made before plea pleaded, was to enter in the common rule book, a rule to authorize the payment of the money, and take the receipt of the clerk (3 Cow. 337; 1 Johns. 149-150); but the clerk was not authorized to receive money as paid into court, without a rule permitting him to receive it, and where he had so received money without a rule, a motion for the payment of money made on the writ, to the plaintiff after the clerk had returned the money to the defendant, was denied. 1 Wend. 103. Where money is properly paid into court, it is a payment *pro tanto* (Id. 191); after it is paid in, the plaintiff cannot have a verdict, unless he recover in damages and costs more than the sum paid (1 T. R. 710-711), and the plaintiff is entitled to costs to the time of payment. Id. 629, and 1 Johns. 149. The payment is an acknowledgment by the defendant, that the plaintiff is entitled to recover the sum so paid (1 T. R. 464), and this admission he is not permitted to deny. *Malcolm v. Fullerton*, 2 T. R. 648.

A sheriff was ruled to return an execution after suit brought; he did so, and paid the money into court, without

a special order permitting it, and pleaded such payment, and that the plaintiff had accepted the money; replication that the plaintiff had not accepted; demurrer to plea, and joinder in demurrer; the court said: "After an action is commenced against a sheriff for money received upon an execution, he stands upon the same footing as other creditors, and cannot discharge himself, by simply bringing the money into court. He can pay it into court, but then the payment must be made in the manner established by the rules and practice of the court," citing 3 Cow. 336; 1 Wend. 540.

In *Brewster v. Van Ness*, 18 Johns. 133, the sheriff was attached for not paying money made on execution to the plaintiff, and he was ruled to do so. There is *obiter* in the two last cases for the sheriff paying the money into court on the return of the execution, but that may have been based upon the mandate of the writ. The effect of such mandate will be considered hereafter.

A form of a plea of payment into court is given in 1 Chitty's Pl. (11th Am. ed., appendix) 741. These authorities are referred to for the purpose of showing the practice from an early day, at common law, in respect to the cases in which money may be paid into court in an action, and how and when, and the effect of such payment.

This cursory view of the practice enables us perhaps to understand more clearly what is the precise legal significance of the phrase, "pay money into court," and leads to the conclusion that such payment, in its technical meaning, is a defense, entire or partial, according to the circumstances of such particular case.

The case at bar is distinguished from each of those referred to, in its having been brought for money collected on execution by an officer of the court, and (as the third plea alleges) paid into court before suit brought to recover it.

It is to be considered then whether under any circumstances the defendant Brown, as sheriff, could pay the money into court and thereby discharge himself and sureties

from any liability to the plaintiff therefor; if he might have done so and paid the money into court, such payment, as we have seen, is a defense. At common law the sheriff was, by the writ, authorized to pay the money into court, for the *fi. fa.* commanded him to bring the money into court. Such was the form of execution and practice in England (HOLROYD, J., 5 B. & C. 630), and the same form and practice has prevailed to some extent in this country (2 Peters' C. C. 243; 28 Tex. 484; 4 Seld. 63), and the *fi. fa.* at common law was tested and made returnable in term time.

In Colorado, the practice of returning the execution in term time has been changed by the statute. Executions are made returnable in this Territory within ninety days from date, without reference to any term of court and, as in the case at bar, the mandate of the writ, in respect to the money made upon it, is "and have you these moneys ready to render to the plaintiff for damages and costs." It is a general rule that a sheriff is bound to execute the process of the court, according to the terms.

The sheriff was not directed by the execution in this case to pay the money into court, but to have the money ready to render to the plaintiff; he was not, therefore, authorized by the writ to pay the money to the clerk as payment into court. It was competent, however, for the court, out of which the execution issued, by its order, to have directed the sheriff to pay the money made upon it into court, *Acker v. Ledyard*, 4 Seld. 62, and such an order and the payment of the money into court in pursuance of it, would protect the sheriff and his sureties in an action afterward commenced to recover the money so paid. *Id.* This power of the court was fully maintained after elaborate research and consideration in *Stebbins v. Walker*, 14 N. J. (2 Green) 90.

We deduce from the cases referred to and many more carefully examined, the general rule, that the payment of money into court is payment to the clerk under the gen-

eral or special rule directing or permitting the payment, or by virtue of the mandate of the court in its process, or by the authority of law.

The plea to which the demurrer was sustained set up as a defense the payment of money into court, which, if made out, would have been a good defense in bar of the action, and the judgment should be reversed, because of overruling of this plea, if thereby the defendants were precluded from making this defense at the trial. We think the defendants could have availed themselves of this defense in the court below, under the plea of *nil debet*. Under the issue made by the plea of *nil debet* to the declaration, it was competent for the defendants to have given in evidence an order of the court for the payment of the money into court (if any such order was made) and the clerk's receipt therefor, and thereby to have shown that the sheriff had done his duty, and that the defendants were discharged from any liability for the money. 1 Chitty's Pl. (11th Am. ed.) 482. Under the plea of *nil debet*, the whole merits of this action, then, were put in issue. In such case, though a court sustain a special demurrer to a special plea, setting up matter of defense which may be given in evidence under another plea, the error in sustaining the demurrer is not a ground for reversal. *Chambers v. Clews*, 21 Wall. 317; *Grand Chute v. Winegar*, 15 id. 355; *Sloan S. M. & L. Co. v. Guttshall*, decided at this term (*ante*, page 8).

The sustaining of the demurrer, though erroneous, was harmless, and is not a cause for reversing the judgment.

The overruling of the motion for new trial and the giving of judgment assigned for error, are disposed of by the foregoing; the other errors assigned relate merely to matters within the discretion of the court and cannot be sustained.

The judgment is

Affirmed.

A. W. STONE, J. We all agree that the judgment of the district court should be affirmed, but as my views are to

some extent different from my learned associates, I will briefly state them.

Alexander K. Brown, as sheriff, by virtue of an execution in favor of Wm. E. Doggett et al. against Deitman Schneider, levied and made the sum of \$1,035.79, and returned the execution satisfied in full. The money was not paid to the plaintiffs, and to recover it this suit is brought on the official bond of the sheriff. The defendants filed a special plea that the said sheriff paid into court, and into the hands of one Wm. H. Salisbury, at that time clerk of the district court of the second judicial district, at his office, the full amount of the said judgment, interest and costs, and received from the said clerk a receipt in full for the amount paid. The plaintiffs demurred to this plea and for cause assigned that the sheriff had no authority to pay it to the clerk, and the clerk had no authority to receive it. The court sustained the demurrer, and the defendants abide by their plea. It was admitted that the sheriff, Brown, received the money on the execution; that he paid the money to Salisbury, and that Salisbury was the clerk of the district court for the second judicial district, Gilpin county. The plea of *nil debet* was filed and issue joined upon it, and the defendants could prove under this plea any matter admissible under the special plea; besides the matters of defense alleged in the special plea were admitted as facts, so that the defendants were not prejudiced by the judgment on the demurrer. The question for decision by this court is, is the payment by the sheriff, to the clerk of the court, of moneys collected by him on execution, a good payment as against the plaintiffs in execution. The writ commanded the sheriff to make the money and have it ready to render to the plaintiffs, and to return the writ with the manner of its execution. Originally it was the duty of the officer to have the money in court on the return day, there to be paid to the creditor. And it has been held that a payment to the creditor was no excuse to the officer for the non-performance of this duty. Such is not now the law. The sheriff

may pay the money to the plaintiff without bringing it into court. But to discharge himself, he must pay the money to the plaintiff, or pay it into court. If he has no doubt of the plaintiff's right to receive the money, he may pay it to him. If he has any doubt of the right of the plaintiff to receive it, he may pay it into court, and discharge himself from all responsibility.

What is such payment into court, as will discharge the sheriff?

Is a payment of money collected by the sheriff, in the absence of any law, order or rule of court, or any command in the writ so to do, a payment into court? I think not. The clerk derives all his powers from the statute, and in each case it must appear that what he did was within the authority conferred on him by law. He is appointed by the court, and is required by statute to give a bond in the sum of \$5,000, for the faithful performance of the duties of the office, and to pay over all moneys that may come into his hands by virtue of his office, and by virtue of his office is meant, acts within the duties of his office, and for which his sureties are responsible in case of his default. He is required to keep a fee book, in which he shall set down under the proper title, the cost of each suit, including his own, sheriff's and witnesses' fees, and after judgment make up the costs and charges of each party litigant, and include the costs of the prevailing party, and send out a bill of costs with the execution, and keep an alphabetical docket of all judgments and decrees, and to enter therein all final judgments and decrees rendered at any term, and when any judgment or decree is satisfied, he shall make a memorandum of it in the proper column. He is also required to keep a book and enter therein the returns of the sheriff or coroner. Ch. 70, §§ 34-37 and 39, R. S. He is required to pay over fines to the county treasurer. Ch. 21, § 20, R. S.; and to that end, a power to collect and receive such fines is necessarily implied. Other similar duties are also required of him. When money is paid into court, it re-

mains with the clerk, as the fiduciary of the court, and is under the immediate control of the court. It is his duty to issue the process of the court, for the collection of money, but not to collect it; he is not a collecting officer, nor the agent of the plaintiff to collect money for him; a payment to him, by the sheriff, of moneys collected on an execution is not a payment into court, unless the writ so directs it paid, or some order of the court is made so directing, which is a matter of record in the court, and is no payment or satisfaction of the judgment.

The clerk is the proper custodian of money brought into court, but payment to the clerk of money that he is not by law, or some order of the court, authorized to receive, is not a payment into court. To constitute a payment into court, it must be paid to the clerk, as an officer of the court, in term time, and evidenced by some record of the court, as in the case when a tender is plead, or otherwise brought into court to abide the judgment of the court, and is shown by some record of the court.

In the cases of *Mazyck v. Bell* and *Mazyck v. McEhoen*, 2 Bailey, was held that payments made after judgment in the cause, to the clerk of the court, was no discharge to the defendant; and that the clerk has no official authority to receive money in civil causes, except when money is paid into court; 1st, upon the tender pleaded; 2d, when the party paying has obtained leave of the court to do so. In all other cases he is the private agent of the party paying.

In *Currie v. Thomas*, 8 Port. 293, it was held that, independent of statutory enactments, money cannot be lawfully paid to the clerk in vacation, or in any manner than as the officer of the court, in term time. In *Tompkins v. Woodford*, 1 Penn. St. 156, it was held that a defendant in a judgment who pays to the prothonotary the debt and interest due on a judgment, pays it in his own wrong. Such payment is not good, the prothonotary having no authority to receive it. The clerk is not the agent of the party or the law. *Baer v. Kestler*, 4 Rawle, 364. Money paid to the

clerk, and entered by him on his docket as paid into court, will not affect the right of the plaintiffs to have his judgment revived. 3 Penn. St. 351.

A clerk of the superior or inferior court is not authorized by law to collect money on judgments or executions obtained in or sued out of their respective courts; and a payment made to a clerk, on a judgment, is not good, as a payment against the plaintiff.

The clerk is not the agent of the plaintiff to collect money for him. It is an act outside the duties of his office. *Bank of Georgetown v. Ault and Ault*, 31 Ga. 359; *DeLagarza v. Booth*, 28 Texas, 485.

The duties of clerk, neither directly nor indirectly, confer upon him any right, as clerk, to receive money on debts of record, of which he may be the custodian, and the payment to him of such demands, unless authorized by the party or specially directed by the court, furnishes no protection to the party making the payment. *Chinn v. Mitchell*, 2 Meto. (Ky.) 92; *Durant v. Gabby*, id. 91.

The clerk is not authorized to receive money paid into court, without a rule of court. *Baker v. Hunt*, 1 Wend. 103.

The authorities are uniform, so far as I am able to find, that payment to the clerk, of money on a judgment or execution, obtained in the court of which he is clerk, is no payment. He is not authorized to receive it. It is not a payment into court, unless made by order of court, or the command in the writ so directs. The only authority to the contrary is a dictum of Mr. Crocker, in his work on Sheriffs. He says, "the usual course is to pay over the moneys collected to the plaintiff, or the attorney, but it may be paid into court, that is, to the clerk of the court where the judgment record is filed, and where the execution is to be returned."

No authority is cited, and I think none can be found, unless he be understood as meaning paid to the clerk, by order of the court. If the sheriff brings money into court,

pursuant to the command of his writ, his act is official, and an end to his responsibility. But if he pay it to the clerk of the court, without an order of court, it is not in obedience to the command in the writ, and is no excuse for the sheriff when called on for the money.

When the sheriff returns an execution satisfied, he becomes liable to the plaintiff for the money, and the plaintiff may compel him to pay it, either by rule of court or action.

All the authorities cited by counsel for plaintiffs in error are to the effect, that payment into court is sufficient. That such is the law I have no doubt, but a payment to the clerk, as we have seen by the authorities, is not a payment into court, unless the command in the writ or some order of court so directs.

For these reasons, which I think are fully supported by authority, the judgment of the court should be *Affirmed*.

SPECIAL PLEA — DEMURRER — GENERAL ISSUE. — Where under the general issue, defendant is permitted to litigate facts set up in the special plea, to which a demurrer has been sustained, the sustaining of the demurrer, though erroneous, is not ground for a reversal: *Brown v. People*, 3 Colo. 115.

KANSAS PACIFIC RAILWAY CO. v. TWOMBLY, Administratrix.

1. The verdict of a jury in an action on the case will not be disturbed unless it appears to be clearly against the evidence, or without support.
2. On a railroad track, where cars frequently pass, every one is bound to be vigilant in his own protection, according to the common experience of men of ordinary prudence under like circumstances, but the want of such vigilance is matter of defense in an action against the railroad company to recover damages for injuries sustained because of its negligence.
3. Upon facts undisputed, the inference of negligence may be so strong that the law will not admit a right of action in the plaintiff, but where the facts are such that different minds may honestly draw different conclusions, it is proper to refer them to the jury to determine.
4. Where deceased crossed the railway track of defendant, and was met in a hurried manner by a friend on the adjacent parallel track of another road, thence turned back to defendant's track, and held there in conversation during the passage of a long train running at the speed of five or six miles an hour on the adjacent road, and having separated, the deceased was then

killed by a switch engine backing up on defendant's track in a direction opposite that of the passing train, the survivor having got twenty feet away before being apprised of the accident, and not having seen the switch engine, nor heard it because of the noise of the passing train; *held*, that the turning back of deceased was not an act of negligence which the law will recognize as such, but that it was properly left to the consideration of the jury; *held*, also, that it was properly left to the jury to determine whether or not the deceased was guilty of negligence, under the circumstances, in not observing the approaching engine.

Appeal from District Court of Arapahoe County.

THIS was an action on the case under the statute (act of 1872, p. 117), by Louisa Twombly, as administratrix of the estate of George W. K. Twombly, against the Kansas Pacific Railway Company, to recover damages for the death of the intestate, caused, as she alleged, by the negligence of the defendant in the management of a switch engine then being run on the defendant's track, at the intersection of I and Wynkoop streets in the city of Denver. The cause was tried at the September term, 1873, of the district court of Arapahoe county, resulting in a verdict for the plaintiff in \$5,000. A motion for a new trial having been interposed and overruled, the defendant appealed. The only question presented to this court for review was the ruling of the court below upon the motion for a new trial.

It appeared in evidence upon the trial that the defendant and the Rio Grande Railroad Company had railway tracks running parallel, between four and five feet apart, along Wynkoop street. The defendant's track was a broad gauge, located west of that of the Rio Grande, which was a narrow gauge. One James W. Truax was called by the plaintiff, and testified that he had known George W. K. Twombly since 1867, and saw him about one minute before his death; met him on the narrow gauge track on I street; it was in the part of the street used for wagons and the like; they stopped very near the gutter; did not see Twombly at the time it struck him; witness was going toward the river and put his hand on Twombly's shoulder, as the narrow gauge train was likely to pass, and caused him to move

on to the wide gauge track, and spoke to him — less than a minute, probably, about a plow; were at the time facing the depot, rather looking at the hind end of the passing narrow gauge train; witness passed along about twenty feet, heard an out-cry, and saw that the other engine had passed over and killed Twombly; the Kansas Pacific engine came from the south toward the depot, the direction in which they had been looking; the Rio Grande train was going south, and they were watching the hind end of it; witness scarcely stopped to speak, being in a great hurry; did not see the Kansas Pacific engine until it had run over Twombly; must have been some four or five steps, or twenty feet from the engine when it passed; when witness looked back, the Rio Grande train had very near, if not quite, cleared the way; when he met Twombly, was not inclined to wait, so took him along a few steps to speak to him; did not hear the Kansas Pacific engine approaching or any warning of it; the outcry was the first notice of it; did not hear any bell rung on it; should think the bell was not rung; the narrow gauge bell was ringing and witness' attention was drawn to that; saw or heard nothing of the Kansas Pacific engine until it had passed; did not think he could have mistaken the Kansas Pacific bell for the Rio Grande; the sounds of the two bells being very different and easily distinguishable; did not see Twombly when he was struck, but found him some thirty or forty feet toward the depot, from where he left him standing; his body was lying between the broad and narrow gauge tracks and the head lay between the two tracks; the Kansas Pacific engine was still in motion, passing toward the depot, when witness heard the outcry raised by some boys; the body was not moved after witness looked round; on hearing the outcry he missed Twombly and stepped back, and, as the engine got by, saw what it was; when witness left Twombly he stood by the division of the street and sidewalk, close by the gutter; the streets are eighty feet wide, of which twelve feet are used for a sidewalk; Twombly was just on the street side of the gutter; when witness met him both were walk-

ing fast and witness took him along because he had only just time to cross ahead of the narrow gauge; did not think the Kansas Pacific engine was moving faster than three or four miles an hour; the noise of the narrow gauge train drowned the noise of its approach; witness and Twombly were standing with their backs the way the train was going, and facing diagonally toward the train; had known Twombly since 1867, and did considerable business with him.

It also appeared that from the point where the accident occurred, the view was plain and unobstructed for some distance each way. That the deceased had lived in the immediate vicinity for a year or more. That the accident happened between half-past six and seven o'clock in the morning of July 1st, 1872.

It was insisted upon the argument by the appellant that deceased had been guilty of contributory negligence, and that the court below should have so held as matter of law upon the facts proved and should have set aside the verdict. The appellant also insisted:

"1. That this court must be governed by the common-law rule as to contributory negligence. That any negligence upon the part of the person injured, contributing to it, will prevent recovery.

2. That where the facts are undisputed, and there is no doubt as to the inferences to be drawn from such facts, the question of the existence of negligence is for the court and not for the jury.

3. That to pass on to or stand upon a railroad track, without looking in each direction, is negligence that will preclude any recovery for an accident to which such negligence contributes."

Messrs. SAYRE, WRIGHT & BUTLER, and Mr. J. P. USHER and Mr. C. E. BRETHERTON, for appellant.

Messrs. CHARLES & DILLON, for appellees.

HALLETT, C. J. At the last term we examined the bill of exceptions in this record, and the time and manner in which it was perfected, and arrived at the conclusion that the several rulings of the court in admitting and rejecting testimony at the trial, and in directions to the jury were not properly preserved, and that the only matter presented for review in this court is the ruling upon the motion for new trial. 2 Col. 559. According to that decision and an earlier case (2 Col. 169), the only question for present consideration is the finding of the jury, which we cannot disturb, unless it appears to be clearly against evidence or without support. This view is not controverted, but it is said that the evidence discloses a want of due care on the part of appellee's intestate at the time of the alleged injury, which contributed to the result. This, if true, will defeat the action, for it is considered that in a place of danger, such as a railroad track on which cars frequently pass, every one is bound to be vigilant in his own protection, according to the common experience of men of ordinary prudence under like circumstances. But it does not rest with the plaintiff to prove that deceased used such care and caution, although it is enough that the absence of it appears in his evidence. *Railroad Co. v. Gladmon*, 15 Wall. 401. Upon facts admitted or clearly proved the inference of negligence in the party injured is often so strong that the law will not admit the plaintiff's right of action, but in other cases it is said to be a question for the jury. *Railroad Co. v. Stout*, 17 Wall. 657.

It is often difficult to trace the line between these classes of cases, but here it appears to be quite distinct. The situation of deceased at the time of the accident was peculiar, and it is not at all certain that a prudent man under like circumstances would have behaved differently. Two railroad tracks were laid in a public street of the city of Denver, one of which was used by the Denver and Rio Grande Co. and the other by appellant. The general course of this street is said to be north and south, and it is

intersected at regular intervals by other streets crossing at right angles, all of which were used by the public. On one of these cross streets deceased came from the west first to the track of appellant, which was upon that side, and then to the track of the Rio Grande Co. on which a train was approaching from the north at a speed of five or six miles an hour. On this latter track and directly in front of the approaching train, deceased met one Truax, who put his hand on deceased's shoulder and pressed him back to appellant's track as if to speak to him. At the time he so met deceased, Truax was coming from the east in a rapid walk or run, and the Rio Grande train was so near the place of meeting that there was no time for words, and to use his own phrase, Truax carried deceased back in order that he might speak with him. In this it is supposed that deceased exhibited a want of care, for it is said, that having passed appellant's track in safety, he should not have returned to it. And perhaps this is so, but we must remember that all men do not decide wisely in sudden emergencies of danger. We are not very well informed as to Truax's manner in approaching deceased, except that it was hurried, and, therefore, we cannot say what the latter might have inferred from his conduct. Possibly Truax's appearance and bearing was such as to indicate that new dangers lay in the pathway of deceased, and certainly his conduct indicated that he had a matter of importance to impart. To hold as matter of law that a correct decision must be made upon the instant, under the circumstances, is too large a demand upon human infirmity. Nor can it be said with certainty that at the point of turning back, deceased had notice of the danger which awaited him on appellant's track. He had just crossed that track safely, and if, in doing so, he looked for a reasonable distance in each direction along the track, it does not appear that appellant's locomotive was then within such distance. If upon coming to a railroad track in a city, a footman is bound to look for cars in both directions (a point upon

which we express no opinion), it is plain that he is not, in all cases, required to look as far as the track may be seen. In cities and towns, railroad trains are usually moved slowly, and there is not the same reason for looking to a great distance along the track that obtains in the country where trains are driven at high speed. This may not be true everywhere in eastern States, where express trains are often taken through considerable towns and villages at high speed, but it is generally true with us, and the evidence warrants the belief that the roads in question were so used.

If, then, upon first coming to appellant's track as a footman, deceased looked in each direction for a reasonable distance, as it is said he was bound to do, it does not appear that the locomotive was then within such distance, and therefore it cannot be said that he was advised of danger from that locomotive. Nor if he saw the locomotive with the tender in advance, at a distance of several hundred feet, can it be said with certainty, that he knew that it was approaching him. In a front view, with piston and driving wheels in motion, the approach of an engine is much more easily detected, than when it is backed up, and the tender only, on low wheels, is in the line of vision. Upon this we conclude, that turning back from the Rio Grande track was not an act of negligence, which the law will recognize as such, but that matter was for the consideration of the jury, to whom it was properly referred, and we will now advert to what occurred afterward.

The carelessness imputed to deceased, at this point, is, in not looking for the approaching locomotive, for it is probable that he could not hear it, on account of the noise made by the Rio Grande train. If, as claimed by counsel, he remained on the track for a considerable time, without looking, there would be some ground for the charge, but the jury may have reached another conclusion on the evidence. The only witness to that interview was Truax, and although he stated that he and deceased stopped on the

track, at another time he says, that he "almost kept right along."

But few words were exchanged, and Truax ran away without seeing or hearing the approaching locomotive, and had gone but twenty feet when the accident occurred. Upon this the jury may have believed that deceased paused but a few seconds, and as to that, it stands in the same category with the other circumstances of this affair.

We think, therefore, that as a matter of law it cannot be said that the negligence of deceased directly contributed to his death, and whether this was true as matter of fact, was for the consideration of the jury. To them it was properly referred, and by them it has been determined, in conformity with established principles of law. Those principles are recognized in the following cases, with which, as we have learned from the argument, counsel are entirely familiar. *Railway Co. v. Whitlaw's Adm'r*, 13 Wall. 270; S. C., 2 Bissell, 282; *Wheelock v. Boston & Albany Railroad Co.*, 105 Mass. 203; *Marietta & Cincinnati Railroad Co. v. Picksley*, 24 Ohio St. 654. No point is made as to the negligence of appellant's servants, which appears to have been pretty clearly made out, and, therefore, we do not discuss it. As to the suggestion that the injury was inflicted by the Rio Grande train, it is not supported by the evidence, and the jury have found otherwise. Upon the whole case we see no reason to disturb the verdict, and the judgment will be affirmed, with costs. *Affirmed.*

AFFIRMED in *Railway Co. v. Trumbly*, 100 U. S. 578, as to effect on judgment of repeal of statute pending appeal, and what is reviewable on writ of error.

CONTRIBUTORY NEGLIGENCE—NONSUIT.—If plaintiff's evidence shows proximate contributory negligence as the cause of injury, a nonsuit is proper, but if not so shown and defendant's negligence is shown he must prove contributory negligence: *Denver v. Danmore*, 7 Colo. 341.

KELLER, Administrator, v. KLOPFER.

1. In an action of unlawful detainer (R. S., p. 333, § 5), where the complainant alleges a tenancy and a holding over, and there is evidence tending to show that the defendant is in occupation under an agreement to purchase, held, not error to instruct the jury that, if they should find the defendant went in under an agreement to purchase, the plaintiff could not recover.

2. A verbal lease by a *feme covert* of her real estate, though with the concurrence of her husband, is void.
3. Estoppels to be binding must be mutual.

Error to District Court of Arapahoe County.

THE defendant in the court below had judgment. The case is stated in the opinion.

Messrs. BROWNE & PUTNAM, for plaintiff in error.

Mr. E. L. SMITH, for defendant in error.

BRADLEE, J. This cause was commenced before a justice of the peace by the plaintiff's intestate, as landlord, against the defendant as tenant, holding over after the expiration of his time, without leave, under § 5, ch. 35, R. S., to recover possession of the premises, alleged to have been demised.

The lease set up in the complaint is the lease of Barbara Keller, the plaintiff's wife and intestate, to the defendant in 1869. The plaintiff at bar, we presume, has been substituted by the proper order, in the place of his deceased wife; although the record does not show any suggestion of Barbara's death, nor any order substituting her husband and administrator in her stead as party plaintiff, and no point is made by counsel upon this informality in the proceedings. The answer denies the lease averred in the complaint, and denies possession under it. Evidence on the part of the plaintiff tended to show an entry by defendant under a verbal lease, and the evidence on behalf of the defendants tends to show an entry under a verbal contract of sale by Keller, or Keller's wife, to Klopfer, or Klopfer's wife.

The first point made by the learned counsel of the plaintiff in error is, that the court below erroneously charged the jury, "that if the defendant went into the possession of the premises in question, under an agreement for sale thereof by Keller, or Keller's wife, to Klopfer, or Klopfer's wife, then, whether the agreement of sale was in writing or not, the plaintiff cannot recover."

The ground of objection urged to this instruction is, because the property belonged to Keller's wife, and, therefore, he could not make a contract for its sale that would bind her, and that Klopfer's wife was not involved in the issue.

Assuming that Keller could not make a valid contract of sale, yet if he made an invalid sale, and defendant entered under it, the entry manifestly would not be an entry under a lease; whether the sale was to Klopfer, or to Klopfer's wife, the result would be the same. The charge of the court in this respect was entirely proper.

The court also instructed the jury, "that if the alleged leasing by Keller's wife, to defendant, was verbal, and through the medium of her husband, acting as her agent, then, even though Keller was authorized to make such lease, or Mrs. Keller afterward ratified it, the relation of landlord and tenant was not created thereby, and the plaintiff cannot recover."

This instruction is assigned for error. It is to be borne in mind that there was no evidence given tending to show that the husband had been authorized, if at all, otherwise than verbally, to make the verbal lease. It is claimed by the learned counsel for the plaintiff, that a married woman at common law could lease her lands with the concurrence of her husband; no authority is cited for this proposition, excepting section 101, Taylor's Landlord and Tenant, but that section lays down the doctrine, that the husband at common law had the right to take possession, lease and receive the rents and profits of his wife's lands during the life of the wife, and if a living child be borne of the marriage, during his life. This right the husband has as tenant by the courtesy, but it is taken away by chapter 60, R. S. (with certain exceptions not necessary to mention), by which the rents, issues and profits of her lands are made her sole and separate property, not subject to the disposal of her husband, unless it may be in respect to such rights acquired by marriage in Colorado before the passage of the act.

That act, while it expressly authorizes a married woman to contract respecting her personal property and separate business, is silent in regard to her right to contract in relation to her real estate, hence I conclude that it was not the intention of the legislature to remove her disability to contract respecting her real estate, except in the manner pointed out by the statute and prescribed in the 17th section of the Conveyancing Act. Nor can it be said that this disability, as to verbal leases, is removed by section eight of the statute of frauds, which provides that every leasing for a longer period than one year shall be in writing; that section prescribes the manner in which competent persons may contract, and was not in my opinion intended to remove incompetency; to hold that, would be, it seems to me, to validate all verbal leases by infants, or other incompetent persons for one year. The lease in question was made, if at all, by a married woman, and must be sustained, if at all, by the common law. At common law, a married woman could only convey her estate by fine and recovery. Fines and recoveries were abolished by 3 and 4 William IV., ch. 74, and transfers of the wife's real estate by deed of the wife, with the concurrence of her husband, was substituted, provided that her deed should always be acknowledged in a private examination apart from the husband.

Chancellor KENT says (2 Kent's Comm. 154): "Upon the view of American law on the subject, we may conclude the general rule to be, that the wife may convey by deed; that she must be privately examined; that the husband must show his concurrence to the wife's conveyance by becoming a party to the deed." The disability of the wife to contract, so as to bind herself at common law, arises not from want of discretion, but because, by marriage, she is placed under the power and protection of the husband; he, therefore, was required to be present, and concur in her deed, as her protector from the impositions of others, and the law was likewise careful to protect the wife from the power which the law gave the husband over her person and prop-

erty, and, therefore, required the examination of the wife apart from her husband ; and the certificate of the officer taking the acknowledgment, that she, apart from her husband, acknowledged the execution of the deed, without any fear or compulsion from him.

This tenderness and care for the wife's interest, in requiring the wife's private examination and acknowledgment of the wife, to protect her from any coercion of the husband compelling the conveyance of her estate, has been adopted in Colorado ; to allow a conveyance by verbal lease for a year by a married woman, either apart from, or with her husband's concurrence, would leave her to the danger of imposition in the former case, and to the coercion of her husband in the latter.

The short length of time the estate conveyed by parol may run does not furnish a reason for an inference that the legislature intended to withdraw the protection which the law had thrown around a wife in disposing of her real estate, for in many instances the value of the yearly use of one parcel of real estate would far exceed the value of the fee of another.

The separate deed of a married woman, purporting to convey her real estate, is void (27 Penn. St. 13) ; as a rule, a wife is incapable of making any contract that can be enforced against her (48 id. 499) ; to be bound by her contract, she must follow the mode of contracting pointed out by the statutes. 7 Ohio St. 641.

We have considered the disability of a married woman to contract respecting her real estate under the common law as amended by statute before 1869, when the lease in question was made, if at all. If made, it is a verbal lease by a wife, although the husband may have concurred in the lease, yet being verbal, it could not be certified and acknowledged as required by the statute, and cannot, therefore, be upheld under the statute ; it was void. 2 Kent, 150.

But it is claimed that if the defendant entered under a

lease from a wife, he cannot be allowed to question its validity. This raises a question of estoppel which we proceed to consider.

All estoppels must be reciprocal and mutual to be binding. § 90, Taylor's Landlord and Tenant, and cases cited.

Mrs. Keller, a wife, was not bound by the void lease; so strongly does the rule prevail that a wife may avail herself of her coverture to defeat a contract, though she have been guilty of fraud in making it. 39 Penn. St. 299; 48 id. 472. Mrs. Keller, then, was not estopped; the act set up as an estoppel not being binding on her, there was no *mutuality*, and the defendant could not, therefore, be estopped by it; that transaction being void, did not create the relation of landlord and tenant. Without that relation this cause cannot be maintained in any view of the evidence; under section five of the statute, it is, therefore, unnecessary to discuss any other question raised by the argument. Perhaps this action might have been maintained under an allegation that the lease was void, and the premises were wrongfully claimed under color of a void lease, but that question is not raised by the complaint and we do not consider it.

Affirmed.

BEST v. HOPPIE.

1. To charge an indorser of a note as maker, it is necessary to show specifically that he put his name upon the back of the note before delivery to the payee.
2. The plaintiff had judgment against two defendants in an action before a justice of the peace; the case was removed into the district court by *certiorari*; in the latter court, the cause having been tried on the merits, was affirmed as to one, and dismissed as to the other of the defendants. The judgment of dismissal held to be a bar to a subsequent action against the defendant so prevailing.

Appeal from District Court of Gilpin County.

On the 16th day of April, 1872, L. C. Tolles and A. A. Smith made their promissory note for \$200, payable to

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the order of A. F. Hoppie, ninety days after date. The name of John Best was indorsed on the back of the note. On February 2, 1873, Hoppie sued all of the parties before a justice of the peace, and obtained judgment against Tolles and Best, Smith not having been found. Tolles and Best removed the cause in the district court of Gilpin county on a writ of *certiorari*, where the judgment was affirmed as to Tolles and dismissed as to Best. In September following, Hoppie again commenced suit in the district court against Best as maker, and recovered judgment for \$241.60 and costs. Best appealed.

Mr. CLINTON REED, for appellant.

Mr. L. C. ROCKWELL, for appellee.

A. W. STONE, J. Appellee sued appellant on a promissory note. Appellant plead, *first*, a former recovery on the same note by a judgment rendered by a justice of the peace; and *secondly*, a plea of a judgment on *certiorari* in the district court in favor of appellant.

The judgment in the district court was, that the action as to John Best be dismissed.

It is admitted the causes of action are the same. The "*certiorari* act" provides, "that in cases coming before the court on *certiorari*, the court shall proceed to give judgment in the cause as the right of the matter may appear, without regarding technical omissions, imperfections or defects in the proceedings before the justice, which did not affect the merits, and may affirm or reverse the judgment in whole or in part, or render such judgment as the facts and law will warrant."

The whole proceeding had by the justice was before the district court, and the court determined that the judgment against Tolles be affirmed, and as to Best, dismisses the action.

The only evidence in the case was a note signed by S. C. Tolles and A. A. Smith, with the name of John Best written

on the back of it. To charge Best, it was necessary to show specifically that he put his name on the back of the note before it was delivered to the payee. *Good v. Martin*, 1 Col. 165.

The plaintiff failed in this proof. He failed to make out his case. The judgment of dismissal was a judgment on the merits.

The plaintiff had elected to litigate his rights as to both defendants, in the justice's court and in the district court. The judgment as to Best was against him and he is bound by it. The former suit in judgment is a bar to this suit. *Zimmerman v. Zimmerman*, 15 Ill. 84; *Elwell v. McQueen*, 10 Wend. 520.

The judgment is reversed with costs.

Reversed.

CITY NATIONAL BANK v. GOODRICH, Assignee.

1. A mortgage of personal property consisting of goods in a merchant tailor. ing establishment is void as against creditors where the mortgagors by the consent of the mortgagee continue to carry on business, manufacturing and selling the goods, in the usual course.
2. Though a chattel mortgage to secure an antecedent debt may be good as between the parties, yet if, at the time of the transfer of the property mortgaged, the mortgagee has knowledge of the insolvency of the mortgagors, such transfer is in fraud of the Bankrupt Act and void as giving a preference to creditors.

Appeal from District Court of Arapahoe County

THE appellee brought an action in trover in the court below against the appellant, claiming to recover as assignee in bankruptcy the value of certain chattels, taken from Baxter & Hobson, by the appellant, under circumstances that rendered the taking a fraud within the meaning of sections 35 and 39 of the Bankrupt Act. Baxter & Hobson were, upon their own petition, adjudicated bankrupts, on the 19th day of May, 1873.

Up to about the 5th day of May, 1873, Baxter & Hobson had been engaged in carrying on the business of merchant tailoring.

About the 17th day of March, 1873, Baxter & Hobson were indebted to the appellant in the sum of \$2,500, which was secured by a chattel mortgage upon their stock of goods. Before the maturity of this indebtedness, and on the 5th of April, 1873, another arrangement was effected between Baxter & Hobson, and the appellant,—the indebtedness was made to mature thirty days thereafter, was increased from \$2,500 to \$2,700, and was secured by a new chattel mortgage on the stock and fixtures of Baxter & Hobson. The addition of \$200 to the indebtedness was made up of \$150—the estimated cost of foreclosing the chattel mortgage—and \$50 added by way of interest.

At this time, April 5th, 1873, as it appears in evidence, Baxter & Hobson had in their store about \$4,000 worth of goods, and accounts on their books in their favor for about \$1,200 more, which would make them worth about \$5,200, if the book accounts were all good. On the other hand, they were indebted to about the sum of \$2,000.

Between April 5th, 1873, and May 17th, 1873, Baxter & Hobson had received from the east, between \$2,000 and \$3,000 worth of goods, and had sold at least \$2,000, from which it appears that relatively the parties stood about the same on the 17th day of May, 1873, as they did on the 5th of April, 1873.

On the 17th day of May, 1873, the appellant took and removed the goods.

The mortgage under which the appellant claimed to, and did, take the goods, covered all the furnishing goods, trimmings, and fixtures of Baxter & Hobson, and permitted Baxter & Hobson to retain the possession and to use and enjoy the goods until default.

The mortgage was given to secure an antecedent indebtedness of Baxter & Hobson to the appellant.

The assignee claimed to recover the value of the goods

taken by the bank, for the reason that the bank had obtained a preference prohibited by the Bankrupt Act.

The cause was tried by the court without a jury, and the appellee had judgment for \$2,600.

Messrs. SAYRE, WRIGHT & BUTLER, for appellant.

Messrs. FRANCE & ROGERS, for appellee.

A. W. STONE, J. On the 5th day of April, 1873, Baxter & Hobson, being indebted to appellant in \$2,700, executed to it a note for that amount, due in thirty days, and a chattel mortgage on one hundred and forty-eight pieces of suitings; sixteen pieces of black doeskin; eight pieces beaver; two hundred pieces of casimeres; twelve pieces velvet; seventy-two pieces vestings, and all and every the furnishing goods, trimmings and fixtures, in their store in Denver. The mortgage contained the usual covenants and provisos, and a special proviso, that the mortgagors might retain possession of the mortgaged property, and use and enjoy the same, until default made, in the conditions of the mortgage. The mortgage was duly recorded. The note was not paid at maturity, and on May 8th, 1873, the mortgagee, with the consent of Baxter & Hobson, took possession of the goods, then in the store of Baxter & Hobson, ostensibly under, and by virtue of this mortgage. On the 19th day of May, 1873, Baxter & Hobson were adjudged bankrupts, and this suit is brought by their assignee to recover the goods so taken by the appellant.

The proof shows, that after the execution and delivery of the mortgage, the mortgagors continued in possession of the goods, and carried on their business in the ordinary course, manufacturing the goods mortgaged, and selling the same, as before the mortgage, up to the time that the mortgagee took possession, and that this was well known to the mortgagee.

The law in such case is, that the mortgage is fraudulent, and void as to creditors. This rule is too well settled to re-

quire argument. *Davis v. Ransom*, 18 Ill. 396; *Read v. Wilson*, 22 id. 377; *Griswold v. Sheldon*, 4 Comst. 580; *Bank of Leavenworth v. Hunt*, 11 Wall. 391; *Barnet v. Fugus*, 51 Ill. 352; *Chain v. Herbert*, 61 id. 126; *Putnam v. Osgood*, 52 N. H. 148; *In re Eldredge*, 2 Biss. U. S. C. C. R. 362.

The mortgage being void as to creditors, the appellant acquired nothing by it. The other question to be considered is the effect of the delivery of the goods by Baxter & Hobson to the appellant, on the 8th or 17th of May. Possession was taken on the 8th, but delivery was not perfected until the 17th of May.

The appellant assumed to take the goods by virtue of the mortgage, though it did not take the same goods described in it.

If the mortgage was valid between the parties, the mortgagee acquired no rights as against creditors under it, until the delivery to it of the property described in it, and at that time the proof shows that Baxter & Hobson were insolvent, and appellant knew it.

The effect of this transfer was, to secure the property to the appellant, and give it a preference, and that this effect was intended by both parties does not admit, upon the evidence, of any doubt. The transfer is in fraud of the Bankrupt Act, and void. Judgment affirmed, with costs.

Affirmed.

MORTGAGE OF STOCK OF GOODS is void as against creditors where the mortgagors by the consent of the mortgagee continue to carry on the business, manufacturing and selling the goods in the usual course: *Wilcox v. Jackson*, 7 Colo. 522; *Wilson v. Voight*, 9 Colo. 618; *Brasher v. Christophe*, 10 Colo. 233.

KANSAS PACIFIC RAILWAY CO. v. ROBERSON.

In the absence of proof of custom or usage to the contrary, a general hiring cannot be regarded as a contract for a year's service. The English rule in this regard is not recognized by American decisions.

Appeal from District Court of Arapahoe County.

THIS was an action commenced by Roberson, the appellee, against the Kansas Pacific Railway Company, the ap-

pellant, to recover \$3,000, alleged to be due from the company to Roberson, as its agent on the Pacific coast. The declaration alleged that the company, in consideration of Roberson becoming its agent at a salary of \$3,000 per annum, undertook to employ him in that capacity for a year from October 1st, 1870; that Roberson accepted the employment on those terms and continued in the employment until March 1st, 1871, and averred that he had been willing and offered to continue his services for the period of one year, but that the company refused to permit him to continue in said employment; that he was discharged, etc. The common counts were added and the plea of the general issue interposed. The cause was tried by the court, and Roberson recovered judgment for \$912.94.

Upon the trial it appeared that David H. Moffat was in San Francisco, in the summer of 1870; that he received a telegram from Mr. Perry, president of the Kansas Pacific Railway Company, asking witness to look out for a suitable person for agent of the company; that witness telegraphed back recommending Roberson; that after witness returned to Denver, he telegraphed Roberson, at the instance of an officer of the company, asking what salary he would require; that Roberson replied, \$3,000 per annum; that on the 20th of September, 1870, Roberson received a telegram from the general superintendent of the company as follows: "Will engage you to commence October 1st; the general ticket agent, R. B. Grinnell, will send you instructions by that date"; that Roberson subsequently received a letter from Grinnell, setting out the duties to be performed by Roberson as general agent; that in February, 1871, Roberson received a letter from Beverly R. Keim, general ticket agent of the company, stating that the company had concluded to discontinue the San Francisco office after March 1st, 1871. There was some further correspondence between Roberson and officers of the company, concerning his discharge. It appears that Roberson had received from the company \$1,250, for five months' service, and that

after March 1st, 1871, he had worked for other parties at a compensation of \$150 per month, until October 1st, 1871. It does not appear from the evidence that in Roberson's correspondence with any of the officers of the company, any period of service was fixed, but that he was employed as were other employees, so long as they gave satisfaction or their services were required, and that Roberson's services were no longer required by the company.

Messrs. SAYRE, WRIGHT & BUTLER, for appellant.

Mr. BELA M. HUGHES, for appellee.

HALLETT, C. J. Whether appellee was employed for one year or for a shorter time is the principal question presented in this record, and upon that, we think the judgment of the district court cannot be supported.

At the interview between Moffat and appellee in San Francisco, nothing was said about the terms of the employment, and the correspondence by telegraph, after Moffat returned to Denver, appears to have been directed to the matter of compensation to be paid to appellee, and not to the term of service.

Moffat testifies that an officer of the company wanted to know from him what appellee would ask for taking the place, and thereupon he inquired by telegraph: "What salary will you ask for Kansas appointment?" To this appellee answered: "Three thousand dollars per annum." Assuming that Moffat had authority from the company to make the inquiry, it was, in itself, an inquiry as to price, and not as to the term of service. It is quite certain that the officers of the company were not thinking of the term of service, for there was nothing in the question which they asked of Moffat, nor in the telegram sent to appellee by Moffat on that subject. Upon this it would seem that the answer ought not to be carried beyond the scope of the question, unless there is something in it which manifestly conveys a larger meaning. In ordinary intercourse, an

answer to a question will be taken for what it purports to be, rather than in any recondite sense which may, upon careful scrutiny, be found in it. Referring to the answer of appellee to Moffat's telegram, we find that it may be understood as fixing the *rate* of compensation, and if received by appellant, it probably was so understood. It is not denied that under some circumstances, such language may also refer to the term of service, as for instance, where the parties have previously discussed the subject, or there are other circumstances showing that the parties intended to make time a matter of stipulation. *Franklin Mining Co. v. Harris*, 24 Mich. 115, is a case in which it appeared, from the acts and declarations of the parties, that they intended to engage for a year, and an agreement to pay a certain sum *per annum* concurred to establish such a contract. But the case at bar is different, for the reply was in answer to a specific question concerning the price to be paid to appellee, and it may be, and probably was, understood as referring only to the rate of compensation. In support of this view we have the practical construction of the contract by the parties, which, in a doubtful case, is entitled to weight.

After entering upon the service, the salary was paid monthly and received by appellee apparently without objection, and this does not accord with the notion that he was working for a gross sum payable at the end of the year.

If, as contended, the telegrams show a yearly hiring, there was no stipulation for monthly payments and nothing would have been due until the contract was fully performed by appellee. *Stark v. Palmer*, 2 Pick. 267; *Olmstead v. Beale*, 19 id. 528.

If now we advert to the situation of the parties, which is also a circumstance to be considered, where the intention is not clearly expressed, we find nothing to support the theory that the contract was to continue for a year. Appellant was about to open an office in a distant city for the purpose of selling tickets and securing traffic over its

road, and whether it would be profitable to maintain the office, could not then be known. An intention to keep the office open for a definite time was not expressed, and it is not reasonable to suppose that appellant intended to do so if it should result in loss. *Baxter v. Nurse*, 6 M. & G. 934. In all that took place between the parties and the circumstances under which they acted, there is nothing to show a contract for a year, unless it can be inferred from the answer of appellee to Moffat's telegram, and that, we think, cannot be done.

If appellee understood that he was contracting for a year's service, it was not sufficiently shown that appellee so understood the agreement, and unless both parties concurred in that understanding, the contract cannot extend so far.

As to the English rule that a general hiring shall be taken to be a hiring for a year (2 Chitty's Cont. 841), we have not found any American case which recognizes it, and we think it has not been adopted in this country. In England, the rule stands on custom and usage, and it is not contended that any such usage prevails in this country (2 Pars. on Cont. 32-33 n). But if any such custom obtains, as to any class of servants, it would certainly be competent to prove it as entering into and forming a part of the contract of hiring, and when that is done, we may have the English rule or something like it.

In the case at bar, no usage or custom was shown respecting the employment of agents by railroad companies, and without it a general hiring cannot be regarded as a contract for a year's service.

The judgment of the district court is reversed with costs, and the case is remanded.

Reversed.

MURPHY v. THE PEOPLE.

1. Where several are jointly indicted, one pleads guilty and is sentenced to pay a fine and the costs of prosecution, and a *nolle prosequi* is entered as to the other defendants, it is improper to tax up all the costs of the prosecution against the party convicted. The liability for costs in such case is several.
2. The costs in criminal cases must be taxed according to law, and cannot be made the subject of stipulation between the court and the convict, or between the prosecuting officer and the convict.

Appeal from District Court of Jefferson County.

THE case is stated in the opinion.

Mr. HARRY SALES, for plaintiff in error.

Mr. GEORGE G. WHITE, for the people.

BRAZEE, J. The only question involved in this case is a question relating to the taxation of costs. The appellant and ten others were jointly indicted for riot. Appellant plead guilty, a *nolle prosequi* as to the other defendants was entered; judgment "that the said Dennis M. Murphy pay a fine of \$50 and the costs of this prosecution, and as to the other defendants, a *nolle prosequi* be entered, and that the said people have and recover of and from the said Dennis M. Murphy, one of the defendants, the sum of \$50, their fine as aforesaid, together with the costs of this prosecution to be taxed," etc., and that the other "defendants go hence without day."

The clerk taxed all the costs made in the case respecting all of the defendants, and issued execution therefor against the appellant.

A motion in vacation to re-tax costs was made, on the ground that all the costs made against all the defendants were taxed against Dennis M. Murphy. This motion was

overruled with leave to file affidavits, and thereupon renew the motion. The motion was renewed before and heard by the district court, upon voluminous affidavits tending to establish or disprove the fact that Dennis M. Murphy agreed to pay the costs made against his co-defendants who were discharged upon *nolle prosequi*.

The costs in criminal cases must be taxed according to law and not as per agreement. Such an agreement is without any consideration unless the consideration may be the mitigation of sentence; such a consideration between court and convict, or between the prosecuting officer and the convict, would manifestly be void, being against public policy, as substituting the bargain with the convict instead of the judgment of the court as the measure of punishment to be inflicted. Whether the money to collect of the convict be a fine or costs is immaterial. In this case, amount of costs, \$367.50, was a much more serious pecuniary penalty than the fine.

The taxation of costs cannot be maintained upon the theory of a binding stipulation, and it remains to be seen, whether such taxation can be maintained under the law and the judgment.

The judgment in this case was several as against the appellant. To charge him with all the costs of prosecuting the case against his ten co-defendants against whom, confessedly, no sufficient cause of prosecution existed, or could be made out, would be manifestly unjust. If his co-defendants had been convicted, the judgment must have been several. 10 Miss. 40.

Inasmuch as the costs are merely incident to the judgment, joint defendants are severally liable for the costs incurred in procuring their respective convictions, not for the costs of each other, nor for costs made by the people against them respectively. *Moody v. People*, 20 Ill. 319.

The law did not authorize the taxation of costs made by the clerk. The judgment is susceptible of a construction in

accordance with the law, and did not authorize the taxation of all the costs against the appellant.

The taxation of costs is vacated and the cause is remanded to the court below, and the clerk of that court is directed to re-tax the costs in accordance with this opinion.

SANBORN v. CREE.

An assignee of a lease without warranty cannot set up a defect of title in defense to an action upon a note given in consideration of the assignment. In such case the assignee occupies the same position as a purchaser of real estate under a deed of quit-claim.

Error to Probate Court of Arapahoe County.

THIS was an action in assumpsit upon a promissory note, given by Sanborn to Cree for \$1,700. The declaration contained a special count and the common counts. The defendant pleaded :

“1st. Non assumpsit.”

“2d. *Actio non*, because he says the promissory note sued on in the first count of the plaintiff's declaration was given by the defendant to the plaintiff without consideration ; that is to say, the said plaintiff at the city of Denver and county of Arapahoe, did on the day of A. D. 1874, for the price of \$2,200, \$400 of which was paid in cash, and the said promissory note given to secure the balance, assign and set over unto the defendant a certain lease to three hundred and eighty-five feet of a certain mining claim or lode known and called the ‘Cash Lode,’ situate in Gold Hill Mining District, Boulder county, Colorado. The said plaintiff then and there, representing unto the defendant, that he, the said plaintiff had a valid and subsisting right, under and by virtue of the said lease, and that the same was in full force and effect, whereas this defendant avers that at the time of the said assignment to him of the said lease as afore-

said, the said lease had become null and void, and that the said plaintiff had no right under and by virtue of the same, wherefore the defendant says the note set forth in the said declaration was given without consideration," etc.

"3d. *Actio non.* Because he says the promissory note sued on in the first count was obtained by fraud and circumvention; that is to say, that the defendant being the sole owner and proprietor of a certain mine or lode named the 'Cash Lode,' the same being situated in the Gold Hill Mining District, in the county of Boulder, that the said defendant was anxious to dispose of the said mining claim, and to that end had men of capital to examine and inspect the same, and just as defendant was about to close his negotiation with said men, and perfect and conclude said sale for a large sum of money, to wit, the sum of \$25,000, the said plaintiff received notice thereof, and immediately set up a fraudulent and fictitious claim thereto, and did then threaten to bring suit against this defendant, in ejectment, for the possession of said mine, unless defendant would buy up said false, fraudulent and fictitious claim to said mine; and thereby, and by means of said suit, so discourage said men that they would refuse to buy the said mining claim, which the defendant avers would have been the effect had such suit been brought; and the defendant avers that he was induced by the fear of said fraudulent threats to enter into and execute the said note in the first count of the said declaration mentioned; and the defendant doth further state that up to the time of making of the said threats by him the said plaintiff so as aforesaid made, and at the time when the said promissory note was executed by the said defendant that he, the said plaintiff, had no title or claim in or to the said mining claims, or any part thereof, of any description whatever; and that the defendant was then, and for a long time prior thereto, had been the sole owner and possessor of said mining claim, of all which the said plaintiff had notice; and this defendant is ready to verify, wherefore," etc.

The plaintiff demurred to these pleas, assigning as special causes:

"1st. That the second plea does not show that the interest of plaintiff to lease terminated before the assignment of lease to the defendant.

"2d. That defendant, having set forth the particulars of the want of consideration, is confined thereto, and it does not appear that defendant did not get all the consideration which he contracted for.

"That as to the 3d plea it does not appear but that defendant did not as much know the facts therein set forth as having taken place at the time of the execution of the note as he does now, or as the plaintiff then did; nor that his action was induced by threats," etc.

The demurrer was sustained, and the defendant electing to stand by his second and third pleas, judgment was given for the plaintiff upon the demurrer. The cause was afterward tried by the court without a jury, and the plaintiff had judgment for \$1,737.78. The errors assigned in the record are upon the sustaining the demurrer to the second and third pleas.

Mr. SAM. P. ROSE, for plaintiff in error.

Messrs. REED & BLAKE, for defendant in error.

HALLETT, C. J. In the second plea, plaintiff in error alleged that the promissory note in suit was given upon the assignment of a lease to him, and that at the time of such assignment the lease was null and void, and, therefore, the note was without consideration.

He also avers, by way of recital, that defendant in error represented that he had a valid and subsisting right under the lease, but he does not state that he believed such representations, or that he was induced thereby to enter into the contract.

This defense is simply that of a bad bargain, from which plaintiff in error wishes to be relieved. It is held that a purchaser of land, by quit-claim deed, cannot set up a defect of title in defense to an action, upon a note given for

the purchase-money. *Bonney v. Smith*, 17 Ill. 531; *Kerney v. Gardner*, 27 id. 163.

And an assignment of a lease, without warranty, stands upon the same principle. It is not shown that plaintiff in error was ignorant of the title to the mine, and if he chose to pay a good price for something that was worthless, he cannot be relieved upon the ground that he erred in judgment. *Hardesty v. Smith*, 3 Ind. 39; 1 Ohit. on Cont. 29, *et seq.*

For aught that appears in the plea, the contract may have been made in the settlement of conflicting claims to the property, or plaintiff in error may have obtained possession under the lease, and may have enjoyed the property to the full extent of his contract. *McClerkin v. Sutton*, 29 Ind. 407.

The plea is clearly insufficient as a defense to the action, and the third is no better. The matters alleged in that plea to show fraud in the execution of the note were apparently equally well known to both parties, and, therefore, plaintiff in error was not deceived.

The demurrer was properly sustained to both pleas, and the judgment is affirmed with costs.

Affirmed.

LOUISVILLE PRIZE MINING CO. v. SCUDDER et al.

It seems that if the agreement is one embraced within the terms of the statute of frauds, the plaintiff must declare specially; otherwise if it is a promise to pay a precedent existing debt.

Error to District Court of Gilpin County.

THE case is stated in the opinion.

MR. L. C. ROCKWELL and MR. HUGH BUTLER, for plaintiff in error.

MR. CLINTON REED, for defendant in error.

A. W. STONE, J. The evidence shows that John Scudder contracted the debt sued upon, in the name of the Central Gold Mining Company, and the Grass Valley Mining Company, as the agent of said companies. That afterward he found himself unable to pay *his* debts, and that he took Richardson and Wade to plaintiff's store to see what debts he (Scudder) owed.

Who Richardson and Wade were, or what interest they had in Scudder's debts, does not appear. Scudder says he made arrangements with the Louisville Prize Mining Company, whereby the company was to pay the debts of the plaintiffs and Mr. Tappan and others, and this agreement was burned up; was in writing, and signed by the president of the company defendant.

That the Grass Valley Company had a lease of the Central Company's property, and the payment of these bills was one of the considerations upon which the property was surrendered to the Louisville Prize Mining Company.

What that agreement contained is not proven. The witness is not asked as to its contents. He states generally that he made an *arrangement*—that the *agreement* was burned up—that it was in writing, and signed by the president of the company. What that agreement otherwise contained we are not informed.

He says the whole account was submitted to "*them*." Who are intended by "*them*," we are not advised.

McShane was permitted to testify, over the defendant's objection, as to what Richardson and Wade said, and as to the contents of a letter written by Wade.

It is not shown what relation Richardson and Wade, or either of them, sustained toward the Louisville Prize Mining Company, if any, and the court erred in receiving this evidence.

The testimony of Scudder is very loose and unsatisfactory. In many instances it is evident that he did not mean what he said, and what he did mean is very uncertain.

The record furnishes this court very limited information upon the question at issue, and the counsel of both

parties have based the greater portion of their argument on an assumption of facts not appearing in the record.

The question of pleading, we think, depends upon the construction of the agreement made by the defendant, whether it is one embraced within the terms of the statute of frauds or not, and the record furnishes no satisfactory evidence what that agreement was.

There is no descriptive proof of it, and the evidence of Scudder is evidently his conclusions of what it contained and not facts.

The substance of the contents of that agreement should be proven. If the agreement is one embraced within the terms of the statute of frauds, then plaintiff must declare on the special promise. *Brown on Statute of Frauds*, § 504; *Quin v. Hanford*, 1 Hill, 82; *Beers v. Culver*, id. 589.

If the agreement is not within the statute, and is not a promise to pay the debt of a third person, but a promise to pay the debt of the party making the promise to a particular person designated by the party to whom the debt belonged, and who had the right to make such payment to the third party, a part of the contract of the sale or bargain, then it is not within the statute.

It is, in such case, a promise to pay a precedent and existing debt. *Barker v. Bucklin*, 2 Denio, 45, and cases cited. And if the amount is agreed upon by the parties the common count for money due on an account stated is sufficient. 1 Chit. Pl. 358.

The judgment is reversed and remanded with costs.

Reversed.

CASES AT LAW AND IN CHANCERY

DETERMINED IN THE
SUPREME COURT

OF THE
STATE OF COLORADO.

WINNE et al. v. COLORADO SPRINGS Co.

1. **Facts**, and not mere conclusions of law, must be stated in pleadings. Thus in an action against a surety upon a promissory note, where forbearance to the maker is sought to be interposed, it is not sufficient to aver merely that "for good and sufficient consideration" further time was given. The consideration must be stated.
2. The discharge of a surety upon a promissory note, on the ground of forbearance may, in an action against the surety, be given in evidence under the general issue.
3. A plea averring the solvency of the maker of a note at maturity, and an *offer*, merely, by him to pay, is bad in substance as a plea of tender. Actual tender of the amount due and a refusal to accept must be averred, to constitute a sufficient plea.
4. To exonerate a surety from liability upon the ground of forbearance, the extension must be for a time certain and upon a consideration binding upon the creditor. (*Sears v. Van Dusen*, 25 Mich., disapproved.)
5. If judgment is obtained for an amount exceeding the *ad damnum* in the declaration, the plaintiff in the judgment may remit the excess in this court. But in such case the appellant will be allowed costs in this court.

Appeal from District Court of El Paso County.

ON the 11th day of March, 1874, Myron F. Thomas made and delivered to the Colorado Springs Company (a corporation) his promissory note for \$1,200, which was indorsed by Winne & Cooper, and Matt France. Suit was commenced upon the note after maturity, in the district court of El Paso county, by the payee against all the parties above named, and service had upon each. The declaration averred in one count that "before the delivery of the note to the plaintiff, and in order to give the said Thomas credit with the plaintiff, and at the request and for the accommodation of the said Thomas, the said defendants, Peter Winne and Job A. Cooper (in the style of Winne & Cooper), and Matt France, then and there indorsed the said last-mentioned note, and plaintiff further avers that in consideration of the said indorsement of said last-mentioned note or instrument of writing by the said Winne and said Cooper and said France, and on account of the credit so given to Thomas by such indorsement, the said plaintiff then and there accepted said last-mentioned note or instrument of writing and gave the said Thomas credit for the sum of money therein mentioned, according to the tenor thereof. And the defendants then and there delivered the said last-mentioned note or instrument of writing to the plaintiff, and thereby promised to pay to the order of the plaintiff the sum of money therein specified, according to the tenor thereof," etc.

Judgment was taken against Thomas by default. The pleas interposed by his co-defendants were *non-assumpsit nul tiel corporation*, and two special pleas. The plaintiff demurred to the special pleas, which are sufficiently stated in the opinion. The demurrers were sustained and judgment entered thereon as follows:

"This day this cause came on to be heard upon the plaintiff's demurrer to the third and fourth pleas of the defendants, Peter Winne, Job A. Cooper and Matt. France, by them plead herein, the plaintiff appearing by his attorney,

J. M. Davidson, and the said last-named defendants by their attorney, A. C. Phelps, and after argument of counsel, the court being fully advised in the premises, it is considered by the court that the matters and things in the said third and fourth pleas alleged are not, nor is any of them, sufficient in law to bar or preclude the said plaintiff of his action, and that said plaintiff have and recover of and from the said defendants, Winne, Cooper and France, his costs on this issue accruing."

The cause was tried on the remaining issues at the October term, 1874, before a jury, resulting in a verdict for the plaintiff in \$1,632, upon which judgment was subsequently rendered. Winne, Cooper and France appealed to this court. The errors assigned were: In sustaining the demurrers to the special pleas; that the district court erred in rendering final judgment in the cause without first entering judgment against the appellants upon the sustaining of the demurrer to their said third and fourth pleas, and without issue joined on said pleas; and that the district court erred in rendering final judgment in said cause without having first rendered the proper judgment against said defendants (appellants) on sustaining the said demurrers to their said special pleas.

It may be proper to state that no evidence appears to have been offered by the defendants in the court below tending to show their discharge as sureties.

Messrs. BENEDICT & PHELPS, for appellants.

Messrs. DAVIDSON & HARRISON, for appellee.

THATCHER, C. J. This was an action brought against Myron F. Thomas and the appellants upon a promissory note. Judgment by default was taken against Thomas. The other defendants, the appellants herein, plead the general issue, *not tiel* corporation, and two special pleas, setting up in each a defense as sureties. To each of the special pleas a demurrer was allowed. Judgment was taken against all the defendants at a subsequent term.

The first error assigned is, that "the district court erred in sustaining the demurrer of the plaintiff in said court to the third plea of the appellants." This is a plea that the appellee, by an agreement with Thomas, and without the consent of the sureties (the appellants), gave him further time for the payment of the note "for a good and valuable consideration," and that thereby the sureties became discharged.

The demurrer to this plea is general and special. The special ground of demurrer is, that the plea contains no statement of the consideration. The plea is bad. The consideration is the very gist of the agreement to extend the time, and should be truly and fully pleaded. The mere averment that the time was extended "for a good and valuable consideration" is not sufficient. It is but the statement of the existence of a consideration, without the facts out of which it arose. It is simply a conclusion of law which, as a rule, ought not to be pleaded. It may be laid down as a general proposition that whenever a parol agreement is declared upon, or pleaded in defense of an action (unless the agreement be a written instrument, purporting to be for value received, *Prindle v. Caruthers*, 15 N. Y. 425), the declaration or plea should disclose the facts from which it must appear that there was a legal consideration to support the agreement relied on. If such an averment be wanting, the court cannot on demurrer determine the legal sufficiency of the consideration. On another ground, it is necessary that the consideration should be explicitly stated, viz.: that the adverse party may not be surprised at the trial by the introduction of the testimony to prove a consideration not stated in the pleading. *Marshall v. Aiken*, 25 Vt. 332; 1 Chitty's Pl. (16th Am. ed.) 300, note k; *Harris v. Rayner*, 8 Pick. 542; *Moore v. Ross*, 7 N. H. 528; *Bailey v. Bussing*, 29 Conn. 5.

It was not necessary to set up this defense by a special plea, as even if well pleaded, the same defense is available under the general issue. *Warner v. Crane*, 20 Ill. 148.

The next error assigned is, to the allowance of the demurrer to the defendants' fourth plea, which sets up substantially that the principal debtor being solvent and prepared to pay at the maturity of the note "offered to pay the said plaintiff the amount due thereon," which offer the plaintiff refused, and that thereafter Thomas became and remained insolvent, whereby the sureties became discharged. If this is intended to be a plea of tender, it is substantially defective. Not a mere offer to pay, but an actual tender must be averred, unless the production of the money was waived, in which case the waiver must be pleaded, and it must be alleged that the defendant was about to tender, etc. 2 Chitty's Pl. (16th Am. ed.) 471, note *a*.

If the plea is intended to set up an offer to pay by the principal debtor, he being solvent, the question is, does such a plea present a valid defense to an action against the sureties? When a tender is actually made of the amount due, satisfaction of the debt is within the reach of the creditor. Good faith to the sureties requires that he should accept the money. Sureties are liable to the creditor; but their obligation is accessory to that of the principal. When the principal makes payment, or actually tenders payment of the sum due to the creditor, he does all that the sureties are legally and equitably required by their contract to see that their principal shall do. If the creditor refuses to accept the money, when actually tendered and clearly within his grasp, he is guilty of a palpable omission of duty to the sureties, and they are thereby released from all liability. This doctrine rests upon an intelligible ground. *Joslyn v. Eastman*, 46 Vt. 263. But an actual tender of money by the principal differs very widely from a mere verbal offer to pay, even though he be in a perfectly solvent condition when he makes the offer. The contract of the sureties is not that the principal will offer to pay the debt at maturity, but that he will in fact pay it, or what, so far as the obligation of the sureties is concerned, is equivalent thereto, he will make an actual tender thereof. To declare that a mere

offer to pay, which chronic borrowers are in the constant habit of making, without a dollar in sight, operates to discharge the sureties, would be to announce a dangerous principle; to relax, if not to nullify the binding character of the sureties' contract, in a case where their rights and remedies remain unaffected by any act of their principal or creditor. The ground upon which sureties are discharged, when an actual tender is made and rejected, is, that at the time of the creditor's refusal to accept the money, the complete satisfaction of the debt is not contingently or conditionally, but absolutely under his control and in his power. In such case the conduct of the creditor in omitting to perform the duty which the law clearly enjoins, to wit: to accept the tender, is a fraud upon the sureties and the reason for their exoneration is stronger than in a case where a security is abandoned or surrendered to the principal, or an execution actually levied has been withdrawn, and the authorities are agreed that in the latter class of cases the sureties are discharged at least *pro tanto* by the act of the creditor. *Sneed v. White*, 3 J. J. Marsh. 525; *Jones v. Bullock*, 3 Bibb, 467; *Curran v. Colbert*, 3 Ga. 239; DeColyar on Guaranties, etc. 438 (Morgan's Am. ed.); Daniels on Negotiable Instruments, 289; 2 Am. L. Cas. 395 (5th ed.). But the principle upon which these decisions rest, viz: that the means of satisfying the debt is actually under the control of the creditor, cannot be evoked in aid of the doctrine, that a mere unaccepted offer to pay, unaccompanied by a production of the money exonerates the sureties. *Sears v. Van Dusen*, 25 Mich. 351, is, so far as our research has extended, the only case in conflict with the doctrine here laid down. The supreme court of Michigan does not in this case rest its decision upon any substantial foundation. Says the court: "The finding of facts does not show that the defendant in error (surety) consented to be bound by the extension." This is true. But neither does the finding of the facts show that the creditor was bound by any valid agreement to extend the time. After a verbal offer to pay has once been made, consent to forbear or mere indul-

gence determinable at the will of the creditor, binds no one. To exonerate a surety from liability, the extension must be for a time certain and based upon a sufficient consideration. *Gardner v. Watson*, 13 Ill. 347; *Woolford v. Dow*, 34 id. 427; *Miller v. Stem*, 2 Penn. St. 286; *M' Lemoire v. Powell*, 12 Wheat. 554; *Coman v. The State*, 4 Blackf. 242.

In the absence of a valid agreement to extend the time, the rights and remedies of the creditor against the principal and sureties as well as the rights and remedies of the sureties against the principal are unchanged. The creditor's hands are not tied up for a single moment; he may sue at any time. The sureties are entirely free to pay the debt and sue the principal for the amount. The relations of the parties are in no respect altered. When sureties seek to be discharged on the ground of extension of time, the controlling question is, was the extension of such a character as to bind the creditor and thereby preclude him from pursuing his remedy against the principal? If yea, even if the suspension of the remedy be but for a day, the sureties are exonerated; otherwise, they are held. In the case before us, the creditor was not bound to delay suit an instant by reason of the forbearance he had extended. However high respect we may entertain for the opinion of the supreme court of Michigan, we cannot bow to its authority when so clearly in conflict with sound reasoning, and the great current of decisions.

The two remaining assignments of error, both going to the sufficiency of the entry of the judgment upon allowing the demurrer to the third and fourth pleas, are not well taken. The judgment is not, as contended, interlocutory. It clearly shows a final disposition of the third and fourth pleas and is in substantial conformity with approved precedents. *Robinson's Forms*, 110.

The judgment of the court below is in excess of the *ad damnum* laid in the declaration, by \$132. The appellee has remitted the excess, as under the authorities it may do. *Consolidated Gregory Co. v. Raber*, 1 Col. 513; *Linder v. Monroe's Executors*, 33 Ill. 389.

For the residue, the judgment of the lower court will be affirmed. The appellants will recover costs in this court.

Affirmed.

On petition for rehearing, the following opinion was rendered by

WELLS, J. We are unable to find in the fourth plea, what counsel supposed to be contained there. As we think the plea cannot, by any reasonable interpretation, be said to impart more than this, to wit: that the principal debtor neither produced the sum due, nor had it in hand, nor indeed elsewhere, but was possessed of a large estate and ample means and might presently have procured it.

If the allegation that the debtor was possessed of much property and ample means is not to be taken as qualifying the allegation that he was there prepared to pay, and as showing wherein the preparation consisted, the words are meaningless.

It is said, however, that the creditor's refusal dispenses with the production of the money, and the actual offer of it. No case is cited to show that the creditor's refusal will dispense with having the money present, nor can it be maintained upon authority, that the offer to produce is dispensed with by the creditor's refusal to accept.

Now, as between debtor and creditor, the rejection of an offer to pay, under the circumstances stated in the plea, would in no respect have changed the position of the parties. The rejection of such a proposal neither impairs the right of action nor diminishes the damages. It is not effectual even to stay accruing interest nor relieve the debtor of costs in a subsequent action. The reason is, that the offer amounts to a mere proposition to perform what the debtor has already more solemnly undertaken. It is, therefore, mere empty clamor, which the creditor is under no requirement to even notice. Whether he assent, or refuse, or maintain silence, is all one. Now if this be its effect as be-

tween parties, how can the circumstance that a third person stands as surety to the debtor, affect the duty of the creditor? Can he, in either case, accept what is not tendered nor even presented? He can neither accept nor reject.

The most positive refusal of a mere theoretical offer in words, no money being present or shown, is a nullity, whosever rights are concerned.

The case of *Ramsey v. The Westmoreland Bank*, 2 Pen. & W. 203, the broadest of the cases cited by counsel, is questioned by high authority (2 Am. L. Cas. 397), but even this case does not countenance such a defense; the money was there in court subject to the order of the creditor; in the words of the court, the creditors "had the means of payment in their power." We see no reason to modify our former conclusions.

Rehearing denied.

EXTENSION OF TIME, TO RELEASE SURETY, must be for a time certain and upon a binding consideration: *Byers v. Hussey*, 4 Colo. 321.

JUDGMENT, REMISSION OF EXCESS. — If judgment is obtained for an amount exceeding the *ad damnum* in the declaration, the plaintiff in the judgment may remit the excess in the supreme court: *Duncan v. Wheeler*, 4 Colo. 145; *Bissell v. Cushman*, 5 Colo. 78.

VENINE v. ARCHIBALD.

1. The act of the legislative assembly (Laws of 1874, pp. 214-15) providing that a party demanding a trial by a jury of twelve men in the probate courts of certain counties, shall be required to advance and pay into court a jury fee of \$20, is not in contravention of the seventh amendment of the Constitution of the United States, nor is such fee unreasonable in amount.
2. It is error in giving instructions to a jury upon the law to ignore testimony tending to establish a material fact, and which fact, if established, would change the rights of the parties litigant.

Appeal from Probate Court of Clear Creek County.

THIS was an action in trover brought by Archibald against Venine to recover damages for the alleged conversion of two horses, a wagon and harness. The cause was originally instituted before a justice of the peace in Clear Creek county, from whose judgment an appeal was taken to the probate court. Upon the trial in the probate court, before a jury, Archibald obtained a verdict for \$217. Judgment was sub-

sequently rendered in his favor for that amount, and Venine prosecutes his appeal in this court. The facts are sufficiently stated in the opinion. The second and third instructions complained of by the appellant and passed upon by this court are as follows:

"If the jury believe from the evidence that although the plaintiff and defendant had made a trade for the property, yet, if on any account this trade was rescinded by them and the consideration money paid back by the plaintiff to the defendant under a promise by the defendant that the property should then be delivered to the plaintiff by the defendant, the acceptance of the money by the defendant placed the plaintiff legally in the same relation to the property as if no trade or sale had ever been made by the plaintiff with the defendant, and the plaintiff then became the owner and entitled to the immediate possession thereof.

"If the jury believe from the evidence that the defendant promised the plaintiff that he would deliver the said property to the plaintiff or to Forest as agent or bailee of the plaintiff, and failed, neglected or refused to do it, is in law a trover and conversion, and no demand and refusal is necessary to enable the plaintiff to recover damages in trover and conversion."

Mr. W. S. ROCKWELL, for appellant.

Messrs. TAYLOR & YATES, for appellee.

ELBERT, J. At the trial in the court below the plaintiff in error, Venine, demanded a trial by a jury of twelve men, which was granted by the court upon the condition that he pre-pay the jury fee fixed by statute at \$20. This pre-payment Venine refused to make and the trial was had before a jury of six men.

Section 3 of an act relating to the probate courts of Clear Creek and other counties provides (*inter alia*) as follows:

* * * * * "All issues of fact in said probate courts

shall be tried by jury of six men, unless both parties waive a trial by jury, in which case the same may be tried by the court." * * * * * Sess. Laws 1874, p. 214.

Section 4 of the same act provides (*inter alia*) as follows:

"If at any time before the calling of the cause for trial, and before any *venire* shall have issued, either party shall demand a trial by a jury of twelve men, a jury of twelve men shall be summoned and impaneled, but the party demanding the same shall be required to advance and pay into said court the sum of \$20 at the time of making such demand, and the money so paid shall be paid by the said probate judge to the treasurer of the proper county as aforesaid." * * * * * Sess. Laws 1874, pp. 214-15.

It is contended by the plaintiff in error that this act is in contravention of the seventh amendment of the Constitution of the United States, which is as follows:

"In suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

We do not think that this provision of the Constitution can be fairly interpreted to inhibit reasonable regulations by the legislative power to meet the expense necessary to the support of the jury system.

The citizen enjoys the right subject to the necessary and unavoidable burden of expense. The assertion of any legal right is subject to the same burden. While the Constitution secures the right of trial by jury, there is no pledge that in giving the right legal effect there shall be no expense attending the legal procedure. As long as the right remains substantially as at common law, the requirements of the Constitution are met and satisfied.

In the case of *Beers v. Beers*, 4 Conn. 535, Hosmer, C. J., states the general doctrine as follows: "It is sufficient and within the reasonable intendment of that instrument (the Constitution), if the trial by jury be not impaired, although

it may be subjected to new modes, and even rendered more expensive, if the public interest demand such alteration. A law containing arbitrary and unreasonable provisions, made with the intention of annihilating or impairing the trial by jury, must be subject to the same consideration as if the object had been openly and directly pursued. But, on the other hand, every reasonable regulation made by those who value this *palladium* of our rights, and directed to the attainment of the public good, must not be deemed inhibited because it increases the burden or expense of the litigating parties."

Although the application of this doctrine to particular cases may have been contested, the general doctrine itself remains unquestioned. *Colt v. Eves*, 12 Conn. 243; *Flint River Steamboat Co. v. Foster*, 5 Ga. 195.

The case of *Adams v. Cowiston*, 7 Minn. 461, involved the question of the constitutionality of a law requiring the prepayment of jury fees. EMMETT, C. J., says: "We can see no objection to a reasonable fee of this kind. The Constitution does not guarantee to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy, or impede the due administration of justice. And that a party who demands a trial by jury should be required to advance a small jury fee, whether it be considered as a tax on litigation or as part of the expense which is necessarily incurred in his behalf, seems no more liable to a constitutional objection than is the requirement that the fees of the clerk, sheriff and other officers shall be paid in advance when demanded. If the clause in the Constitution means that we shall be permitted to litigate literally without price, there is an end to all fees from the issuing of the summons to the entry of satisfaction of the judgment." See also the case of *Randall v. Kehler*, 60 Me. 40.

Neither is the objection that the fee is unreasonable in amount well taken. This is a matter resting in the discre-

tion of the legislature, and courts will not interfere unless the fixed fee should amount to a practical prohibition of the right.

If regard be had to the actual additional expense incurred by reason of the *venire* for twelve men, the amount fixed by this statute is not disproportionate.

For the foregoing reasons we do not regard the act in question as open to the constitutional objection urged.

Venine having refused to pre-pay the jury fee, the trial rightfully proceeded before the jury of six men provided by statute. *Randall v. Kehlor*, 60 Me. 40.

The motion for nonsuit was properly overruled, as there was sufficient evidence to take the case to the jury.

Not regarding the third assignment as well taken, we pass to the consideration of errors assigned to the instructions of the court. It was in evidence that Archibald sold and delivered the team to Venine on the 6th day of July, 1874, and that Venine paid therefor, on the same day, the purchase-money. Also, that on the same day, Venine discovered the existence of a chattel mortgage on the team in favor of one Forest, and that thereupon it was agreed to rescind the sale.

Archibald paid back the purchase-money and Venine agreed to return the team to Archibald on condition that he (Venine) was paid the sum of \$14 expended by him for hay and oats for the use of the team. There was also evidence tending to show that on the following day, the 7th of July, the parties made a substitute agreement for the above, to the effect that Venine should keep the team, secure Forest by his personal bond of indemnity and retain the money returned by Archibald to indemnify himself against any claim that might thereafter arise on his bond to Forest.

There was a bill of sale of the property, under date of the 7th of July, executed by Archibald to Venine, apparently in pursuance of this agreement.

There was also evidence tending to show still another agreement between the parties, made on the 8th of July, in effect rescinding the sales made on the 6th and 7th,

Venine to keep the purchase-money returned and to deliver the team to Forest as mortgagee in the chattel mortgage upon payment of his demand for money expended for hay and oats ; both Archibald and Forest agreeing to pay his demand thereby.

Under this state of the testimony the court gave the following instruction :

“ If the jury believe from the evidence that the plaintiff was on the 6th day of July, 1874, the owner of the property named in his bill of particulars, and then entitled to its immediate possession, and that the value thereof has been proven, and that the defendant converted the same to his own use, they will find the defendant guilty and assess the plaintiff's damages.”

This instruction was calculated to lead the jury to believe that they were at liberty to disregard the evidence going to show a perfected sale to Venine on the 7th of July, and to consider the right of the plaintiff to recover as entirely dependent upon his ownership of the team on the 6th of July, an ownership entirely consistent with the sale to Venine on the 7th of July. Also, to consider themselves at liberty to disregard the testimony going to show that Venine demanded reimbursement of the money expended for hay and oats, as a consideration precedent to a return of the property, and that Archibald agreed to pay therefor. There was evidence to this effect, and had the jury found this agreement on the 7th, or this demand on the part of Venine and agreement on the part of Archibald to pay proved, they were uninstructed as to the law of the case, and being uninstructed, as though there was no such evidence in the case, the tendency was to mislead the jury.

Both the second and third instructions given by the court on behalf of the plaintiff are open to the same objections as the first.

They state the law upon a part of the evidence only, and leave the jury unadvised as to the law if they should believe the testimony which the instructions ignore.

Where the testimony ignored by the instructions is of sufficient weight to entitle it to be considered by the jury, and the facts which it tends to prove, if proven, would change the rights of the parties litigant, such instructions are clearly erroneous, and when there is nothing in the further instructions of the court, as in this case, to correct the error, they must be held to have misled the jury. *Gallagher v. Williamson*, 23 Cal. 331.

The judgment of the probate court is reversed with costs, and the case remanded for a new trial.

Reversed.

BROWN v. CITY OF DENVER.

1. A grant of power to impose municipal taxes involves a decision by the legislature that benefits proportionate to the burden will be conferred. The burden of proof is upon him who assails the legislative action, and to warrant judicial interference, he must show a clear case of violation of the principle exempting private property from condemnation to public use.
2. If in respect to the particular estate, the proprietor derives a substantial benefit from the maintenance of municipal government, he must contribute to its support.

Error to Probate Court of Arapahoe County.

THIS was an action brought to recover taxes paid under protest to the collector of taxes for the city of Denver. It was contended by the plaintiff that the tax was illegal, having been assessed upon lands not subject to taxation for municipal purposes. The defendant had judgment upon a trial before the court below upon an agreed statement of facts. The plaintiff prosecutes this writ of error to reverse that judgment.

The plaintiff in error complains that the court below erred in giving judgment for the defendant, and that the finding of the court was against the evidence. The cause is presented to this court upon an agreed statement of facts,

which, after describing the estate involved by metes and bounds, and admitting the title to be in the plaintiff in error, proceeds as follows :

“That said real estate is not and has not been laid off into either lots, blocks, streets or alleys, as a part of the city of Denver, or as an addition thereto or for any public use or purpose whatsoever ; and there was and is no desire on the part of the plaintiff to do the same. That the boundary line of the said city of Denver was extended to include said real estate by an act of the legislature of Colorado, approved January 9, A. D. 1868, at the solicitation of the officers or agents of the city of Denver. That the plaintiff never had said real estate mapped or platted as an addition to the city of Denver. That the same is uncultivated and unimproved and is lying open to the common. That the act of said legislature in making said real estate a part of the said city of Denver was without the plaintiff's consent or solicitation. That the houses adjacent to said real estate are few and scattering. That the southern boundary of said real estate forms a part of the southern boundary of said city. That said property was and is used by the said city only for the purpose of taxation for city purposes, and at present is not necessary except for that purpose. That a tax was assessed and levied upon said real estate, for city purposes only, for the year 1874, said tax being assessed at the said rate according to the valuation of said property that was assessed for said year on other city property. That after the time limited by law for the payment of said sum of money there accrued as interest upon said property the sum of \$55 56-100, and that as said tax and interest was not paid before the time fixed by law for advertising delinquent property, the same was advertised for sale. The cost of said advertising amounted to the sum of \$55 55-100, making the amount due on said property for taxes as aforesaid at the time of payment as hereinafter mentioned by the plaintiff, \$666 60-100. That said real estate was about to be sold for said tax so delinquent as aforesaid, together with said accrued charges of \$111 10-100 for interest and advertising on the

24th day of May, A. D. 1875, on which day the same was paid by the plaintiff to J. M. Strickler, county treasurer and ex-officio city collector. That said sum was paid by the plaintiff under protest to the said Strickler, the said plaintiff reserving the right to test the legality of said tax and to receive the said sum of money back from said city of Denver in case said tax should be held illegal by the courts of the Territory. That this sum so paid by the plaintiff was paid by the said Strickler to T. M. Field, treasurer of the said city of Denver, and was by said Field deposited in the city treasury for its sole use and benefit, and is now subject to its order and use. That the foregoing are all the facts applicable to the said cause of action."

Mr. G. G. SYMES and Mr. W. S. DECKER, for plaintiff in error.

Mr. C. S. THOMAS, for defendant in error.

WELLS, J. Every grant of the power to impose municipal taxes or assessments involves a determination by the legislative power that benefits proportionate to the burden will in some way be conferred.

If a power exists in the courts to review the determination, which has of late been doubted (Cooley on Tax. 120), it is a power to be exercised with a cautious hand. Every presumption supports the legislative action, and whoever assails it, assumes the burden of proof. Unless a clear violation of the principle which exempts private property from condemnation to public uses, without compensation, be exhibited, the wrong, if any, is beyond judicial interference.

It is not essential to the validity of such a grant of power that the premises affected should be occupied for residence or trade, or immediately necessary for such occupation, nor that they should be subdivided or offered for sale in parcels suitable for such purposes, nor that they should be benefited or enhanced in value in equal ratio with all other

lands to which the power of taxation is extended. The courts will not nicely balance the benefit against the burden, nor limit the liability to the exact measure of the advantage. If, in respect to the particular estate, the proprietor derives a substantial benefit from the maintenance of municipal government, he must contribute to its support. *Durant v. Kaufman*, 34 Iowa, 194; 2 Dillon on Mun. Corp., § 634.

Testing the plaintiff's case by these principles, he has not established his title to the immunity which he asserts. For any thing shown, these premises may, before the imposition of the tax in question, and before the grant of the power to tax, have been directly connected with the center of business and population of the city, by streets and avenues, opened, graded, paved, lighted, and which are now, and must in the future be maintained at the public expense. These and the erection of public buildings in the vicinity, the construction of irrigating ditches and other public improvements, the suppression of nuisances and the exercise of the municipal authority in other respects may, consistently with all that is shown, confer upon these premises the greater part of their present value, and by the same causes continually operating, that value may be maintained or enhanced in the future.

We cannot assume that these things are so; neither can we take judicial notice that they are not. The legislature have found that the proprietor will be compensated for the burden imposed; it rests upon him, as before said, to negative this conclusion. The facts shown to us do not maintain the issue which he has made.

The judgment must be affirmed with costs.

Affirmed.

MOLANDIN v. COLORADO CENTRAL RAILROAD COMPANY.

Causes can only be heard in this court when properly removed from the lower courts by appeal or writ of error. Parties cannot, by stipulation, in the absence of a writ of error and a certified transcript of the record, confer jurisdiction upon this court. The law *alone* can confer jurisdiction over the subject-matter of a cause.

Error to District Court of Arapahoe County.

THE material portions of the stipulation upon which this cause was brought to this court are as follows :

"It is hereby stipulated and agreed by and between Miller & Markham, attorneys for the plaintiff, and Henry M. Teller, attorney for the defendant in the above case, that the following facts were proved or admitted on the trial of this case by the jury, before the Honorable Andrew W. Brazee, judge of the first judicial district, at the September term, A. D. 1875, of said court, and that the following proceedings were had." After stating the facts agreed upon, the stipulation concludes: "Thereupon the plaintiff rested his case; and the defendant moved the court for a nonsuit, and the same was granted. To which the plaintiff then and there objected, and excepted to the court granting the same, and the objection and exception is made a part of the record; and it is hereby agreed that *this stipulation shall be taken and considered as a bill of exceptions and record* in this case, and that the same go up to the supreme court of Colorado Territory, and be decided and otherwise acted on by said court, *the same in all respects as if taken up on writ of error.*

" MILLER & MARKHAM,

" *Attorneys for Plaintiff.*

" This stipulation not to be used in any subsequent trial, if there should be one.

" H. M. TELLER,

" *Attorney for Defendant.*"

Rule 28, referred to in the opinion, is as follows: "No judgment will be pronounced in any agreed case unless an affidavit of some credible person shall be filed, setting forth that the matters presented by the record were litigated in good faith, about a matter in actual controversy between the parties, and that the opinion of this court is not sought with any other design than to adjudicate and settle the law relative to the matter in controversy between the parties to the record."

Messrs. MILLER & MARKHAM, for plaintiff in error.

Mr. H. M. TELLER, for defendant in error.

THATCHER, C. J. This is essentially an appellate tribunal. Causes can only be heard in this court when properly removed from the lower courts by appeal or writ of error. Unless the statute prescribing the mode of bringing cases into this court from the lower courts be complied with, we are without authority to assume jurisdiction. Until the court has acquired jurisdiction of a cause under the law the agreement of parties to the action relative to its status and disposition in this court, can have no force or effect whatever. The case before us is somewhat anomalous; neither a writ of error, nor a *scire facias* to hear errors, has ever been issued. A transcript of the record has never been filed in this court. By no method recognized by the law are we apprised that this case was ever pending in the court below. It is styled "an agreed case." Technically it is not what is understood by an agreed case, nor is it so treated by counsel. If it were an agreed case no judgment could be pronounced before the filing of the affidavit required by the twenty-eighth rule of this court. When the court once acquires jurisdiction of the subject-matter, the defendant by a voluntary appearance may dispense with the service of the *scire facias* as he may waive any other personal privilege. So far, however, as relates to the writ of error, it may well be questioned whether without its issuance, this court has jurisdiction of the subject-matter.

The supreme court of the United States has uniformly held that the issuance of a writ of error is essential to the exercise of its appellate jurisdiction. *Washington County v. Durant*, 7 Wall. 694; *Hodges et al. v. Williams*, 22 How. 87. In the case last cited the court held that the writ of error is not a mere matter of form, but matter of substance prescribed by law and essential to the jurisdiction of the court (and referring to the case of *Hines v. Papin* with approval), that an erroneous writ could not be amended even by consent of parties upon the ground that consent of parties could not confer jurisdiction over the cause, where it was not given by law and legal process. This doctrine, so far as it relates to amending erroneous writs, would not, of course, apply here, where the right to amend the writ so as to make it conformable to the original record, is conferred by statute. In Wisconsin it is held that the issuance of the writ of error is necessary to the jurisdiction of the appellate court. In the case of *Rolke v. The State*, 12 Wis. 573, the court says: "Suppose an inferior court should send up a record of a cause to the supreme court, without any writ whatever, no one would insist, because the papers were filed with the clerk of the supreme court, that *ipso facto*, the supreme court had jurisdiction. The court of review must issue its writ running to the inferior court, and by means of its process, bring the cause before it in a proper manner."

We are not unaware that the rigor of this principle has been somewhat relaxed by the supreme court of Illinois. In the case of *Birkby v. Birkby*, 15 Ill. 122, the court says, "where the record is brought up by the party and filed, properly certified in the first instance, the writ of error is unnecessary, or at most is but matter of form." But sound principle, the general analogies of the law, and the weight of authority clearly indicate that when a cause is sought to be removed by writ of error from the court below to this court, that the writ of error must in fact issue; that jurisdiction of the subject-matter can only be acquired in the manner provided by law.

Another objection, and one which is certainly fatal, even if doubt were entertained as to the last, consists in the failure of the plaintiff in error, to cause to be filed in this court, the record in the cause properly certified. How are we to know that such a cause was ever pending in the district court of Arapahoe county? By what means are we to be informed that a judgment of nonsuit was entered in the court below? A duly certified transcript of the record is clearly competent evidence of these facts, and the only evidence which this court under the law can recognize.

By stipulation, the parties to this cause, in the absence of a writ of error, and in the absence of a certified transcript of the record, attempt to confer jurisdiction upon this court. Our statutes will be searched in vain to find any provision which confers jurisdiction by stipulation. Consent of parties cannot give jurisdiction of a cause. The law alone can confer jurisdiction over the subject-matter.

But when this court has once acquired jurisdiction of a cause, "parties may doubtless stipulate to waive errors, or to waive certain proceedings required by statute, but consent cannot confer jurisdiction, where a statute has provided that it can only be acquired in a certain manner. *Keene v. Whitaker*, 13 Curt. 248; *Rathbun v. Moody*, 14 Minn. 364; *Burckle v. Eckhart*, 3 Comst. 137; *Jewett v. Hodgdon*, 2 Greenl. (Me.) 335. This cause must be

Stricken from the docket.

PARTIES CANNOT CONFER JURISDICTION UPON SUPREME COURT by stipulation, in the absence of a writ of error and transcript of the record: *Fulley v. Cook*, 4 Colo. 110; *Ross v. Duggan*, 5 Colo. 105; *McKenzie v. Ballard*, 14 Colo. 428; and *Pembrey v. Thatcher*, 3 Colo. 278, where the court say: "We are unable to follow those courts which announce a contrary doctrine." But the supreme court has never held that the facts may not be agreed upon by the parties in causes where it has assumed original jurisdiction: *People v. Boughton*, 5 Colo. 488.

WAGNER et al. v. HALLACK et al.

1. Debtors residing without this State are excluded *ex vi termini* from the operation of the statute (R. S., p. 418, § 103) which provides that "suits shall be commenced before justices in the township in which the debtor resides." Such non-resident debtors may be sued wherever found.
2. All promises to answer for the debt or default of a third person must be in writing, whether the promise be made before, at the time or after the debt or liability is created.

3. In the absence of words or circumstances showing a contrary intent, the words "we will see the articles paid for," or equivalent words, import a collateral undertaking and are within the statute of frauds.
4. When the court can clearly ascertain from the evidence what the words were, the determination of their meaning is a question for the court. But where the law assigns to the words a *prima facie* meaning only, and there is some evidence of their having been used in a different sense, their determination is a question for the jury.
5. The initials C. O. D. have a well-known commercial meaning, and manifest the intention of the vendor to control the *jus disponendi*.

Error to Probate Court of Arapahoe County.

DURING the month of September, 1872, one Boughten, of Cheyenne, Wyoming Territory, wrote on behalf of one Heenan to the Hallack Brothers, the defendants in error, at Denver, Colorado Territory, requesting them to send to Laramie, Wyoming, certain articles of their manufacture to be used in the erection of a building at Laramie, which Heenan was then under contract to build for the Wagner Brothers, the plaintiffs in error. The articles ordered were prepared and shipped, and as alleged by the Hallacks were received and used by the Wagners. The latter declining to pay for the goods, Hallack Brothers instituted suit against them before a justice of the peace in Denver. The Wagners were non-residents, living in St. Louis, Missouri, but being found in Denver, personal service was had. Upon the trial of the cause before the justice of the peace, the Hallack Brothers recovered judgment, whereupon an appeal was prosecuted to the probate court of Arapahoe county.

Upon the trial in the probate court Erastus F. Hallack, one of the defendants in error, testified: "The date of Boughten's order was the latter part of September, 1872; we shipped the goods by freight and marked them C. O. D.; it is not customary for railroad companies to deliver goods so marked without being paid for them; I don't know that I ever knew it to happen except in this case; I think the bill attached to the deposition of Henry Wagner is the one I sent to Woodbury, but I don't know; my recollection is that I instructed Woodbury to collect this bill made out

against Heenan, from the defendants; I sent this bill to Woodbury, made out against Heenan, to collect of the defendants for goods already sent by freight, C. O. D. C. O. D. means to collect on delivery, by the man or person authorized to collect; Woodbury was authorized to collect; although this bill was sent to Woodbury for the defendants, the bill was made against Heenan because the order came from him; it came through the hands of Boughten for Heenan; I think the goods were charged on our books in the way the bill was made out; the goods were never charged on our books to anybody but Heenan; at the time I received the order I knew for whom Heenan wanted the goods, from the letter received from Boughten, who said that they were for the store of Wagner, for Wagner Bros.; I don't know who received the goods at the place of delivery; these goods were not sent to the defendants; I do not think we wrote any letters to Heenan about paying for these goods; we never gave Heenan credit for the goods nor looked to him for our pay; Boughten was our agent at the time; Woodbury was made our agent in the collection of this bill; I do not know whether or not the defendants ever received those goods; I don't know that a bill for the railroad company accompanied these goods; we sometimes mark goods C. O. D. when we don't expect the railroad company to collect the bill; I marked these goods; I think there were five or six packages, all marked to Woodbury."

The witness, Woodbury, testified: "I remember a conversation with the defendants sometime in the fall of 1872 in reference to a sale of the stuff for their building; I think it was about the 12th or 15th of October; Henry Wagner requested me to write to the plaintiffs and ask them to ship them some sash, doors and brackets, which had been previously ordered for the building which Heenan was then erecting at Laramie City; to the best of my recollection he requested me to write to the plaintiffs and ask them to send doors, sash, brackets and mouldings which had been ordered for their building, and they would see those articles

paid for; about that time there was something said that they were afraid the plaintiffs would not ship to them on Heenan's account; I think this was said by Henry Wagner, and I wrote to the plaintiffs on the same evening; I only wrote them one letter; I told them that Wagner Brothers requested them to ship these doors, sash, etc., as soon as they could, or immediately, and they would see them paid for; I heard from the plaintiffs in answer to that letter; the bill now shown me attached to the deposition I think I have seen before, either this or a copy of it; I received it from the plaintiffs in a letter I should think about the 24th or 25th of October, 1874; I saw the stuff which the defendants shipped me at Laramie City in the store room of the defendants; part of it was in packages and part of it had been taken apart; those in packages were marked "B. Woodbury, Laramie City," if I recollect right; it was noon when I saw them; I passed by on my way to dinner; Charles Wagner and Heenan were there at the time; I had a conversation with them in reference to the goods when I passed; I think Charles Wagner requested me to stop in; Heenan and Wagner were in the building at the time; two doors and one sash had been separated, and they were talking about the size of the sash; claimed that they were not made according to order; that these two particular sash were too small — too short and too narrow; I remarked that I thought they were made according to order, and it could be ascertained by sending for the plan and order; and I sent to the plaintiffs for them, and received them and measured the sash in question, and found them according to order; the same evening I had a conversation with the defendants about pay; I took the bill of the goods to the defendants to their store adjoining the building which was then being erected, and requested them to pay for them; in answer to my request to pay, the defendants said they did not know whether or not the goods were made according to order, and they were not willing to pay for them until they saw who was to blame, etc. I never understood from the defendants how the goods came to be taken from the depot.

I don't know who took them ; I have no recollection of authorizing any one to take them. I next saw those goods in the building of the defendants, put in position in the front ; they never paid me for that bill."

There was evidence to prove the value of the goods in question in the Denver market.

On the request of the plaintiffs, the following instructions were given, which were objected to by the defendants :

"1. If the jury find from the evidence that the plaintiffs forwarded the goods to Laramie City to Benjamin Woodbury, as their agent, and if they farther find that the defendants took the goods without authority from the plaintiffs or said Woodbury, and converted them to their own use, they are responsible to the plaintiffs for the value thereof."

"2. The jury are instructed that if they find from the evidence that the plaintiffs furnished the material in question to the defendants, and upon the promise of the defendants that they would see them paid for, they will find for the plaintiffs."

"3. When a person furnishes goods to another on a promise to pay for them, made previously to the furnishing of the same by and on the credit of a third person, such third person is liable, and the case is not within the statute of frauds."

The court *ex mero motu* charged the jury as follows, to which the defendants also objected.

"The primary question for you to determine, after finding the sale and delivery of goods, is this : upon what promise and whose credit were the goods sold and delivered ? If upon the promise and credit of these defendants, then you should find against them ; but if upon the promise and credit of any one else, then you should find in favor of these defendants. In ascertaining this question, you may consider against whom the bill for them was made, whether or not the plaintiffs held the said Heenan primarily liable, so that the value of the material was an existing debt against him at the time the goods were shipped ; whether or not

the defendants were only secondarily liable by reason of a promise by them to pay an indebtedness already existing against said Heenan. Should you find from the evidence that the plaintiffs received an order from said Heenan for the goods in question, but declined to ship them to him, or part with the possession of them until they received a promise from the defendants that they would pay for them, if they did so promise, and that in response to and relying upon such promise the plaintiffs shipped said goods to Mr. Woodbury, after which the defendants received them, or the benefit of them, you should find for the plaintiffs."

The jury found a verdict in favor of the plaintiffs, and judgment having been rendered on the verdict, the cause was brought into this court upon writ of error.

Mr. CHARLES S. THOMAS, for plaintiff in error.

Mr. E. P. JACOBSON, for defendant in error.

ELBERT, J. The first question that presents itself in this case is one of jurisdiction.

The plaintiffs in error, who were defendants below, claim that at the time the suit was commenced they were non-residents, and that the cause of action accrued in the Territory of Wyoming. By reason of these facts, it is claimed that the justice of the peace, before whom the suit was originally brought, had no jurisdiction. This claim is based on the language of section 103 of the Justices Act, R. S. 418, which is to the effect, that suits shall be commenced before justices, in the township where the debtor resides, unless the cause of action accrued in the township of the plaintiff. The jurisdiction of justices of the peace in civil actions is statutory, and it has been uniformly held that the statute conferring the jurisdiction and prescribing its exercise must be strictly construed. It will be observed, however, as we advance, that the question in the present case is not so much as to a grant of jurisdiction, as to how far a grant, originally full and complete, is affected by a subsequent limitation. The his-

tory of an act is properly consulted with a view to its just interpretation. Section one of the Justices Act confers jurisdiction on justices of the peace in a large number of enumerated cases, unconditionally, except in the matter of the amount claimed. This section was a part of an act, passed in 1861, at the first session of the legislature, and remained thus unqualified until the second session, when what is now section 103 was added by way of amendment. Subsequently both sections were embraced in the revision of 1868. Prior to the amendment, undoubtedly, both resident and non-resident debtors could have been impleaded wherever found. In the abuse of this power, or at least in its liability to abuse, the provisions of section 103 had their origin. Debtors were sued in tribunals distant from their places of residence, and the cost and vexation of litigation were thereby unnecessarily and oppressively increased. As a security against such abuses this section was adopted, giving resident debtors a *forum* at their own doors.

Such considerations, however, would not apply to the case of a non-resident debtor, unless the State should forego all jurisdiction of his person, and in all of its tribunals. The hardship with him was not in being sued in a justice's court, but in being sued in any court. When a resident debtor pleads the provisions of this section he *ousts* the jurisdiction of the particular justice, but may still be sued in the proper township. Could a non-resident debtor plead its provisions, he would not only *oust* the jurisdiction of the particular justice, but of any justice, and could not be sued at all in a justice's court, unless in the township of the plaintiff. This would be to give the non-resident debtor a preference over our own citizens, that we do not think the legislature intended. Both as a limitation on section one of this act, and as in derogation of the common law rule, that debts as such have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand on the debtor everywhere, we think the section must be construed strictly. From these considerations, as well as from the language employed, we

think the section cannot be held to apply to non-resident debtors. It says: "Suits shall be commenced before justices in the township in which the debtor, or person sued, resides," etc. This describes a class of debtors, that is to say, *resident debtors*. To such only is the language used applicable, and such only can avail themselves of its provisions. Residence cannot be predicated of non-residents, and such are not only not included, but *ex vi termini*, are excluded, from the intention and meaning of the act. With respect to them, the jurisdiction stands as before the limitation was adopted, and they may be sued wherever found. Nor is this view regarded as in conflict with any thing said by the court in the case of *Melvin v. Latshaw*, 2 Col. 80, where the same section came under consideration.

It is sought to charge the defendant below upon an alleged promise to pay for goods before contracted for by one Heenan. As some stress is laid on the fact that the promise was made before the goods were shipped, it is well to say at the outset that all promises to answer for the debt or default of a third person must be in writing, whether the promise be made before, at the time, or after the debt or liability is created. *Maloney v. Gillett*, 21 N. Y. 412.

Standing alone and uncontrolled by circumstances showing a contrary intent, the words "we will see the articles paid for," or equivalent words, import a collateral undertaking, and are within the statute of frauds. Throop on Verbal Agreements, § 197 *et seq.*; *Watkins v. Perkins*, 1 Lord Raymond, 224; *Skinner v. Conant*, 2 Vermont, 453; *Twarts v. Crul*, 6 B. Monroe, 472; *Cahill v. Bigelow*, 18 Pick. 369.

Looking to the circumstances of the case for something that will authorize a different construction, we find that credit does not appear to have been given to any one. By the original contract between the plaintiffs and Heenan, no time of payment was fixed, and the presumption in such case is that payment and delivery were to be concurrent. Benjamin on Sales, § 677.

The object of the negotiations of defendants seems to have been not to obtain *credit* for Heenan or themselves, but to secure shipment of the goods. Their promise, if original, was to pay for the goods on delivery, if collateral, to answer for the default of Heenan should he not pay on delivery.

The goods were shipped to the agent of plaintiffs, and marked C. O. D. These initials have a well-known commercial meaning, and show clearly that the plaintiffs did not intend to give credit to any one. Their purpose is manifest to retain control of the goods and thereby secure themselves against the default of either Heenan or the defendants. Delivery to the carrier, therefore, was not delivery to the buyer, and the *jus disponendi* remained in the vendors. Benjamin on Sales, § 382 *et seq.*

We cannot say, therefore, that credit, in the ordinary acceptance of the term, was given to either Heenan or the defendants, and this inquiry, which is always resorted to as a means of determining the original or collateral character of the undertaking, does not avail us. The book entry and bill were both in Heenan's name, and standing alone, *prima facie*, are an admission that the goods were furnished on Heenan's credit. 1 Greenleaf, § 196.

Considered, however, with reference to the foregoing facts, while they do not show a credit given, they tend strongly to show that Heenan was regarded by the plaintiffs, at the date of the shipment, as the original contracting party; that the goods were shipped on *his order*, and not on a subsequent order of defendants; and that the defendants had in no wise been substituted or considered as original promisors. In this respect, therefore, both book entry and bill confirm the collateral character of the undertaking by the defendants.

The fact that the defendants, one or both, were present with Heenan when Woodbury found the goods at the store, which Heenan was building, cannot be considered as of any weight in the present inquiry touching the collateral character of the promise. It was their duty, certainly their

right to be there, looking after their interests as owners. It cannot be said that owners under such circumstances must absent themselves, and forego the oversight of their interests, under penalty of being charged with the debts, and on the contracts of their builders.

A circumstance of more importance is the fact that the defendants, when the bill was presented for payment, objected on other grounds than not being liable, and it is insisted that this is to be taken as an admission of their liability. Whatever may be the force of this circumstance in some aspects of the case, its bearing on the language of the promise made by the defendants is at best remote, and of necessity by a series of presumptions more or less forced, and all founded, not on what the defendants said, but on what they failed to say. We infer their liability from their failure to deny it. This is permissible under certain circumstances. 1 Greenleaf, § 197 *et seq.* But we go further, and infer that it was an admission of an original, and not a collateral liability; that it was an admission that they regarded their previous promise in the light of an original undertaking, notwithstanding the plain collateral import of its language. Such ground is too uncertain for either judge or jury to tread with safety. It would be to open the door to all the mischief sought to be avoided by the statute.

The foregoing considerations equally apply, whether the plaintiffs proceed upon the theory that there was a delivery to the defendants, as original promisors, or a delivery to Heenan, upon the credit of the defendants.

They are also applicable in determining Heenan's liability, the rule being, that if the third person is liable at all the promisor's undertaking is collateral. Throop on Verb. Agr., §§ 147 and 178, and cases cited.

There was no controversy about the words of the promise, nor was there any circumstance but what strengthened their collateral import.

Whether under all the circumstances it should have been left to the jury to determine whether the promise was original or collateral, is a question upon which the court is not

agreed. The rule is that where the court can clearly ascertain from the testimony what the words were, the determination of their meaning, and the nature of the contract which they create, is to be made as a matter of law. Where the law assigns to the words a *prima facie* meaning *only*, and there is some evidence of their having been used in a different sense, then it is a question for the jury. Throop on Verb. Agr., § 183.

Clearly the jury should have been instructed as to the character of the words used as a matter of law, and the necessity of evidence to overcome their *prima facie* force. The rights of the defendants were under the protection of this rule, of which they did not receive the benefit, and which the court failed to explain or apply. In the absence of this the second instruction given for the plaintiffs was calculated to lead the jury to believe that the words used imported an original undertaking, and in the instructions given by the court upon its own motion, the phraseology of the promise is lost sight of, and they are framed as though there was an absolute promise to pay on the part of the defendants, in evidence. In this respect the instructions were erroneous.

It remains to consider another aspect of the case.

If there was a conversion, the plaintiff could waive the tort and recover as in *assumpsit*. 1 Chitty's Pleadings, 107, (d), (1). 2 Greenleaf's Ev. 89, (5). But in this case, it would be incumbent on the plaintiffs to show a conversion by defendants.

There is no direct proof on this point, and how far the facts and circumstances of the case go to show the liability of the defendants, in this view, it is unnecessary to consider.

The controversy seems to have been over the character of the special promise, and of the many instructions given to the jury, but one went to the right of the plaintiffs to recover as in case of a conversion, and that but imperfectly. In such case, the measure of damages would be the value of the goods at the place of delivery. If we were authorized to presume that the verdict of the jury was founded on

the conversion of the goods by the defendants, there was no evidence of their market value at Laramie City, the place of delivery. The instruction of the court, therefore, as to the measure of damages, was erroneous.

The judgment of the court below is reversed, with costs, and the case remanded for a new trial. *Reversed.*

DEBTORS MUST BE SUED IN THE TOWNSHIP WHERE THEY RESIDE. — This statute prevents vexatious litigation and costs: *Denver S. P. & P. R. R. Co. v. Roberts*, 6 Colo. 336; *Reynolds v. Larkins*, 10 Colo. 132; *Charles v. Amos*, 10 Colo. 277.

SMITH v. PIPE.

1. In an action of ejectment, where the regularity of the issuing of a patent from the government is involved, the court is bound to presume that all necessary steps previous to the issuing of the patent have been taken.
2. The rule that in a court of law the legal estate only is regarded, and that a mere equity cannot be set up to bar an ejectment by the owner of the legal estate: *Held*, to apply to the facts of this case.
3. If the legal estate remains in the grantor, he being a public officer and holding as trustee under the act of congress (5 Stat. at Large, 657), his conveyance after the expiration of his office will entitle his grantee to maintain ejectment. The fact of the grantor not executing the conveyance in his official character is immaterial for the purposes of this action.
4. The limitation in letters patent to the successors of the grantee named in the patent can have effect only so far as it accords with the act of congress. The purpose of the act was to confer the right of pre-emption upon the settlers upon town lands.
5. A freehold of inheritance must be implied in the trustee notwithstanding the omission of the words of succession in the statute.
6. The purpose of the statute is to confer the estate upon the county judge or the corporate authorities in their official and politic capacity, and to limit it to the successor until the trust should be finally exhausted.
7. The grant of the sovereign confers upon the donee the capacity to take according to the purpose and to the extent intended.
8. A vacancy in the office will occasion no difficulty, the designation of the incumbent by his proper name being mere surplusage. The power to take is vested in the office, not in the individual.
9. Conveyance by the successor of the donee is sufficient to convey title upon which the grantee may maintain ejectment, and the conveyance may not be questioned in a court of law.
10. Even where a breach of the trust is affirmatively shown, the court cannot make an exception to the general rule, and submit the trustee's conveyance to investigation at law.

Appeal from District Court of Jefferson County.

THIS was an action of ejectment commenced by appellant, against the appellee, in the Jefferson county district court, on the 19th day of May, A. D. 1873, for the recovery of the possession of lots one, two, three, four, five and six in block nine in Bush & Fisher's Addition to Golden City, in Jefferson county.

The declaration was in the usual form claiming the premises in fee. Plea of not guilty. On the trial the appellant offered in evidence a patent of the United States, dated September 1st, A. D. 1866, properly executed to Henry Altman, probate judge of Jefferson county, which, after reciting the fact that certain land warrants had been assigned to Henry Altman, probate judge of Jefferson county, Colorado Territory, in trust for the several use and benefit of the occupants of Golden City town site, according to their respective interests, under the town site act of congress, approved 23d May, 1844, and which had been located upon the following described land, to wit: The east half of the south-east quarter of section twenty-eight, and the west half of the south-west quarter of section twenty-seven, in township three, south of range seventy west, in the district of land formerly subject to sale at Golden City — now Denver City, Colorado Territory — containing one hundred and sixty acres, according to official survey, said patent further says: "Now, know ye, that there is therefore granted by the United States unto the said Henry Altman, judge as aforesaid, in trust for the several use and benefit of the occupants of Golden City town site, according to their respective interests under said act of 23d May, 1844, as assignee as aforesaid, and to his successors and assigns in trust as aforesaid, the tract of land above described, to have and to hold the said tract of land, with the appurtenances thereof, unto the said Henry Altman, judge as aforesaid, in trust for the several use and benefit of the occupants of Golden City town site, according to their respective interests under said act of

23d May, 1844, as assignee aforesaid, and to his successors and assigns in trust as aforesaid, which said patent is properly executed and recorded." To the introduction of this evidence the appellee objected, but the objection was overruled and appellee excepted.

The appellant also offered in evidence a deed purporting to be executed by Henry Altman to him, which deed is as follows: "This indenture made and entered into this 18th day of February, A. D. 1873, between Henry Altman, formerly of the county of Jefferson, and Territory of Colorado, now of London, in the kingdom of Great Britain, party of the first part, and Ensign B. Smith, of the county of Jefferson, and Territory of Colorado, U. S. A., party of the second part, witnesseth: That, whereas, the said party of the first part did on the 18th day of February, A. D. 1864, then being probate judge of the county of Jefferson, Territory of Colorado, enter under the town site act of the congress of the United States, approved May 23, 1844, entitled an act for the relief of citizens of towns upon the lands of the United States under certain circumstances, the following described lands, being the town of Golden City, and situated in the county of Jefferson, Territory of Colorado, to wit: the west half of the south-west quarter of section twenty-seven, the east half of the south-east quarter of section twenty-eight, the east half of the north-east quarter of section thirty-three, and the west half of the north-west quarter of section thirty-four, in township three, south of range seventy west, of the sixth principal meridian, the same being then subject to entry at the United States land office, situated at Golden City, but now at the City of Denver, in said Territory; and, whereas, on the 1st day of September, A. D. 1866, patents were issued by the government of the United States of America to the said party of the first part, conveying to the said party of the first part the hereinbefore described lands; and, whereas, on the 11th day of October, A. D. 1869, one Joseph Mann, a successor of the said party of the first part, in the office of probate judge of said Jefferson county, after hearing the allegations and proofs of the claimants of the herein-

after described land, being a portion of the lands hereinbefore described, made a deed in fee simple to the hereinafter described lands to the said party of the second part, which said deed is duly recorded on page 231 of book P of records of said Jefferson county ; and, whereas, said party of the first part has never conveyed the legal title to the hereinafter described tract of land to any person, whomsoever ; and, whereas, it is desirable to vest the title to the hereinafter described tract of land in the said party of the second part, as the occupant thereof, as provided by the said act of congress of the United States: Now, therefore, in consideration of the premises and the sum of one dollar, lawful money of the United States of America, to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, and by these presents doth grant, bargain and sell, convey and confirm unto the said party of the second part, his heirs and assigns, the following described tract or parcel of land, situated in the county of Jefferson and Territory of Colorado, to wit: Commencing at the north-east corner of the north-west quarter of the south-west quarter of section twenty-seven, in township three, south of range seventy west, of the sixth principal meridian, running thence west twenty chains, thence south two chains, thence south, $34^{\circ} 30'$, twenty-three and a quarter chains, thence east seven chains, and thence north twenty chains to the place of beginning, containing 28 and $\frac{1}{100}$ acres, the same being on the east side of East street, and a portion of the north-west quarter of the south-west quarter of section twenty-seven, township three, south of range seventy west, to have and to hold the same, together with all and singular the privileges and appurtenances thereunto belonging, unto the said party of the second part, his heirs and assigns forever.

In testimony whereof, I have hereunto set my hand and seal, the day and year first above written.

HENRY ALTMAN.

A Stamped
[SEAL.]
Wafer.

CONSULATE GENERAL OF THE UNITED STATES, }
LONDON.

On the 19th day of February, A. D. 1873, at London, before me, Joshua Nunn, Vice and Deputy Consul General of the United States of America for Great Britain and Ireland, residing at London, duly commissioned — the consul general being absent on official duty — personally appeared Henry Altman, known to me to be the person of that name described in, and who, in my presence, executed the foregoing conveyance or instrument of writing, and then acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein contained.

In testimony whereof, I have hereunto set my hand and affixed the seal of the consulate general of the United States of America, at London, aforesaid, the day and year last above written.

[United States
Consulate
General's
SEAL
London.] J. NUNN,
Vice Deputy Consul General U. S. A., London."

Which said deed was duly recorded in the records of said Jefferson county, on the 30th day of April, A. D. 1873.

To the reception of the deed in evidence with the indorsements thereon, the appellee objected and assigned the following reasons for his objection :

1. Said deed purports to be executed by Henry Altman, not as probate judge, but as an individual.

2. Said deed was executed after the expiration of Altman's term of office of probate judge of Jefferson county.

3 The legal title in fee is not in Altman, individually, but in his successor in office.

4. The deed is not executed and acknowledged according to law.

5. The deed conveys more land than the act of congress authorizes. The act of congress only authorizes the probate judge to deed lots to occupants at the time of entry.

6. Their entry of services not proven.

7. There is no proof that Smith was an occupant at the time of entry.

8. There is no proof that Smith complied with the provisions of the act of the legislature, or the act of congress, in such cases made and provided.

C. C. Carpenter was called as a witness by the appellant, who testified — the deed of Altman to Smith having been shown witness — “I have seen Henry Altman write, and I know his handwriting. The signature to this deed is his and in his handwriting.” Thereupon the court overruled the objections of the defendant and admitted the deed in evidence, and appellee excepted.

The appellant then offered in evidence a deed purporting to be made by Joseph Mann, probate judge of Jefferson county, Colorado, to the appellant, dated the 11th day of October, A. D. 1869, executed by said Joseph Mann to Ensign B. Smith, and acknowledged in the usual form, before D. C. Crawford, county clerk, conveying to said Smith the same land as described in the deed of Altman, which said deed contains the following statement: “This deed made between Joseph Mann, probate judge of Jefferson county, Territory of Colorado, party of the first part, and Ensign B. Smith of the second part, witnesseth: That the said party of the first part, for and in consideration of \$35.37, to him in hand paid, and for the fulfillment of the trust in the probate judge reposed, in the entry of the town site of Golden City, at the United States land office, hath remised, released and quit-claimed, and by these presents doth remise, release and quit-claim unto the said party of the second part, and to his heirs and assigns forever (describing the land as described in the Altman deed) together with all the estate, right, title, interest and property possession, claim and demand, whatsoever, as well in law and equity, of the said party of the first part, of, in and to the described premises, and every part and parcel thereof, with the appurtenances, to have and to hold all and singular the above-mentioned and described premises, together with the appur-

tenances unto the said party of the second part, his heirs and assigns forever."

Which said deed was recorded in the records of said Jefferson county, on the 11th day of October, A. D. 1869.

To the introduction in evidence of which deed the appellee then objected for the following reasons :

1. It was not made and executed in compliance with the act of congress under which said land was located and entered.

2. The plaintiff should first show that the land was entered in compliance with law.

3. The same objections that were urged against the reception of the Altman deed in evidence, which said objections were overruled by the court, and the appellee then and there excepted.

Joseph Mann was sworn as a witness, and the deed, purporting to be made by him to plaintiff, shown him, and he testified : " At the time of the execution of said deed I was probate judge of Jefferson county, and as such probate judge, I executed said deed." The deed was read in evidence, with the indorsements thereon, and the appellee excepted.

It was admitted that the entry of the land described on the patent was made January 18th, A. D. 1864.

E. B. Smith, the appellant, was sworn as a witness, and testified as follows : " The lots in dispute are one, two, three, four, five and six in block nine, in Bush & Fisher's addition to the town of Golden City, and are now, and were at the time of the commencement of this suit, in the possession of the defendant, John Pipe, and are on the lands described in the deeds made to me by Henry Altman and Joseph Mann. I know the lines of land and where the lots are on the land." Defendant's counsel said : We make no point on the location of the lots.

The appellant's counsel read in evidence an act of the territorial legislature of the Territory of Colorado, approved March 3, A. D. 1864, entitled an act to legalize and confirm the entry of the town site of Golden City.

The plaintiff rested his case. The appellee moved the court for a nonsuit, for the following reasons:

1. The plaintiff has failed to substantiate a cause of action.

2. Upon all the grounds heretofore urged against the admissibility of plaintiff's evidence; and the court granted the motion of nonsuit, to which the appellant excepted, and the appellant moved the court to set aside the judgment of nonsuit, which motion the court overruled and the appellant excepted, and the court gave judgment of nonsuit against the appellant and rendered judgment in behalf of appellee and against appellant for costs; to which the appellant excepted and prayed an appeal which was granted.

The following errors are assigned on the record.

1. The court erred in granting the defendant's (appellee's) motion for a nonsuit.

2. The court erred in rendering judgment of nonsuit.

3. The court erred in overruling and refusing plaintiff's (appellant's) motion to set aside said judgment of nonsuit.

4. The court erred in rendering judgment for costs in favor of the defendant (appellee) and against the plaintiff (appellant).

Mr. JOHN W. BLACKBURN, for appellant.

Mr. W. TELLER, Mr. A. H. DeFRANCE, and Mr. G. G. WHITE, for appellee.

WELLS, J. 1. The patent, which was admitted on the part of plaintiff below, afforded at least presumptive evidence of its own regularity. Whether the requirements of the act of congress had or had not been complied with, was in the first instance a question for the land officers, and must be taken to have been properly resolved. *Bagnell v. Broderick*, 13 Peters, 450; *Winfield Town Co. v. Maris*, 11 Kan. 148.

2. If the legal estate in the premises still remained in Altman after the expiration of his official term, his convey-

ance would entitle the grantee to maintain ejectment. 1 Perry on Trusts, § 328.

If such conveyance were in violation of the duties of the trust, the grantee would, of course, hold as trustee for the one entitled under the act of congress; but in courts of law the legal estate only is regarded; and a mere equity cannot be set up to bar an ejectment by the holder of the legal estate. This doctrine has been applied to trust estates of the peculiar character of the one now under consideration. In *Clayton v. Spencer*, 2 Col. 378, the probate judge of Arapahoe county, holding the legal estate in the Denver town-site, had conveyed certain lots in violation of the trust, and the grantee brought ejectment against one in possession who had succeeded to the rights of the occupant at the sale of the entry.

On bill brought, the ejectment was restrained, and the plaintiff at law was decreed to release to the defendant; which is in effect to say: 1st. That the conveyance of the probate judge, though in violation of his duty, passed the legal estate; for if not, the decree must have directed a cancellation of that conveyance, and a re-conveyance by the trustee to the party entitled; and, 2d. That the first conveyance, though in violation of the trust, was unimpeachable at law; for otherwise, equity could not have entertained jurisdiction. *Cook v. Rice*, 2 Col. 131, and *Coy v. Coy*, 15 Minn. 120, countenance the same doctrine. The circumstance that Altman did not assume to execute the conveyance in question in any official capacity is not material. If the estate did not pass to his successor in office, it remained in Altman, the individual, and his conveyance in his private capacity may transfer it effectually for the purposes of the present action.

3. The limitation in the letter's patent to the successors of the grantee named can have effect only so far as it accords with the act of congress.

But the purpose of this statute was to supply a defect in the pre-emption laws, and to confer upon the settler upon town lands, by means of different agencies, the same privi-

lege which had been before extended to the settler upon agricultural lands, *i. e.*, the right of pre-emption in fee. This it is supposed will not be questioned.

We must, therefore, imply in the trustee a freehold of inheritance, notwithstanding the omission of words of succession from the statute, for this is necessary to the accomplishment of the trust. 1 Perry on Trusts, § 315 ; 1 Washburn on Real Estate, 57*. The estate vested, therefore, either in Altman the individual, and remained in him after his office expired, and is limited to his heirs at his death, or else it vested in the probate judge, and not in the individual, and at the expiration of Altman's incumbency, those who succeeded him in the office succeeded also to the trust estate and powers.

Now considering the probability, or as one may say, the certainty that the public and official character of the trustee named in the statute induced the nomination of that officer in the first instance, and that if the trust estate be deemed to be limited to the successor, those in interest have the assurance which the same public, official, and respectable character affords of the intelligent and faithful administration of the trust, while if it be held to remain in the incumbent at the date of entry after the expiration of his office, it must inevitably descend to the heir ; whereby it may happen that the responsible duties and powers of the trust may devolve upon an infant, a non-resident or convicted felon, it cannot be doubted that the purpose of the statute is to confer the estate upon the county judge or the corporate authorities in their official and politic capacity, and to limit it to the successor in office until the trust should be finally exhausted. Nor does any technical difficulty arise from the circumstance that the county judge, or municipal authority, is not, for all purposes, a corporation, even if this be admitted. The legislative will is not to be frustrated by the application of the technical rules which govern private grants. *Rutherford v. Greene*, 2 Wheat. 196. The grant of the sovereign confers upon the donee capacity to

take according to the purpose, and to the extent intended ; *e. g.* : grant in fee by legislative authority capacitates the heir of the grantee to inherit, though he be an alien, *Goodell v. Jackson*, 20 Johns. 693 ; and the like grant to a slave enables him to both accept the estate, and transmit it to his heirs, though these be also under the disability commonly annexed to the condition of servitude. *Jackson v. Lewey*, 5 Cow. 401.

In like manner it is said to have been decided, that legislative authority to the justices of a particular court, to take bonds to themselves, in their official capacity, confers upon them, *quoad hoc*, a corporate character. *Justices of Cumberland v. Armstrong*, 3 Dev. 284 ; and to this effect is *Polk, Governor, v. Plummer*, 2 Humph. 507.

Neither will the circumstance that by the death or removal from office of the incumbent during his term, a vacancy may occur, whereby the fee will be in *abeyance*, breed difficulty, for it seems that the designation of the incumbent by his proper name in the letters patent, as in the present case, is unwarranted by the statute, and may be rejected as mere surplusage. Thus, it was held in the *Governor v. Allen*, 8 Humph. 182, that a bond required by statute, to be taken to the governor, sufficiently designated the obligee, as "the governor in and over the State," etc., and that in an action thereon, the office, and not the incumbent, was the plaintiff; and as to the point of pleading this is supported by *Merritt v. The Governor*, 4 Yerg. 489 ; so in *Polk, Governor, v. Plummer*, it was held, in respect to a similar bond, that the office is the payee; and to the same effect in *Findlay v. Tipton*, 4 Hayw. 216 ; where, the bond being to "John Sevier, governor," etc., whereas, in truth, another held the office at the date of the sealing, it was held that the name of the individual was surplusage, and might be rejected. And so, at common law it is said, "a bishop may take by the name of bishop, without any other name," *Shep. T.* 237 ; and though the proper name be mistaken, as a grant to George, bishop of N., where his

name is John ; or the grant be to the mayor and commonalty, or a dean, and chapter ; and mayor or dean is not named by his proper name, all these and such like grants are good. Id. 236.

And even if we reject these authorities ; if we say that the estate is not in the office, but in the incumbent so long as he holds the office, so that in case of vacancy the *fee* will be suspended, still no rule of the common law is violated ; for while the fee cannot be put in abeyance by the act of the party, it may by operation of law, of which the case supposed is an example. 1 Washburn on Real Property, 48*.

In this view of the matter the conveyance of probate judge Mann makes a case for the plaintiff. The recitations of this conveyance sufficiently evidence that the grantor was assuming to act in pursuance of the statute. 2 Perry on Trusts, § 511, c. The resolution implied in it, that the grantee was at the date of the entry the occupant of the premises, is supported by the presumption which attends the official acts of all officers. *Sherry v. Sampson*, 11 Kan. 611 ; and whether in fact error was committed is not to be contested in a court of law

4. The unusual extent of the trustee's grant, in the present case, is not supposed to afford an exception to the general presumption, which, as we have seen, is indulged to support the acts of the probate judge, in the administration of the trust. Nothing is shown, as to whether the premises were, at the date of the entry, within or without the settled portion of the town site ; nor as to their location, with reference to the inhabited portion ; nor as to the number of the inhabitants at the date of the entry ; nor the character of the premises granted. All these, and perhaps many other circumstances, must be taken into account, in determining whether, in the particular case, so large a tract can be said to be in several occupancy, within the meaning of the act of congress.

In the silence of the record we cannot assume that the trustee has erred or exceeded his duty ; and even if a breach

of the trust were affirmatively shown, no reason occurs to us, to make an exception to the general rule, and subject the trustee's conveyance to investigation at law. In any point of view, therefore, the case made by the plaintiff should have been submitted to the jury. The judgment of the district court is reversed, and the cause will be remanded for further proceedings, according to law. *Reversed.*

TOWN-SITE TRUST: *Georgetown v. Glase*, 3 Colo. 234; *Aspen v. Rucker*, 10 Colo. 189, 200; *Fillmore v. Beithman*, 8 Colo. 125; *Anderson v. Bartels*, 7 Colo. 239; *Murray v. Hobson*, 10 Colo. 69, 74; *Aspen v. Aspen T. & L. Co.* 10 Colo. 200. See, also, *George v. Tufts*, 5 Colo. 182.

MARTIN v. FORCE.

1. Where the bill of exceptions fails to show that all the evidence in the court below is preserved in the record, this court is deprived of the right to review the judgment of the lower court upon the evidence.
2. A bill of exceptions is to be regarded as a pleading of the party aggrieved, and must be construed most strongly against the party who prepared it. The regularity of the proceedings of the lower court must be presumed unless the contrary appears in the record.
3. When the trial is by the court without a jury, and no exception is reserved to the judgment, this court has no power to review the judgment of the lower court upon the evidence.
4. A suggestion of diminution to enable the party to bring in a more perfect transcript of the record after the cause has been submitted and determined will not be entertained.

Error to Probate Court of Arapahoe County.

THIS case is stated in the opinion.

Messrs. BROWNE & PUTMAN, for plaintiff in error.

Mr. W. W. COOK, for defendant in error.

THATCHER, C. J. *First.* Upon two grounds this court has no jurisdiction to review the judgment of the court below upon the evidence. First, the bill of exceptions does not show that all the evidence is before us. This omission is fatal to our right to review the judgment upon the testimony. *Greene v. McFadden*, 5 Clarke (Iowa), 549; *Illinois Central Railroad Co. v. Garish*, 39 Ill. 371. No exact form

of words is requisite to indicate that all the evidence introduced at the trial, in the court below, is set forth in the bill of exceptions, yet it must be clearly manifest to this court, from an examination of the record, that no evidence has been omitted from the bill of exceptions, upon which the finding and judgment of the court below might be predicated. The reason for this rule is obvious. If there was additional evidence it may have been of a character to influence the court in its finding. Of its precise nature, if indeed any evidence has been omitted, we are not advised, and we are not at liberty to infer that it was immaterial. The bill of exceptions under our Practice Act, which is similar to that of Illinois, is to be regarded as a pleading of the party aggrieved, and if it be in any way ambiguous, uncertain or omissive, it must be construed like any other pleading, most strongly against the party who prepared it. *Rogers v. Hall*, 3 Scam. 5.

To support the verdict of the jury or the finding of the court, we are bound to make every fair and just intendment. The proceedings of the lower court must be presumed to have been regular in every respect, unless the contrary appears in the record. The maxim *Omnia presumuntur rite et solenniter esse acta, donec probetur in contrarium* applies. Broom's Legal Maxims, 729; *Spieres v. Parker*, 1 Term R. 503.

Second. The trial was to the court, and no exception was reserved to the judgment. Without such exception it has been held, that under section 22 of our Practice Act this court has no power to review the judgment of the lower court *upon the evidence*. *Phelps v. Spruance*, 1 Col. 414; *Liss v. Wilcozen*, 2 id. 85.

No exceptions were taken to the admission of improper or the exclusion of proper testimony. We, therefore, are precluded from reviewing the judgment on any ground. The plaintiff in error is not properly before this court.

The judgment of the court below must be affirmed

Affirmed.

UPON a petition for rehearing in this cause, the following opinion was delivered by

THATCHER, C. J.: The petition for rehearing is based upon a supplemental transcript of the record offered for filing under the rule, from which it appears that the plaintiff in error did, in fact, except to the judgment of the court below, and that the bill of exceptions did, in fact, contain all the evidence. It is, in effect, a suggestion of diminution of the record, not only after the cause has been submitted, but after judgment has been pronounced. It would be a very loose practice that would permit, after the final determination of a cause, the aggrieved party, through whose negligence an imperfect bill of exceptions has been incorporated into the record, to suggest diminution with a view to a rehearing. The case of *Steele v. The People*, 40 Ill. 59, is an authority for saying that a suggestion of diminution to enable the party to bring up a more perfect transcript will not be entertained after the term at which the cause was submitted.

The petition must be denied.

Petition denied.

BILL OF EXCEPTIONS: *Law v. Brinker*, 6 Colo. 558; *Poiré v. Rocky Mountain Transp. Co.* 7 Colo. 569.

REGULARITY OF PROCEEDINGS: *Gomer v. Chaffe*, 5 Colo. 385; *Hughes v. Cummings*, 7 Colo. 541; *Pennistoun v. McNally*, 11 Colo. 559; *Behymer v. Nordloh*, 12 Colo. 354.

LYON v. WASHBURN.

1. Where an appeal is taken to the probate court from a judgment of a justice of the peace, and the cause submitted in the latter court upon the merits, a want of jurisdiction in the justice of the peace cannot be averred in this court, if the cause is one over which the probate court could have exercised original jurisdiction.
2. The proper foundation must be laid for the introduction of secondary evidence of the contents of a lost instrument. But where the plaintiff by letter-authorized one as her agent to collect rents, and the agent accepted an attornment, and afterward as an attorney, his authority as such not being questioned, instituted suit to recover the rents: *Held*, that the letter was immaterial in a suit for the rent; instituting the action was a ratification of the act of the agent, notwithstanding the same individual acted as both agent and attorney at law.
3. When the evidence shows that an attornment has been made and accepted in good faith, the tenant, in an action by the landlord against him for rent, will be estopped to assert title in his original lessor, or the demise under which he entered.

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Error to Probate Court of Clear Creek County.

THIS was an action in assumpsit for rent. The cause was commenced by Levi H. Shepard, the agent and attorney of Emma Washburn, against Henry E. Lyon, before a justice of the peace. The plaintiff recovered a judgment from which the defendant appealed to the probate court of Clear Creek county. Upon a trial *de novo* in the latter court, without a jury, Shepard, on the part of the plaintiff, testified: "In September, 1873, I received a letter from Emma Washburn, which letter was lost, asking me to act as her agent and collect her rent in Georgetown."

The defendant objected to the witness stating the contents of the letter as to his agency, "without proof of the loss of the letter." The objection was overruled and the defendant excepted.

The witness Shepard testified further, as follows:

"I went down to see Mr. Lyon, who was then living in the house on lot 18, in block 75. I told him that the house was then owned by Mrs. Washburn, and that she had written to me to rent the house and collect the rent. He said that he wanted to still live in the house, and would pay me the rent, but could not do so before the first of January. I told him that that would do if he would pay it the 1st of January, 1874. I then told him that he might have the house at the same rent per month that he was then paying for it, and asked him how much he was paying. He said \$10 per month, at least so I understood him to say, \$10. After the 1st of January, 1874, I saw Lyon again and asked him if he could pay me some rent on that house. He said he could not because he was disappointed in getting money, but promised to in a short time. Some time in March I saw Mr. Lyon again and asked him for payment of rent. He again told me that he had been disappointed and could not pay me before the 1st of May. I saw Lyon and he said he could not pay before the 1st of July. After the 1st of July, I called on him and he said he would come to my office and settle with me that night.

He did not pay me at that time, and kept the house until the 13th of October, and then left and did not pay me any rent. Mr. Lyon was in the house in November, 1873, when I went to see him. I have charged rent since the 6th day of November, 1873, to the 13th day of October, 1874."

This witness also stated on cross-examination, that at the time he informed Lyon of his authority to collect rent for Emma Washburn, that he also "asked Lyon for rent due prior to that time, for Dr. Pollok."

The plaintiff produced in evidence a deed of quit-claim from Jennie Pollok and her husband, conveying the premises in controversy to the plaintiff; the deed bearing date November 6th, 1873, also a deed bearing date April 11th, 1874, to the plaintiff from James Gunn, president of the board of selectmen of Georgetown, as trustee under the acts of congress, and the laws of Colorado, for the relief of the citizens of towns upon the public lands. Also a trustee's deed from one Ed. C. Parmelee, to Jennie Pollok, reciting a trust deed from Bell Key to Parmelee, for the use of H. M. Arney, to secure the payment of \$250; the breach of the conditions of the trust deed, and the forfeiture and sale thereunder of the premises in question to Jennie Pollok, on the 23d of August, 1873.

The defendant introduced evidence to prove that he had not promised to pay rent to Shepard as the latter had testified, and also that he "went into possession under Bell Key on the 25th of April, 1872, at a rental of \$8 per month, but not for any specified time; that Bell Key owned the property when he took possession, and that he had known no one in paying rent except Bell Key "

The court gave judgment in favor of the plaintiff for \$88 and costs. The defendant excepted and prosecutes this writ of error, assigning for error the ruling of the court below in permitting evidence of the contents of the letter testified of by the witness Shepard, for the reason assigned at the trial, also upon the admission of the several deeds in evidence; also that the court erred in rendering judgment in favor of the defendant in error, and that the judgment was manifestly against the evidence.

Messrs. TAYLOR & YATES, for plaintiff in error.

Mr. L. H. SHEPARD, for defendant in error.

WELLS, J. 1. Whether in any conceivable case the title to land may be so in dispute in an action to recover rents, or for the use and occupation of lands, as to exclude the jurisdiction of the justice of the peace, is not necessary to be now determined. At the close of the case made by the plaintiff in the court below, the defendant put in his testimony and submitted the whole matter to the determination of that court upon the merits without excepting to the jurisdiction in any form. The tacit stipulation which is to be implied from his conduct in this respect is equivalent in its effect to an express waiver of the objection, and inasmuch as the probate court might have entertained the controversy if the cause had been an original one, the jurisdiction cannot now be questioned. *Allen v. Belcher*, 3 Gilm. 594; *Bisher v. Richards*, 9 Ohio St. 498.

2. The objection which was taken to the testimony given by Mr. Shepard as to the contents of the letter of instructions, said to have been received by him from his client, seems to us to have been made in apt time, and the reasons assigned therefor sufficiently explicit to advise the court that more specific evidence of the loss of the writing was demanded. Such evidence the defendant was entitled to exact. To show in general terms that a writing is lost without showing search or inquiry for it, has never been regarded as sufficient to admit secondary evidence of its contents. The letter was not material, however, except for the purpose of showing the agency of Mr. Shepard to accept defendant's *attornment*. But the action is founded upon this transaction, and is an effectual ratification of the agency which Shepard then assumed. *First Parish in Sutton v. Cole*, 3 Pick. 245; *Hening v. Polly*, 8 Mass. 113; *Ham v. Boody*, 20 N. H. 414; *Bank of Augusta v. Conroy*, 28 Miss. 870.

The circumstance that the action appears to have been instituted by the same authority who assumed to act for the plaintiff in the matter of the *attornment* is not supposed to afford an exception to the general rule.

The authority of the attorney not having been questioned below is, for the purposes of the present inquiry, conclusively presumed. The ratification of the act of Mr. Shepard in accepting the *attornment* is as complete and effectual as if the action had been instituted by another attorney, or for that matter, by the plaintiff herself. The error in allowing secondary evidence of the contents of the letter seems, therefore, to be immaterial.

8. The general rule confessedly is that the tenant cannot deny his lord's title. Fraud, force, or mistake of fact, inducing an *attornment*; or the acceptance of a lease by one already in possession, is conceded to furnish an exception. It was once held, also, that where a mere *attornment* is shown to establish tenancy, the defendant may rebut this by showing that he received the premises from a third person for a term which is still unexpired. *Cornish v. Searell*, 8 B. & C. 471.

Recently it has been attempted to extend the exception to all cases where the tenant was in actual possession at the time of the attornment or acceptance of the lease. *Tewksbury v. Marzloff*, 33 Cal. 237; *Franklin v. Mereda*, 35 id. 566; *Fuller v. Sweet*, 30 Mich. 240.

In such case it is plausibly said, the one has received nothing, and the other has parted with nothing. There is no consideration for the attornment; and it has no more validity, or effect, than any other promise made without consideration. The argument omits from consideration the circumstance, that every letting, and every acceptance of an attornment, involves an implied, if not an express undertaking that the tenant shall peaceably enjoy the premises as against the landlord; that is to say, that proceedings for the assertion of the hostile title shall not be instituted. This undertaking to forbear suit, whether express or im-

plied, is as effectual and sufficient a consideration, for the promise to pay rent, as an original delivery of the possession would be. It is no answer to say that the tenant may be liable to one landlord, by virtue of an original lease, and to another by virtue of a subsequent attornment; even if the law be assumed by the argument, it is still no answer. To avoid the assertion of a hostile title, one may lawfully contract to pay for his own; and if the threatened litigation be forborne, he is bound by his promise; and so, the tenant holding under a lord, where title is unimpeachable, may, if he will, undertake to pay rent to every stranger who demands it. Such demand implies the threat of litigation and dispossession, if the demand be refused; and if made in good faith, and without fraud, or other improper practice to induce concession, and if the tenant yield to it, with a full understanding of all the facts, which are material to the question of his liability, it is difficult to see why he should not be bound by his promise, even though he should become liable thereby to pay triple rent for the same premises.

If, in truth, the adverse claimant have the paramount right, and be entitled to immediate possession, an attornment to him, in good faith, to avoid the threatened eviction, is probably a bar to the action of the original lessor for rent. *Moore v. Goddard*, 13 Metc. 178; *Somers v. Salters*, 3 Den. 216; *Merryman v. Bourne*, 9 Wall. 592.

If the hostile title be not the superior one, it is the tenant's own folly to yield to an empty claim, but if he does so, and thus induces a forbearance of litigation, it may be until the statute of limitations has completed its course, no principle can be invoked which shall permit him to recede from what he has solemnly undertaken. The effect of the attornment upon the possession of the original landlord, if the tenant should yield the premises to him, it is not necessary to consider at this time.

The court below has found, in effect, that defendants attorned to the plaintiff; and notwithstanding the contradic-

tions in testimony, sufficient appears to sustain this finding. The evidence was given to bring the case within the just exceptions to the general rule.

The defendant was, therefore, *estopped* to assert the title of the original lessor Key, or the demise under which he entered. The conveyances offered on the part of the plaintiff below were an ineffectual attempt to show the title, which, as we have seen, the defendant was precluded from denying. The error in admitting them was, therefore, immaterial. Judgment is affirmed with costs. *Affirmed.*

JURISDICTION — QUESTION WHEN RAISED. — If a cause is taken to the probate court from a justice of the peace, and there submitted upon the merits, a want of jurisdiction in the justice cannot be averred in the supreme court, if the cause is one of which the probate court could have taken original jurisdiction: *Smith v. District Court*, 4 Colo. 287; *Behymer v. Nordloh*, 22 Colo. 384.

SMITH et al. v. MAYER et al.

1. In the trial of a cause the jury are to *hear* the testimony; an inspection is allowed only in special cases, and generally only by the consent of both parties.
2. Regularly, when the burden of proof lies with the plaintiff, he should be required to develop his whole case in the opening. But it is within the discretion of the court, to receive in rebuttal evidence which in strictness ought to have been produced in chief.
3. When goods have been sold with a warranty of quality, and those delivered, though inferior to the stipulation, are retained by the vendee, the latter may either pay the price and have his action for the breach of warranty, or he may *recoup* his damages in the vendor's action for the price.
4. The measure of damages held in this case to be the difference between the value which the articles sold would have had in the market at the time of the sale and delivery, if they had corresponded with the guaranty, and their actual value with the defects.

Error to Probate Court of Arapahoe County.

THIS was an action of assumpsit commenced in the probate court of Arapahoe county, to recover the price of a lot of furniture sold and delivered. The declaration consisted of the common counts. Pleas, general issue, and a special plea that the furniture was warranted by plaintiffs to be first-class in material, quality and finish, but that the same was not first-class. That certain bedroom sets

should be dressing case suits, by the terms of the sale, but that they were furnished to defendants as bureau suits. That said goods were not finished in oil, and the lumber of which they were constructed was not seasoned and that the goods, in consequence, were badly warped and twisted.

Replication of plaintiffs, denying the averments of the special plea. On the trial, the witness Owen testified that he had been in the employ of the plaintiffs for four years, that he solicited an order from the defendants about the 30th of March, 1875; and sold them at that time a bill of goods, consisting of bedsteads, chamber sets, and center table. The amount of the sale was \$1,546.66. It was understood that "the furniture should be equal to other factories, first-class work."

Upon his cross-examination, the witness Owen was asked the following question, which was objected to by the plaintiffs:

Question—At the time you sold these goods to the defendants, did they not tell you they had ordered goods from another factory; and did you not tell them that if they would countermand their order you would sell them the same kind of goods at lower figures?

Objection sustained and exception.

The delivery of the goods to the defendants having been shown, the plaintiffs rested.

The defendant gave in evidence the following guaranty:

"DENVER, Col., *March* 31, 1875.

I, agent for F. Mayer & Co., guarantee to Smith & Doll that the furniture I send to them shall be all first-class lumber, well seasoned, and goods well finished with oil finish.

"E. L. OWEN, *Agent*."

The defendants proved that they ordered the goods upon the foregoing statement. This was followed by testimony going to show that the goods did not correspond with the warranty, and were defective as alleged in the special plea of the defendants. In rebuttal the plaintiff introduced sev-

eral depositions of witnesses and experts, who had examined the goods in question, who deposed as to the quality of the goods, of their being properly finished, and in compliance with the requirements of the guaranty; besides a number of letters which had passed between the parties to the action, concerning the matters in controversy, to all which objections were made and exceptions reserved by the defendants. The defendants also offered to exhibit samples of the goods to the jury, to which the plaintiffs objected, the objection was sustained and the defendants excepted.

Among other instructions to the jury, the court of its own motion gave the following, upon which error is assigned:

"The jury are instructed that the true measure of damages (if you find such damage) is the difference between the value which the furniture sold would have had at the time of the sale and delivery in Denver, if it had been such as corresponded with the guaranty, and its actual value, with the defects shown in the quality, kind of material, and finish of the furniture, if you find such defects, and the sum when so found by you (if you shall find any), you shall deduct from the contract price, in making up your verdict."

The jury returned a verdict against the defendants for \$1,814.56. A motion for a new trial having been overruled, judgment was entered on the verdict, and the cause was brought into this court on writ of error.

Messrs. THOMAS & HEREFORD, and Messrs. SYMES & DECKER, for plaintiffs in error.

Messrs. HUGHES & WELBORN, and Mr. SAM P. ROSE, for defendants in error.

WELLS, J. 1. The question propounded to the witness Owen, upon his first cross-examination, was properly excluded.

It related to matter entirely foreign to the issue, and which, so far as appears, could in no way affect the credit of the witness, or the measure of damages.

2. The refusal of the court to permit the jury to inspect the samples of furniture produced by the defendant was also entirely proper. The jury are to *hear* the testimony. An inspection is allowed only in special cases, and generally only by consent of both parties. The present case is within the rule and not within any exception.

3. If it be conceded that upon the issue touching the quality of the goods, the burden of proof lay with the plaintiffs, it would seem that regularly they should have put in their evidence to this in the opening. 1 *Greenleaf's Ev.*, § 74; *Rees v. Smith*, 2 Stark. 30; *Ford v. Niles*, 1 Hill, 300; *Hastings v. Palmer*, 20 Wend. 226.

But it is always within the discretion of the court to receive in rebuttal, evidence which in strictness ought to have been produced in chief. *Philadelphia, etc., Railroad Co. v. Stimpson*, 14 Pet. 448; *Kansas Pacific Railroad Co. v. Miller*, 2 Col. 442.

Where, as in the present case, nothing appears to show that the objecting party was surprised or prejudiced by the course pursued, error cannot be assigned.

4. Where goods have been sold with a warranty of quality, and those delivered, though inferior to the stipulation, are retained by the vendee, the latter may either pay the price, and have his action for the breach of the warranty, or he may await the vendor's action for the price, and *recoup* his damages. All questions whether consequential damages may be the subject of *recoupment* being put aside, it is manifest that the same rule must measure the allowance to the vendee, whether he be plaintiff or defendant.

The instructions given by the court, of its own motion, follow the rule, which is almost uniformly prescribed by authority at this day. *Sedgw. Dam.* 286*-291*; *Benj. on Sales*, § 903, *n. d.*

It does not, as supposed by counsel, make the agreed price the measure of the value of the thing contracted for; nor as applied to the present case, does it at all differ in result from what I should think the more logical and natural formula contained in the instructions given on the prayer of the defendants.

Whether in a conceivable case, *e. g.*, where the value of the thing contracted for at the time when delivery should have been made falls below the agreed price, justice does not require a modification of the rule as generally asserted, may well be questioned; in the case supposed, strict adherence to rule as given in the books, or that prescribed in the instructions given on the part of the defendants in the present case, will exact of the vendee (while deprived of the thing contracted for) more than the value of what he has received, as is susceptible of demonstration; in other words, the rule affords the vendor the benefit of the contract which he has broken. The question does not, however, arise upon the present record. As to the other points which are complained of in the charge of the court, no error is apparent, for whether right or wrong, it is inconceivable that they can have misled the jury.

5. The allowance to be made to the defendant for the breach of the warranty was dependent upon the credit to be accorded to the several witnesses; and we do not feel called upon to review the verdict in that respect.

No error appearing in the record, the judgment will be affirmed, with costs.

Affirmed.

ADMISSION IN REBUTTAL OF EVIDENCE, which ought to have been produced in chief, is in the discretion of the court: *Buckingham v. Harris*, 10 Colo. 463.

PACKARD v. KING.

1. The jurisdiction of courts of equity in matters of partition is undoubted, and the statute (R. S., p. 493, § 15) provides for its exercise according to the usual practice of such courts. It is not necessary, therefore, that the bill should be under oath; verification being required only in proceedings under the statute.

2. In matters of partition, a court of equity will not only decree the division of the estate, but will adjudicate other rights and equities growing immediately out of the common tenancy, and adjust its decree to the full exigency of the case.
8. When there is no equity of redemption from sales under a decree, the time in which payment is to be made should be controlled in a degree by the amount to be paid, and the decree should not limit the time to less than ninety days, the life-time of an execution at law.

Appeal from District Court of Jefferson County.

THE bill, which was filed in this suit on the 9th day of November, 1872, alleges that Vevy Ann King, the appellee and complainant in the court below, in the month of January, 1870, jointly with George F. Packard, the appellant, purchased and received a conveyance of Clemency M. McIlvoy and Dennis D. McIlvoy, certain lands situate in Jefferson county, Colorado. That they were to pay \$5,000 for the land, and that at the time of the purchase the complainant paid \$2,500, and that the complainant and Packard on the day following executed and delivered to McIlvoy a mortgage on the land purchased, to secure the balance of the purchase-money with interest, which was to be paid by January 1st, 1871. That on or about the 1st day of February, 1871, complainant paid to McIlvoy on the mortgage, the sum of \$750, making in all the sum of \$3,250; that Packard had not paid any part of the purchase-money, and that there remained due to McIlvoy, including interest, about \$3,000; that the interest of complainant in the estate was liable for this balance of the purchase-money, together with interest due thereon; that since the purchase, Packard had enjoyed the use and occupation and rents and profits in a much larger degree than the complainant; and that upon an accounting, Packard would be found to be indebted to complainant in the sum of \$1,000 as her share of the rents and profits, etc. The bill prays for an accounting as to the amounts stated to be due the complainant and to McIlvoy; and for partition of the premises, and that in default of payment by Packard of the amount that should be found due, that his interest

be sold. After answer the cause was referred to the master to take proof. At the final hearing, a decree of partition was entered and also that Packard pay to the complainant, within sixty days from the adjournment of the court, the sum of \$1,103 $\frac{1}{10}$ with interest and certain costs, and in default, that the master should proceed to sell as at sheriff's sale on execution, the portion of land set apart to Packard and out of the proceeds to pay costs, the amount decreed to be paid complainant, rendering the surplus to Packard, and execute a conveyance to the purchaser, etc. From this decree Packard appealed to this court.

Messrs. BROWNE & PUTNAM, for appellant.

Mr. JOHN W. BLACKBURN, for appellee.

ELBEET, J. This was a bill in chancery filed by the appellee against the appellant, for the partition of a common estate, and other relief in respect of matters growing out of the common tenancy. The jurisdiction of courts of equity in matters of partition is undoubted, and section 15 of the Partition Act, R. S. 493, expressly provides for its exercise according to the usual practice of such courts.

It was not, therefore, necessary, as is claimed by the appellant, that the bill should be under oath. Section 2 of said act, requiring the petition to be verified, is applicable only to proceedings under the statute.

The bill, we think, sufficiently sets forth the interest of the complainant in the property sought to be partitioned. It alleges the joint purchase of the estate by the complainant and the defendant Packard, and a conveyance to them, and under these allegations, the complainant, had not defendants' answer rendered it unnecessary, could have introduced the usual evidences of title. It is claimed, however, that the bill prays for relief in respect to matters cognizable only in a court of law. It is a maxim of equity jurisprudence that "where a court of equity has jurisdiction of a

cause for any purpose it will retain it generally until complete justice is done." Story's Eq. Jur., §§ 74-76, and cases cited. In matters of partition it will not only decree the division of the estate, but will adjudicate other rights and equities of the parties growing immediately out of the common tenancy, and adjust its decree to the full exigency of the case. If rents or profits have been enjoyed by one tenant in excess or exclusion of the co-tenant, it will direct an account, and decree payment. Story's Eq. Jur., § 655; *Lorimer v. Lorimer*, 5 Mad. 363; *Dennis v. Mahoney*, 65 Ill. 406. If one tenant has made valuable improvements on the common estate, they will be set apart to him or contribution will be decreed. Story's Eq. Jur., *supra*; *Lonville v. Menard*, 1 Gill, 40; *Dean v. O'Meara*, 47 Ill. 120; *Kurtz v. Hebner*, 55 id. 520. So also if one tenant has paid an incumbrance upon the estate. *Titsworth v. Stout*, 49 Ill. 80. In the case *Warfield v. Banks et al.*, 11 Gill & J. 98, one of the defendants had made advances in excess of his proportion of the purchase-money, and the amount was decreed him.

In the case at bar the complainant paid her half of the purchase-money at the date of the purchase. The other half, which the defendant Packard was to pay, was secured on the common estate, by the joint note and mortgage of the complainant and defendant.

Subsequently the complainant made a payment on the note and mortgage of \$750, and whether it be considered as a part payment of an incumbrance or as a payment in excess of her proportion of the purchase-money, or both, it is equally within the principle of the cases cited.

Whatever may have been the complainant's remedy at law respecting this advance, the court having jurisdiction of the partition was authorized to do complete justice between the parties by decreeing the payment of this advance, and in default thereof, sale of the lands partitioned to the defendant to satisfy the same.

Nor can the objection that this relief was not specifically prayed for prevail. The advance was alleged in the bill,

an account was prayed, and having been taken, the amount found due was properly decreed under the prayer for general relief. Story's Eq. Jur., § 40, 41, 42.

The objection that there was no redemption allowed by the decree, we would be disposed to consider favorably, if there was any thing in the law to support it. Why there should not be a right of redemption provided in the case of sales under a decree, as in the case of sales under a judgment, it is difficult to see; but our statute provides for redemption only where real estate is sold under a decree of foreclosure. In other cases the right does not exist. *Farnsworth v. Strosser*, 12 Ill. 482; *West v. Fleming*, 18 id. 248.

It has been held that where there is no equity of redemption, that the time in which payment is to be made should be controlled in a degree by the amount to be paid, and that in no case should the time limited by the decree be less than ninety days, the life-time of an execution at law. *Kinsey v. Thomas*, 28 Ill. 502; *Lush v. Architectural, etc.*, 24 id. 553. This rule follows the analogies of the law, and we think it demanded by plain consideration of equity and justice. We will, therefore, direct the modification of the decree in this particular.

Subsequent to the decree there appears an entry, in some respects resembling a judgment at law, for the amount before decreed the complainant. This entry is irregular and will be vacated.

Subject to the foregoing modifications, the decree of the court below is affirmed. The appellant will be allowed costs in this court.

Affirmed.

REDEMPTION, TIME FOR.—Where there is no equity of redemption from sales under a decree, the time in which payment is to be made is to be controlled in a degree by the amount to be paid, and the time should not be limited to less than ninety days, the lifetime of an execution: *Nipple v. Hammond*, 4 Colo. 220; *Denver B. & M. Co. v. McAllister*, 6 Colo. 265.

CITY OF DENVER v. LOBENSTEIN et al.

1. If the plaintiff, in a bill in equity, replies to a plea of *res adjudicata*, he thereby admits the sufficiency of the plea, if true, and if upon the hearing, the plea, going to the whole bill, is sustained, the bill must be dismissed.
2. When a right has been judicially determined by a court of competent jurisdiction, the decree thereon, unless reversed, is conclusive upon the parties, and those in privity with them in law, or estate. This doctrine applies to decrees granting or denying injunctive relief, and is founded upon the maxim: *Interest rei publicæ ut sit finis litium*.

Error to District Court of Arapahoe County.

ON the 14th of May, 1875, Lobenstein and others, the defendants in error, filed a bill in the probate court of Arapahoe county to restrain the city of Denver, plaintiff in error, from taking forcible possession of a certain lot of ground then owned and occupied by the defendants, but claimed by the city as a street. To this bill the plaintiff demurred, the demurrer was sustained; subsequently on the 19th day of June, 1875, the defendants dismissed their bill.

On the 21st day of June, 1875, the mayor and certain of the aldermen of the city of Denver threatened unequivocally to take forcible possession of the same ground, and to use violence in so doing, if necessary, to tear down the defendants' improvements and to convert the ground into a public thoroughfare. On the 22d day of June, 1875, the defendants filed their bill in the district court of Arapahoe county to enjoin the plaintiff, its officers, servants, and agents, carrying these threats into execution. To this bill the plaintiff demurred, and filed a motion to dissolve. Upon argument the motion and demurrer were overruled, and the plaintiff required to answer the bill. Under the rule the plaintiff filed a plea of *res adjudicata*, setting up the decree of dismissal rendered in the probate court on the 19th day of June, 1875, as a bar. Issue

was joined upon the plea and the case set down for hearing. Upon the hearing a decree was rendered in favor of the defendants in error in accordance with the prayer of the bill. To reverse this decree the plaintiffs have sued out this writ of error.

In this court, the defendants in error submitted that the plaintiff in error relied solely on the plea of *res adjudicata*, under the impression that the evidence in the record would support its plea, and also urged that :

"In equity as well as at law the proof must support the allegation. The plaintiff in error took upon itself the burden of showing, first, identity of the thing sued for ; second, identity of the cause of action ; third, identity of persons and parties ; fourth, identity of the quality of the persons. These four conditions are *concurrent*. The plea, without showing them, would have been faulty. The plea was sufficient. It then became absolutely imperative to prove the existence of these four concurrent conditions, and failing in any one of them the defense must necessarily fall.

The plaintiff in error failed to show the existence of the second condition, to wit : 'Identity of the cause of action.'

The decree set up in the plaintiff's plea was rendered upon a statement of facts alleged to have existed anterior to the 14th day of May, 1875. The facts upon which this bill is based did not arise until the 21st day of June, 1875, consequently the cause of action could not have been identical with that of the 14th of May previous.

The plaintiff in error undertook by its plea to make the decree rendered on June 19th operate as an estoppel to the maintenance of the action instituted June 22d, and which was based upon a different state of facts. A decree to operate as an estoppel must have been confined to matters in issue and decided. When the decree was rendered, that of which the defendants in error complain did not exist, and an estoppel cannot be created by mere argument or inference. While the facts in both cases may have been similar,

they were not the same. 'The best and most invariable test as to whether a former judgment is a bar is to inquire whether the same evidence will sustain both the present and the former action.'"

Mr. CHAS. S. THOMAS, for plaintiff in error.

Mr. E. P. HARMON, and Messrs. FRANCE & ROGERS, for defendant in error.

THATCHER, C. J. This is a bill for an injunction to restrain the city of Denver from entering upon, taking possession, grading and converting into a public street in the city of Denver, lot number twelve, in the printing-house block, which said lot is alleged to be the property of the complainants in the court below, being defendants in error in this court. To this bill the defendants interposed a general demurrer, which was overruled, when, by leave of court, they filed the plea of *res judicata*, upon which the complainants then joined issue. Upon the hearing the court rendered a decree in favor of the complainants in accordance with the prayer of their bill. Under its plea, the city offered in evidence the record in a cause determined in the probate court of Arapahoe county, wherein the parties, complainants and defendant, were the same as in this suit, and wherein the complainants by their bill made substantially the same allegations, and prayed for the same relief, concerning the same premises.

To the former bill, the city demurred generally and specially, and moved the court to dissolve the preliminary injunction that had issued in the cause. The demurrer was sustained and the motion to dissolve allowed. Therefore the court, on complainant's motion, dismissed the bill at their costs.

Under the state of the pleadings in this suit the question, whether the dismissal of a bill unqualified by such words as "without prejudice" or the like, following upon the allowance of general and special demurrer, is a bar to a

future action, cannot arise. The court is precluded from this inquiry. The plea of *res judicata* was not set down for argument, for the purpose of determining its sufficiency. The complainants filed a replication to the plea, and thereby admitted its sufficiency if true.

If the plaintiff reply to the plea, he thereby makes as full an admission of its validity as if it had been allowed upon argument; so that if the defendant, at the hearing, proves his plea to be true, the bill must be dismissed." 1 Daniels' Ch. Pl. and Pr. 695; Story's Eq. Pl., § 697; Mitford & Taylor's Pl. and Pr. in Eq. 390; *Dows v. McMichael*, 6 Paige, 139; *Hughes v. Blake*, 6 Wheat. 472.

As the plea of *res judicata* goes to the whole bill, our inquiry necessarily is directed alone to the consideration of its verity.

Was the subject-matter of this bill adjudicated in a former suit, by a court of competent jurisdiction, between the same parties or their privies? To this extent alone under the pleadings are we at liberty to inquire. The parties are identical. The jurisdiction of the probate court in the former bill is not drawn in question. In each bill the complainants assert the same title to the premises as to which injunctive relief is prayed. The acts which the complainants seek to restrain are the same in both suits. By the same right, to wit: certain proceedings of the city council held on the 10th day of May, A. D. 1875, anterior to the filing of the former bill, the city authorities claimed to act in converting the lot into a street, as appears from the complainants' own evidence. But it is contended that after the dismissal of the former bill, new threats similar to those before were made by the city to do the very act which the probate court had refused to enjoin it from doing; that these renewed threats constitute a different cause of action, and that therefore the doctrine of estoppel does not apply. In other words, the complainants assert in effect, that if A files a bill for an injunction against B to restrain him from cutting grass or committing any other trespass upon the prem-

ises of A, and it is determined by such court at the hearing that A is not entitled to such relief, A is not estopped thereby from filing another bill at once for the same purpose, against the same party, if B still insists upon doing the act which the court refused to enjoin.

If this doctrine be sound, the stability of all decrees granting or denying injunctive relief is practically at an end. Litigation upon adjudicated points in such cases, between the same parties, may never cease.

The moment the right of a litigant to do, or not to do, a particular thing is judicially decided, he is at liberty to bring a new suit for the purpose of re-determining the same right between the same parties. The principle of the maxim upon which the doctrine of estoppel by judgment or decree is founded, viz. : *interest reipublicæ ut sit finis litium* is at variance with the theory of the complainants so ingeniously presented. The renewal of the threats to invade the same right of the complainants does not in any legal sense afford a distinct or different ground of action.

It is held to be a "principle lying at the foundation of all well-conducted jurisprudence, that when a *right* or a *fact* has been judicially determined by a court of competent jurisdiction, the judgment thereon, so long as it remains unreversed, shall be conclusive upon the parties, and those in privity with them in law or estate." *Sawyer v. Woodbury*, 7 Gray, 502.

Both bills present the same issue involving the same inquiry, viz. : the right of the complainants to enjoin the city from occupying and using a certain lot for street purposes. The right or title of the complainants to the relief sought being the issue determined by the allowance of the demurrer to the former bill, cannot be re-litigated by bringing another bill. The decree must be reversed and bill dismissed.

Reversed.

JUDGMENT, WHO BOUND BY.—Where a right has been judicially determined by a court of competent jurisdiction, the decree, unless reversed, is conclusive upon parties and their privies: *Breese v. Halsey*, 11 Colo. 387.

FILLEY v. CODY.

Upon suing out a writ of error from this court, a non-resident of the State must give security for costs, as required by the statute. Nor can the filing of a bond for a *supersedeas* accomplish that purpose, or in any sense waive the necessity of filing security for costs.

Error to District Court of Gilpin County.

Messrs. SAYRE, WRIGHT & BUTLER, for plaintiff in error.

Messrs. H. M. TELLER & W. TELLER, for defendant in error.

THATCHER, C. J. The defendant in error moves the court to dismiss the writ on the ground that no bond for costs has been filed as required by section 1, chapter XIX of the Revised Statutes.

The motion is supported by an affidavit setting up that the plaintiff in error was a non-resident when the writ was sued out. This is not sought to be controverted by counter affidavits.

The statute declares in mandatory terms that if any action shall be commenced without filing a cost bond, the court on motion shall dismiss the same. The language is unequivocal, and leaves nothing to the discretion of the court. *Western Union Telegraph Co. v. Graham*, 1 Col. 183; *Tulpey v. Doane et al.*, 2 id. 299; *White v. Wilson*, 5 Gil. 20. But it is contended, that as a bond for a *supersedeas* was filed simultaneously with the suing out of the writ, no cost bond was necessary; that the *supersedeas* bond served the same purpose as the cost bond. Is this true?

A bond for a *supersedeas* is conditioned "for the payment of the judgment, costs, interests and damages, in case judgment shall be affirmed, and also for the due prosecution of the writ of error." The cost bond obligates the sureties "to pay, or cause to be paid, all costs which may

accrue in this action, either to the opposite party, or to any of the officers of this court, pursuant to law."

The provisions of the two bonds are essentially different. The *supersedeas* bond is limited in its operation. Unless the judgment of the lower court be affirmed, there can be no breach of the condition, and consequently no recovery of costs. It is intended for the protection of the defendant in error. In any event, whether the judgment of the lower court be affirmed or reversed, each party is liable to the officers of this court for his own costs. The payment of all costs occasioned by the plaintiff in error without regard to the ultimate judgment of the court is secured by the cost bond. The officers of the court are protected. If there were no cost bond; if the officers of the court had to rely upon the *supersedeas* bond for the costs made by the plaintiff in error, then in the absence of a judgment against him for costs, his security would not be liable for any.

The purpose of the statute requiring a cost bond is evident. The filing of a bond for a *supersedeas* does not, as we have shown, accomplish that purpose, nor in any sense waive the necessity of filing a cost bond. We are all of opinion that the motion to dismiss must prevail. The writ will be dismissed.

Dismissed.

WRIT OF ERROR IS COMMENCEMENT OF NEW SUIT: *Willoughby v. George*, 4 Colo. 22; *Conner v. Connor*, 4 Colo. 75.
SECURITY FOR COSTS must be given by non-resident on suing out writ of error: *Edgar G. & S. M. Co. v. Taylor*, 10 Colo. 112.

BOARD OF COUNTY COMMISSIONERS OF LAS ANIMAS COUNTY v. BOND et al.

1. Upon suggestion of diminution of the record, the materiality of the alleged defect will not in general be inquired into.
2. A writ of *certiorari* was allowed to go when the transcript of record omitted to show that a writ of attachment had indorsed hereon the interrogatories propounded to the plaintiff in error as garnishee, and the answer thereto.

Error to County Court of Las Animas County.

THE defendants in error sued an attachment out of the probate court of Las Animas, on the 10th day of July last,

under which the now plaintiffs in error were summoned and charged, as garnishees. To reverse this judgment they prosecute this writ of error.

Mr. ARCHIBALD, for defendant in error, suggested diminution of the record in two points: That the transcript returned heretofore omits to show, as the fact is, that the interrogatories, exhibited to the now plaintiff in error, and the answer thereto were indorsed upon the writ of attachment in the court below. Also, that by the said transcript it appears that the answer to said interrogatories were given on the 3d day of July, whereas in truth, the same was given on the 23d day of July, and he prayed for a *certiorari* commanding the county court to certify a full transcript.

Mr. YEAMAN, for plaintiff in error, stipulated to admit the alleged diminution as to the second point, and that the record might be treated as amended according to the suggestion; as to the first point he insisted that whether the alleged diminution exists or not is immaterial.

Per Curiam. As to the second point of diminution alleged, the stipulation of counsel of plaintiff in error will be entered of record, and may supply the place of the *certiorari* and return. The record will be amended in this point according to the defendant's suggestion.

As to the first point in which the transcript is alleged to be defective, the writ may go. The materiality of the alleged defect will not in general be inquired into on suggestion of diminution. *Reed v. Curry*, 40 Ill. 73.

It is unnecessary, however, that the county court should certify matters already before us. The writ will, therefore, direct the county court to certify whether the writ of attachment has indorsed thereon the interrogatories propounded to the plaintiff in error as garnishee, and the answer thereto, or either of them. Counsel for defendant are advised to frame the writ, for which a precedent may be found. 2 Cow. 38-9.

Writ of certiorari allowed.

ATLANTIC INSURANCE Co. v. MANNING.

1. In an action on an insurance policy containing the following condition :
"Or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, or the risk increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured without the assent of this company indorsed hereon," then the policy to become void, etc.: *Held*, proper to instruct the jury, that upon this point the plaintiff could recover, if they believed from the evidence that "it was not within the control of the plaintiff to prevent such vacation."
2. When an instrument is prepared by the party to be held liable under it, and it is ambiguous in its terms, that construction is to be adopted which is most favorable to the promisee.
3. Overruling a motion for a nonsuit, with leave to plaintiff to introduce additional evidence, is within the discretion of the court and cannot be assigned for error.
4. Objections to preliminary proofs are waived, in an action on an insurance policy, by objections to payment of the policy upon other grounds. An allegation of compliance with a condition, is supported by proof that the underwriters waived the condition.
5. When letters are sent to a person on particular business, and an answer received in due course, a fair inference arises that the answer was sent by the person in whose handwriting it purports to be.
6. The belief of a witness as to the genuineness of a signature being founded on a knowledge derived from written correspondence, is competent testimony.
7. The rental of a building at the time of its destruction may be given in evidence as bearing upon the question of loss, but the rental two years prior thereto is too remote to be of value for that purpose.

Error to Probate Court of Arapahoe County.

THIS was an action of assumpsit brought by George Manning, the defendant in error, against the Atlantic Insurance Company, the plaintiff in error, upon a policy of insurance.

It appeared on the trial that on the 23d day of November, 1874, Manning procured of the Atlantic Insurance Company a policy of insurance on a house owned by him in the town of Evans, Weld county, Colorado. The policy was for the sum of \$1,500, and was for the period of one year from November 23d, 1874. About the 24th of December, 1874,

the house covered by the policy was destroyed by fire. The preliminary proofs having been made by Manning were delivered to William H. Worthington, the agent of the company, and by him forwarded to the home office. Worthington received by mail the following letter in reply :

OFFICE OF THE ATLANTIC INSURANCE COMPANY, }
No. 178 Broadway, N. Y. }

JOHN D. COCKS, President. W. O. CORNELL, Secretary.

NEW YORK, *February 26th*, 1875.

Messrs. Evans & Worthington, Agents, Denver, Col.:

Your favor 19th inst. is at hand. Notice of cancellation of policy received ; return the same with monthly account. We have received the proofs of loss under policy 26, account of George Manning. The same are unsatisfactory, as there is no claim under the policy, the risk being changed by the removal of H. C. Sherman, thus leaving the dwelling unoccupied, and so remained at the time of the fire, thus causing the policy to become void under the conditions of the same. You will please notify Mr. Manning to this effect, and oblige,

Yours, Truly,

JOHN D. COCKS, *President.*

The policy, among others, contained the following conditions :

"Or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the assent of this company indorsed thereon, then and in every such case this policy shall be void."

It appeared in evidence that the house in question had been occupied by one Sherman during the summer of 1874 ; of that he was in the occupation of the premises on the 23d day November, 1874, as a tenant of Manning; that he moved into another house shortly before the fire, leaving in the

insured premises a quantity of his household furniture; that this furniture had not been removed at the time of the fire; that Sherman retained the keys of the premises and that his right of occupation would not have expired until the 1st day of January, 1875.

The policy contained the following recital:

"By this policy of insurance, the Atlantic Insurance Company, of New York, in consideration of \$26.25 to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do insure George Manning against loss or damage by fire to the amount of fifteen hundred dollars (\$1,500), on his two-story framed, shingled roof, dwelling-house, situated on lots numbers nineteen (19) and twenty (20), twenty-one (21) and twenty-two (22), in block number sixteen (16), in the city of Evans, county of Weld, Territory of Colorado."

The jury were instructed upon the question of the vacancy of the building, that if it was not within the means or control of the plaintiff he could recover. The instructions asked by the defendant omitted this qualification and were refused. The jury returned a verdict for \$1,500 in favor of the plaintiff. The defendant filed a motion for a new trial, but the motion was denied and judgment rendered on the verdict.

MESSRS. THOMAS & HEREFORD, for plaintiff in error.

MESSRS. SYMES & DECKER, for defendant in error.

ELBERT, J. Under the authorities the construction placed by the court below upon the clause of the policy in controversy must be sustained.

In the case of the *North American Insurance Company v. Zaenger*, 63 Ill. 465, the clause construed is in language, grammatical structure and punctuation, similar to the one under consideration. The rule of construction adopted by the supreme court in the case of *Insurance Co. v. Slaughter*, 12 Wall. 404, is also clearly applicable in this case. At best the clause in question must be held to be ambiguous, that

is to say, a case where the judgment hesitates between two imports, unable to determine which of the two was intended. In such case the rule is well established that where the preparation of an instrument is left to the party to become liable under it, and its meaning is doubtful, by reason of the use of ambiguous or obscure language, other things being equal, the construction is to be adopted which is most favorable to the promisee. *Merrick v. Germania Fire Ins. Co.*, 54 Penn. 277; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 413, and cases cited.

Under this construction of the clause in controversy the instructions given by the court below correctly pronounced the law upon the evidence, and the instructions asked by the defendant were properly refused.

Overruling the defendants' motion for nonsuit with leave to the plaintiff to introduce additional evidence was entirely within the discretion of the court, and is not ground for exception.

Nor was there error in overruling defendants' second motion for a nonsuit, as there was sufficient evidence to take the case to the jury.

As the evidence in the case was pertinent alone to the general issue, it is unnecessary to enter into any discussion of the several special pleas.

The fourth, sixth and eighth assignments of error are to testimony improperly admitted, but wholly irrelevant and immaterial, and which could not have prejudiced the defendant; nor can it be said that the defendant was prejudiced by the testimony of the witness Manning, touching his ownership of the property in question.

The recitals of the policy of insurance, before introduced, were *prima facie* evidence of the plaintiff's title. *Nichols v. Fayette Ins. Co.*, 1 Allen, 63; *Fowler v. U. S. Ins. Co.*, 23 Barb. 143.

The preliminary proofs were sufficiently identified by the witness Worthington to take them to the jury, and any objection to them, as not in strict compliance with the require-

ments of the policy, was waived by the letter from the president of the defendant company. It is well settled that objections to preliminary proofs are waived by objections to payment on other grounds. *Post v. Aetna Ins. Co.*, 48 Barb. 357; *Peoria Ins. Co. v. Whitehill*, 25 Ill. 466.

It was also competent for plaintiff to show this waiver under the averments in his declaration. An allegation of compliance with a condition is supported by proof that the underwriters waived the condition. 2 Phillips' Ins., § 2122; *Pim v. Reed*, 6 Mann. & G. 1.

It is claimed, however, that the letter of the president of the defendant company was improperly admitted in evidence, as there was no sufficient proof of the signature. There was no occasion to prove the handwriting of the president in this case. It was in evidence that the agent, Worthington, had forwarded the preliminary proofs by post, to the defendants, and had received this letter in reply by due course of mail. This brought the letter within the rule laid down in the case of *Overstone v. Wilson*, 2 Carr. & Kerw. 1. In that case the plaintiff's attorney had addressed a letter to the defendant at his residence and sent it by post, to which he received a reply purporting to be from the defendant; and it was held that the letter thus received was admissible in evidence, without proof of the defendant's handwriting. 1 Greenleaf's Ev., § 573, *a*.

The rule is founded on presumptions arising from the ordinary course of business, and by a like rule, based on like considerations, the *identity* of the correspondent may be inferred. In the case of *Casey v. Pitt*, Peake's Add. Cases, 130, Lord KENYON held that if letters are sent, directed to a person on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person whose handwriting it purports to be. 2 Phillips' Ev., p. 503, note 481.

Again, the witness Worthington was, at the date of the letter, and had been prior thereto, the agent of the defendant company, and as such, in correspondence with Cocks, the

president, concerning business of the company. One of the recognized methods of acquiring a knowledge of handwriting is by means of written correspondence, and the belief of the witness as to the genuineness of the signature, being founded on his knowledge, derived from this source, his testimony was competent. 2 Phillips' Ev. 593; *Titford v. Knox*, 2 Johns. Cases, 210; 8 Pick. 148.

The rental of a building at the time of its destruction may be given in evidence as bearing upon the question of loss (*Cumberland M. P. Co. v. Schell*, 29 Penn. 31), but the rental at the time of its erection in this case, two years prior to the fire, we regard as too remote and circumstantial to be of any value for that purpose.

So, too, the evidence offered to show that the defendant company never insured unoccupied property was inadmissible. This was a question of construction on the face of the policy, and parol testimony was properly rejected. 2 Phillips on Insurance, 2119.

We find no substantial error in the record, and the judgment is affirmed with costs. *Affirmed.*

INSURANCE—OBJECTIONS TO PRELIMINARY PROOFS are waived, in an action upon a policy, by objections to the payment of the policy on other grounds. An allegation of compliance with a condition is supported by proof of waiver of the condition by the insurer: *Bishop v. Griffith*, 4 Colo. 71; *Montelius v. Atherton*, 6 Colo. 228.

THE STERLING CITY G. & S. MINING CO. v. HUGHES et al.

An action cannot be maintained upon a bond given pursuant to Revised Statutes (p. 55) conditioned to pay all such damages as shall be awarded against the plaintiff in attachment, in any suit or suits which may thereafter be brought for wrongfully suing out the attachment, until judgment has been obtained against the plaintiff in the attachment suit.

Error to District Court of Arapahoe County.

DEBT upon an attachment bond, and judgment on demurrer to the declaration, in favor of defendants.

Messrs. BROWNE & PUTNAM, for plaintiff in error.

Messrs. SAYEE, WRIGHT & BUTLER, for defendants in error.

ELBERT, J. In the case of the *Sterling City Mining Co. v. Cock*, 2 Col. 24, it was held that judgment must first be obtained against the plaintiff in the attachment suit before an action can be maintained upon a bond given pursuant to Revised Statutes, and conditioned to pay all such damages as shall be awarded against the plaintiff in attachment in any suit or suits which may thereafter be brought for wrongfully suing out the attachment. We see no reason to question the correctness of this decision. *Holcomb v. Faxworth*, 34 Miss. 265; *Sledger v. Lee*, 19 Ga. 411; *Davis v. Gully*, 2 Dev. & Bat. 360.

The recovery against Cock, one of the copartners in the plaintiff company, does not satisfy the rule.

Judgment affirmed with costs.

Affirmed.

GEORGETOWN v. GLAZE et al.

The purpose of the act of congress (May 23d, 1844) is to vest the estate and trust powers, not in the corporation itself, but in some one or more of the corporate officials in their official and politic capacity. The corporation may maintain its bill to correct an abuse of the trust, affecting the common interest of all the beneficiaries, but cannot interfere between individual applicants.

Error to Probate Court of Clear Creek County.

THE bill in this suit alleges that Georgetown in its corporate capacity, in the name of James Gunn, president of the board of selectmen of Georgetown, under the act of congress of May 23d, 1844, and March 2d, 1867, entered and paid for land embraced within the corporate limits of Georgetown, at the United States Land Office, in Central City, Colorado Territory, on the 7th day of January, 1874, and from that day, title to the same, actually vested in Georgetown, through said Gunn, president, etc., but subject to rights of individuals and others claiming any

portion of said lands for whom said title is held in trust, under said acts of congress. Glaze, Plummer, Hunter and Johnson are made defendants.

The bill also alleges that Glaze, on the 15th of January, 1874, filed in the office of James Gunn, police judge of Georgetown, his statement in writing, claiming occupancy and title to, and asking for a deed to lots Nos. 11, 12, 13, 16, 17 and 18, in block No. 76 of Georgetown. That Plummer, on the 13th day of January, 1874, filed a like statement in writing, in the office of said James Gunn, claiming title and occupancy, and asking for a deed to lots Nos. 15, 16, 17 and 18 in said block No. 76. That Hunter, on the 16th of January, 1874, also filed his statement in writing, in the said office of the said James Gunn, claiming title, occupancy and possession of and asking for a deed to lot No. 11 in said block No. 76. That Johnson, on the 2d day of April, 1874, filed his statement in writing in said office of said James Gunn, by which he claimed title to and asked for a deed to lots Nos. 12, 13, 16 and 17, in said block No. 76; that the statement of each of said defendants remains deposited in said police judge's office, uncanceled, and a continuing demand upon the chief officer of Georgetown for the conveyance of said lots to each of said defendants, as claimed to the exclusion of the other, and that neither of said defendants have instituted proceedings to determine the proper person or persons to whom such deed should be made; that more than six months have elapsed since the said defendants, or one or more of them, should have commenced suit against the other to determine as to who should receive title to said lots; that under said acts of congress, said Georgetown, through said James Gunn, holds the said town site in trust as provided by said acts; and when it shall appear that any portion of said site shall not be claimed, and if claimed, that the claimants are not entitled to the ground so claimed, that the same shall be held in trust for all the inhabitants of Georgetown, to be disposed of as provided by the laws of Colorado Territory; that

there is no collusion of Georgetown with any of the defendants, but that the suit is brought to compel said defendants to interplead and show who is, if any one or more of them are, entitled to a deed of said lots, and thus release Georgetown from its responsibility in the premises. Hunter filed a disclaimer; Glaze, Johnson and Plummer filed a plea in abatement to the jurisdiction of the probate court, claiming that the jurisdiction was solely in the district court of said county.

The plea was held insufficient; the last-named defendants demurred to the bill; the demurrer was overruled and the defendant Glaze only answered. The answer of Glaze admits the corporate character of the complainant and the entry by Gunn, but denies that from the time of said entry the title to said town site vested in Georgetown through said Gunn, nor did the said title vest in Georgetown through any person, by virtue of said entry. Admits that the defendant did not commence suit against his adverse claimants, and denies that he should have commenced such suit. Admits the filing of his statement claiming the lots as alleged in the bill, and setting up title in himself from 1867 to the date of filing his answer.

The complainant put in a general replication. The only evidence offered by the complainant at the hearing was the patent from the government conveying the town site to James Gunn, president of the board of selectmen of Georgetown as follows:

“THE UNITED STATES OF AMERICA.

“*To all to whom these Presents may come, Greeting:*

“Whereas, James Gunn, president of the board of selectmen of Georgetown, Clear Creek county, Territory of Colorado, in trust for the several use and benefit of the occupants of the town site of Georgetown, in the county and Territory aforesaid, according to their respective interest, by virtue of the acts of March 2d, 1867, entitled ‘an act for the relief of the inhabitants of the cities and towns upon the

public lands,' and the act of June 8th, 1868, has deposited in the general land office of the United States a certificate of the register of the land office at Central City, Colorado Territory, whereby it appears that full payment has been made by the said James Gunn, president of the board of selectmen as aforesaid, in trust as aforesaid, according to the provisions of the act of congress of the 24th of April, 1820, entitled, 'an act making further provisions for the sale of the public lands,' for the lots or parts of sections described as follows in the field notes of the government survey thereof."

(Description of the land conveyed in which were the lots described in the bill, then followed.)

"Which said tracts have been purchased by the said James Gunn, president of the board of selectmen as aforesaid. Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of congress, in such cases made and provided, have given and granted, and by these presents do give and grant unto the said James Gunn, president of the board of selectmen as aforesaid, in trust as aforesaid, and to his successors, the said tracts above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereto belonging, unto the said James Gunn, president of the board of selectmen as aforesaid, and to his successors and assigns, in trust as aforesaid. No title shall hereby be acquired to any mine of gold, silver, cinnibar, or copper, or to any valid mining claim or possession held under existing laws of congress."

The patent was signed and attested in the usual form. The defendant moved to dismiss because the proof did not sustain the allegations of the bill. The motion was allowed and the complainant prosecutes this writ of error.

Mr. CHARLES E. POST, and Mr. W. S. ROCKWELL, for plaintiff in error.

Messrs. TAYLOR & YATES, for defendants in error.

WELLS, J. It is doubtful whether the act regulating the execution of the trust arising out of the entry of the town site of Georgetown (acts 8th session, 150) is not a private act and so necessary to be noticed in pleading, and proven. It may also be questioned whether the act of February 13th, 1874 (acts 10th session, 213), has the effect to extend the jurisdiction of the probate court to controversies of this character.

Aside from these questions, however, the bill was properly dismissed. The purpose of the act of congress is to vest the estate, and trust powers, not in the corporation itself, but in some one or more of the corporate officials, in their official and politic capacity, as was held at this term, in *Smith v. Pipe* (*ante*, page 187,) nor by construction of law can the entry in the name of the corporate officials inure to vest the estate in the corporation. No such intent is manifest in the statute. The case of the *City v. Kent*, which is relied upon, is, doubtless, authority that the corporation may maintain its bill to correct an abuse of the trust, which affects the common interest of all the beneficiaries, but it is far from sustaining the propriety of an interference by the corporation, between individual applicants where no claim in behalf of the public is sought to be asserted.

The decree of the probate court is affirmed.

Affirmed.

TOWN-SITE TRUST. — The purpose of the act of Congress concerning town sites is to vest the trust, not in the municipal corporation itself, but in some of its officers, as such: *Aspen v. Eucker*, 10 Colo. 189. The corporation may maintain an action for the abuse of the trust, in so far as it affects all the beneficiaries, but cannot interfere between individuals. And it is held that if it may sue to correct such an abuse, it may with equal propriety maintain a bill to prevent such abuse when imminent: *Aspen v. Eucker*, 10 Colo. 190.

CITY OF DENVER v. CAPELLI.

A bill of exceptions must be signed and sealed before it can become a part of the record, and the parties cannot by any stipulation dispense with the signature and seal; the statute (§ 21, p. 508, R. S) is mandatory.

Error to Probate Court of Arapahoe County.

Messrs. PATTERSON & CAMPBELL, for defendant in error, now moved to strike the bill of exceptions from the record, and for the reasons stated in the opinion, the motion was allowed.

THATCHER, C. J. The twenty-first section of our Practice Act requires that a bill of exceptions must be signed and sealed before it can become a part of the record. The statute is mandatory. It is a perfectly well-established doctrine that unless a bill of exceptions be authenticated as required by law by the signature and seal of the judge by whom it was settled, it is no part of the record. *Jones v. Sprague*, 2 Scam. 55; *Reeves v. Reeves*, 54 Ill. 332; *Eastes v. Daubenspeck*, 4 Ind. 617; *Law v. Nelson*, 8 Cow. 746; *Tweedy v. Commonwealth*, 2 Metc. (Ky.) 379; *Haden v. Brown*, 22 Ala. 572; *Danah et al. v. Steamboat "Light-foot,"* 17 Mo. 277. This court must know, in the manner prescribed by law, that what purports to be a bill of exceptions is in fact such, before it can be considered. To adopt any other rule would be hazardous. It would open the door to a dangerous practice. Parties might stipulate contrary to the fact, that evidence was adduced at the trial in the court below, and questions were there raised and decided, and thus the appellate tribunal might be called upon to act, not as a court of review, but to pass upon, for the first time, questions which, in order to entitle them to be considered here, must have been presented in the inferior court.

But it is argued, that as a joinder in error has been filed, the defendant in error has thereby, in effect, stipulated to

waive the statutory requirement of the judge's signature and seal to the bill of exceptions, and that it is now too late to move to strike it from the record. Even if the joinder in error be treated as such a stipulation (a question not now necessary to determine), it follows from what we have before said that it could not avail the plaintiff in error. So essential to the validity of a bill of exceptions are the signature and seal of the judge, that the parties cannot, by the most solemn agreement, dispense with them. The court will not, even by consent, take jurisdiction of a record not authenticated according to law. *Coburn v. Murray*, 2 Me. 309; *Hodgeden v. Commissioners of Ellsworth County*, 10 Kan. 638; *Leonard v. Warriner*, 20 Wis. 41.

Following in the wake of these decisions, which rest upon sound principle, this court cannot adopt a practice which might involve in its consequences such a clear departure, in the exercise of its jurisdiction, from the evident purpose of its organization. The motion to expunge the bill of exceptions must be allowed.

Motion allowed.

BILL OF EXCEPTIONS MUST BE SIGNED AND SEALED before it can become part of the record, and parties cannot by stipulation dispense with this requisite: *Ross v. Duggan*, 8 Colo. 106; *Charles v. Eshelman*, 8 Colo. 110; *McKenzie v. Ballard*, 14 Colo. 428.

CITY OF DENVER v. CAPELLI.

Where a party has tendered his bill of exceptions to the judge, in apt time, under the order of court, he has so far complied with the rule as not to be prejudiced by the failure of the judge to actually sign the bill within the time prescribed. *Actus curiæ neminem gravabit.*

THE motion of the defendant in error, to strike from the record the bill of exceptions in this case, having been allowed, Mr. CHAS. S. THOMAS, for plaintiff in error, now moved for leave to file a supplemental transcript of record.

THATCHER, C. J. *Actus curiæ neminem gravabit* is a legal maxim, which, says Judge CRESSWELL, "is founded on

justice and good sense ; and affords a safe and certain guide for the administration of the law." *Freeman v. Tranah*, 74 E. C. L. R. 415. In the case before us it applies with peculiar force. The bill of exceptions was tendered to the judge within the time fixed by the order of court, but was not signed by the judge within that time. "The act of the court or judge shall not, in law, prejudice or vitiate the well-intended act of the party." For the purpose of facilitating the settling of the bill of exceptions, the judge, by the consent of both parties, as appears by fair inference, permitted it to be withdrawn. Whether the judge should have allowed the bill of exceptions to be taken away after it was duly tendered is not a material inquiry. The fact is, that he did permit it, and delay was occasioned thereby. To this delay the defendant in error contributed, and cannot now be heard to complain. *Underwood v. Hossack*, 40 Ill. 98, is an authority for saying that where a party has tendered his bill of exceptions to the judge in apt time, under the order of court, he has so far complied with the rule as not to be prejudiced by the failure of the judge to actually sign the bill, within the time prescribed. See, also, *Powell on Appellate Proceedings*, 419 ; and *Lane v. Robinson*, 40 Ga. 467.

While the better practice doubtless requires that the supplemental transcript should contain the bill of exceptions only, as that alone has been expunged, we will not on that account, in this instance, deny the motion, but will direct the clerk to strike out of the amended transcript all but the bill of exceptions.

Motion allowed.

BILL OF EXCEPTIONS — TIME FOR SIGNING. — Where a bill of exceptions has been tendered to the judge in apt time, the party will be prejudiced by the failure of the judge to actually sign the bill within the prescribed time: *Swem v. Green*, 9 Colo. 361. The statute contemplates the personal seal of the judge, not the seal of the court: *Widner v. Walsh*, 3 Colo. 412.

MUNRO v. KING.

1. Duplicity in a pleading is bad upon special demurrer.
2. A contemporaneous written agreement executed by the payee of a promissory note, showing a contingency upon which the payment of the note is to depend, is admissible in evidence under the general issue in an action on the note by an indorsee after maturity, against the maker.
3. Failure or want of consideration must be specially pleaded in an action on a promissory note.

Appeal from Probate Court of Clear Creek County.

THIS was an action in assumpsit on a promissory note, by King, the defendant in error, as indorsee, against Munro, the plaintiff in error, as maker. The declaration consisted of a special count in the usual form, and the money counts. The defendant pleaded the general issue, and a special plea of want of consideration. The plaintiff demurred to the special plea, the demurrer was sustained, and the defendant took leave to amend. Under the rule to amend, the defendant filed three special pleas, of these the second and third were stricken out on motion, and the plaintiff demurred to the fourth. Special causes of demurrer to this plea, and among them duplicity, were assigned, "in that the plea alleges that the payee did not convey the property therein mentioned, and then avers that he had no title to convey." The demurrer was sustained and the defendant elected to stand by his plea. The cause stood for trial on the general issue.

Upon trial had before the court, the plaintiff introduced in evidence a promissory note for \$700, dated January 10, 1874, payable to the order of Frank Fuqua, ninety days after date, without interest, and signed by Munro, the plaintiff in error.

Morsman, a witness for the defendant, testified that he saw the note, two weeks after it was given, and again on the 3d day of May, 1874, both times in the hands of Fuqua, the payee, and "at neither time were there indorsements in writ-

ing on the back of the note." Munro, the plaintiff in error, testified that he had given the note to Fuqua, at the time of its date. He also proved the execution and delivery on the same date of an instrument of which the following is a copy :

"This agreement made by and between Wm. Munro and Frank Fuqua is to the effect that, Whereas, Wm. Munro has this day made and delivered to Frank Fuqua his promissory note for the sum of \$700, for a certain interest in and to the Treasure Vault, Gilman, Glendale and Decatur lodes, all of which are located in Park county, except the Glendale lode, which is located in Summit county, Colorado Territory, and it is agreed and understood by the parties hereto that the said note is payable when the said lodes are sold and not until said lodes are sold.

GEORGETOWN, *Jan'y 10th*, 1874.

FRANK FUQUA.

This ageement being offered in evidence by the defendant, was objected to as not being admissible under the pleadings; the objection was sustained and the defendant excepted. The defendant then offered to prove want of consideration and "that the note in question was executed and delivered by witness to Fuqua, payee, because of certain representations made by said Fuqua to him at the time the note was so executed and delivered that he (Fuqua) held an interest with Dewey C. Dorn in certain lodes of silver bearing mineral, and that he (Fuqua) assigned and released his pretended interest to said witness, and that said Fuqua pretended so to do, and at that time said Fuqua well knew that he had no interest in said lodes and that each and every representation by him so made was false to his knowledge; and that said witness relied upon the truth of said statements when he made and executed said note."

The offer was objected to, the objection sustained and the defendant excepted. The plaintiff had judgment for \$700, and the defendant having duly reserved his exception thereto, prosecutes his appeal to this court

Messrs. POST & COULTER, and Mr. W. S. ROCKWELL,
for appellant.

Messrs. TAYLOR & YATES, for appellee.

WELLS, J. 1st. The 4th plea of the defendant is double, and the demurrer was properly sustained. *Meriwether v. Smith*, 2 Scam. 30.

2d. The written agreement of January 10th, 1874, between Munro and Fuqua was erroneously excluded. It was affirmatively shown to have been executed contemporaneously with the note, which was the foundation of plaintiff's action. As between the original parties, therefore, the stipulations of this writing enter into and become a part of the terms of the promissory note. Byles on Bills, 98*. Their effect is to prescribe a contingency until the happening of which, no action can be maintained.

The testimony of Morsman sufficiently evidences that the indorsement to plaintiff occurred subsequent to the day of maturity expressed in the note; plaintiff is therefore affected by the collateral contract, and the action is subject to the same defenses as if payee were plaintiff. The action was prematurely brought, and this is available under the general issue. Gould's Pl., ch. V, §§ 137-8.

3d. The evidence offered to show failure or want of consideration was properly excluded. *Patterson v. Gile*, 1 Col. 200.

The judgment of the court below is reversed with costs.

Reversed.

ACCURAL OF ACTION — GENERAL ISSUE: *Watson v. Iemen*, 9 Colo. 202.
PROMISSORY NOTE: *Heaton v. Myers*, 4 Colo. 64.

VANCE'S HEIRS v. ROCKWELL et al.

1. A writ of error will not lie to the determination of a court acting in a summary proceeding, not according to the course of the common law.
2. By amendment of the Organic Act of March 2, 1863, limited equity jurisdiction was conferred upon courts of probate, and provision was made by the legislature, for writs of error to, and appeals from, the final decisions of such courts.

3. A writ of error may issue from this court, to the decree of a probate court, upon a petition of an administrator for leave to sell the real estate of his intestate, for the payment of debts. In such case the probate court sits, not in the exercise of probate jurisdiction merely, but as a court of equity.
4. A variance between the writ of error and the transcript of the record as to the character of the parties to the suit may be amended in this court, under the statute, R. S. p. 50, § 12.
5. What is sufficient to reverse a judgment can never be cause to quash a writ of error.

Error to Probate Court of Gilpin County.

Mr. L. C. ROCKWELL, for defendants in error, now moved to dismiss this writ of error :

First. Because a writ of error does not lie to a decision of the probate court, adjudicating upon the estates of deceased persons. (Second cause the same.)

Third. Because the court, at the time it rendered its decision, was proceeding under the express provisions of the statute and not according to the course of the common law.

Fourth. Because the plaintiffs in error were not parties to the judgment sought to be removed to this court, and nothing appears in the record to show by what right they prosecute this case.

Fifth. Because there is nothing to show in the paper purporting to be a record in this proceeding, that the supposed judgment was ever given by any court known to the law, nothing to show that this controversy was ever decided by the probate court of Gilpin county," etc.

MESSRS. BELFORD and REED, *contra*.

WELLS, J. The case of *Hadley v. Fish*, decided at the February term of 1876 (*ante*, p. 51), is authority to say that error does not lie to the determination of a court, acting in a summary proceeding, not according to the course of the common law.

No other question was presented in that case. The considerations arising upon the present motion are not precisely analogous.

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The probate courts of the late Territory as originally constituted were invested with jurisdiction of the probate of wills, the administration of decedent estates, and the like, and no special process of review was furnished by the act of congress. Apparently it was supposed that this might with safety be left to the wisdom of the legislative assembly. Accordingly by section 6, of the act of Nov. 7th, 1861, R. S. p. 525, concerning probate courts, an appeal was allowed to the district court from acts and determinations of the probate judges acting in the capacity of judges of probate, whether acting judicially or ministerially.

The case of *Cass v. Davis*, 1 Col. 45, countenances the validity of the legislation in question.

By the act of congress of March 2, 1863, amendatory to the Organic Act, chancery and common law jurisdiction, within certain limits, was conferred upon the probate courts, in common with the supreme and district courts, and provision was made for writs of error and appeals from the "*final decisions*" of the probate as well as the district courts, to the supreme court. We are of opinion, that writs of error were intended to be given as well to decrees in equity as to judgments at law; the phraseology "*final decisions*" includes the adjudication of both jurisdictions, and while apt to describe the determinations of courts of law, only, is not the one usually chosen for that purpose; the departure from the common usage, in this instance, seems to be studied, rather than inadvertent.

The same phraseology was used in the original act (Organic Act, § 6), and we have legislative authority to say that in that instance both decrees and judgments were intended. The 45th section of this act concerning practice in civil cases, Acts 1st Sess. 286, R. S. 514, provides that "in all cases where a judgment or decree shall be rendered either at law or in chancery against two or more persons, either one of said persons shall be permitted to remove said suit to the supreme court by appeal or writ of error."

The leading purpose of this section is to give relief from the rule of the common law, which requires all against

whom the judgment is given to unite in the writ of error, and the writ of error is recognized as an appropriate process already existing, for the review of both judgments at law and decrees of equity.

The same conclusion is inevitable from a consideration of the provisions of section 47 of the same act. It is there provided that "writs of error shall not be brought after five years," "but when the person thinking himself aggrieved by any *judgment* or *decree* * * * shall be an infant, etc.," the period of disability shall be excluded from the computation: The word *decree* is the proper and usual term to describe the adjudication of a court of equity. The section clearly recognizes the writ of error as a remedy already provided, and available both at law and in equity. But there was never any statute other than the 45th section of the Practice Act before quoted, which can be appealed to, as conferring the writ in equity causes. If, therefore, it existed at all as the means for the review of decrees in equity, it was solely by virtue of the provisions of the Organic Act.

Moreover if we rely on the provisions of the 45th section of the Practice Act, as the source of the jurisdiction to issue the writ in equity causes, then there never was jurisdiction in the supreme court to review decrees in equity, save at the instance of one out of several aggrieved persons.

The section does not allow the writ where the decree is given against one only, nor to all where there are many.

But it is believed that the opinion of the profession has always sustained the writ to all decrees in equity, both at the suit of a sole defendant, and at the suit of those aggrieved, however numerous. There are many reported cases where the writ was entertained without question.

Wise v. Brocker, 1 Col. 550; *Machbeauf v. Clements*, 2 id. 37; *Buck et al. v. Fisher et al.*, id. 182; *Denver & Swansea Railway Co. et al. v. Denver City Railway Co.*, id. 673; *Palmer v. Cowdrey*, id. 1; *Walker v. Tiffin Mining Co.*, id. 90; *Cook v. Rice*, id. 131.

The case of *Liss v. Wilcozen*, 2 Col. 7, is authority to say, that affirmative action by the legislative assembly was unnecessary, and *Livingstone v. Livingstone*, 24 Ga. 379, is to the same effect. By virtue of the provisions of the amendment of March 2, 1863, to the Organic Act the writ of error lies to review the adjudications of the district court, when sitting in equity, the same section gives the same process, as the means of relief against errors committed by the probate court, exercising like jurisdiction, and this conclusion also, it is believed, is supported by the concurring opinion of the profession. *Smith v. Remington*, 1 Col. 53; *Jensen et al. v. Brown*, 2 id. 394, are examples.

The conclusion seems a just one, therefore, that by virtue of the Organic Act, the writ of error lay out of the supreme court of the late Territory, to review the decrees, both of the district court and of the probate court, when sitting for the exercise of the enlarged jurisdiction conferred by the act of March 2, A. D. 1863. Now the decree of the probate court, which is complained of in the present case, was given upon petition of the administrator for leave to make sale of the real estate of his intestate for the payment of debts; in giving which decree, as it would seem, the probate court sat, not in the exercise of probate jurisdiction merely, but as a court of equity; as appears from the following consideration: (1) By the original statute of wills (Acts 1st Sess. 428, §§ 94-95), this jurisdiction was conferred upon the district court exclusively; and we are not aware of any statute, prior to the amendment of the Organic Act by the act of March 2, 1863, which assumed to confer it upon the probate court. By the revision of 1868, the jurisdiction is conferred upon the district and probate courts concurrently.

Doubtless, the end to be accomplished by the proceeding is of such character, that if the legislature had seen fit so to do, the jurisdiction might have been conferred upon the probate court originally.

But, inasmuch as it was withheld so long as that court

exercised probate jurisdiction exclusively; and was afterward conferred upon the probate court and district, concurrently, an inference may fairly be founded, that the purpose in this legislation was to give the new jurisdiction to the probate court, not as a court of probate, but sitting for the exercise of the enlarged jurisdiction created by the act of March 2, 1863.

(2) The form of the proceeding is regulated entirely by the statute, and it is there declared that it shall conform as nearly as practicable to the proceedings of courts of chancery in like cases. If this decree now complained of had been given in the district court, no one would have questioned the jurisdiction of the supreme court to review it by writ of error. How then can it be said that error shall not lie to the probate court? The proceeding, whether in the district or probate court, is identical in form, spirit and purpose; and the statute which authorized the writ of error to the decrees of the district court gave the same relief against error in the decree of the probate court, exercising equity powers, as we have already seen.

(3) A more conclusive argument may be drawn from the provisions of the statute regulating this proceeding.

By the act of Nov. 7th, A. D. 1861 (Rev. Stat. 521, § 6), the probate court was required to sit on the first Monday of every month. By the act of March 11, 1864 (Rev. Stat., p. 525), which was the first act passed to regulate the enlarged jurisdiction of the probate court, it was provided that "terms of the probate court for the transacting of business arising under this act shall be as now provided by law for the transaction of probate business."

By the act to amend the last act (Feb. 8, 1865, Rev. Stat. 527), six terms of the probate court were provided to be held first Monday in alternate months. The act does not expressly devote the terms so provided to the trial of causes at common law, but looking to the whole act, it is quite apparent that this was the intention; the terms of that court as a probate court remaining as declared by the act

of 1861. This, it is believed, accords with the practice which was almost everywhere observed. For the exercise of its probate jurisdiction the court is understood to have held its terms in almost every county of the Territory, on the first Monday of each month; and for the exercise of its jurisdiction as a court of common law and equity, on the first Monday of each alternate month, as prescribed by the first section of the act last quoted.

Now reverting to the statute which regulates the proceedings where the personal representative applies either in the district or probate court for leave to sell the real estate of his decedent (Rev. Stat. 671), it is provided by section 98 that upon the filing of the petition, summons shall issue returnable upon the first day of the term of the court next succeeding the date thereof; provision is made for a notice by publication to non-resident defendants, but as in the act to regulate proceedings in chancery in the district court, it is declared that this notice shall not dispense with the issuing of summons or the usual effort to make service thereof, the issuing of summons and the publication of notice are both essential to the jurisdiction, and the two must conform and run together; the summons must be returnable to the same term at which, by the published notice, the defendant is required to appear, as the summons is expressly required to be made to the next succeeding term, and would be void if any term intervened, *Elec v. Wait*, 28 Ill. 72; so if the publication require the defendant's appearance at any other term than that next succeeding, it is entirely ineffectual.

Now by section 103 of the same statute, it is provided that if the first publication of this notice be not at least sixty days before the day named for the defendant's appearance, the cause shall stand continued. But in a court which, like the probate court, sits on the first Monday of every month, and whose vacations can in no case much exceed the limit of thirty days, a lawful publication, under this section, would have been an impossibility.

It is manifest, therefore, that the act confers the jurisdiction upon the probate courts, not as such, but as courts of equity.

It was also manifestly the legislative purpose to assimilate the proceeding to that of the court of equity in other like cases. It may be said to be a new jurisdiction conferred upon the courts of equity with the ultimate purpose to facilitate the settlement of decedent estates and avoid multiplicity of actions.

To deny the writ of error in such case to the decrees of the probate court, is to deny it to all decrees in equity given in that court, and perhaps to all those given in the district court, save in the single case expressly provided for in the 45th section of the Practice Act.

What was said in argument touching the limitations upon the equity jurisdiction of the probate court of Gilpin is not thought to be entitled to controlling effect. Until the act of 1870, enlarging the jurisdiction of the Arapahoe court, was passed, the court was under the same limitation in every county in the Territory. The jurisdiction to authorize the sale of the real estate of decedents was possibly the sole instance in which the probate court exercised equity powers, save in the cases mentioned in section 41 of the act of Feb. 8, 1865; but that jurisdiction was manifestly conferred upon them sitting as courts of equity and not as probate courts, and whether the writ of error shall lie cannot be determined by considerations applicable alone to the county of Gilpin.

What has been said disposes of the first, second and third grounds assigned in the motion. As to the fourth ground, it is unquestionable, that if the writ of error lies at all, the heirs are the proper persons to prosecute it; but the present writ is variant from the record transmitted. It recites a proceeding between Emory J. Vance, Anna E. Vance, Leroy R. Vance and Maria H. Merrill, heirs at law of David C. Vance and Lewis C. Rockwell and John T. Maroney, whereas, according to the record, certified to us,

the proceeding was between John T. Maroney, not in his individual capacity, as the writ asserts, but as administrator, upon the one side, and Emory J. Vance, Mrs. David C. Vance and the unknown heirs of David C. Vance, deceased, upon the other.

Apparently impressed with the absurdity of instituting affirmative proceedings in the names of unknown persons, the persons who framed the writ sought to avoid this by reciting the proceeding below as if those who join in the present complaint had been named as parties in the decree complained of. But this is inadmissible; the decree and proceedings must be recited according to the fact; and the character in which the plaintiffs in error sue, as heirs or otherwise, may be asserted in the *ad injuriam* clause.

Under section 12 of the Statute of Amendments, the writ may, in these respects, be amended here if counsel desire.

The fifth ground of the motion is sufficiently answered by the case of *Skinner v. Beshoar*, 2 Col. 384; what is sufficient to reverse the judgment can never be cause to quash the writ of error.

Motion denied.

SINCE WRIT OF ERROR LIES to review all final judgments and decrees of county courts, it will lie to review decrees of the county court ordering sales of lands of decedents to pay debts: *Stoen v. Strickter*, 12 Colo. 181-183.
WRIT OF ERROR—REVERSAL.—What is sufficient to reverse a judgment can never be cause to quash a writ of error: *Bean v. People*, 6 Colo. 99.

WEBBER v. EMMERSON.

1. A general exception to the charge to the jury without either specifying the objectionable propositions, or excepting to each and every of the instructions, is not available, if any single proposition embraced in the charge is sound.
2. A bill of exceptions must be most strongly construed against the party excepting; this court can make no intendment in his favor. An objection should precede an exception, and where in any view the evidence offered is clearly incompetent, a general objection will be sufficient, but where evidence is objected to and is susceptible of being made admissible by the introduction of further testimony, the specific grounds of objection must be stated.
3. So also a motion to strike out certain evidence, which covers nearly all the material evidence of the opposite side, is too broad. The motion should specifically designate the objectionable evidence.

4. Where a mortgagee of chattels, in the absence of an agreement in the mortgage, purchases the property at a mortgage sale and appropriates it to his own use, he becomes liable for the actual value thereof at the time of the sale, without reference to the amount bid.
5. The declaration of a third party, stranger to a suit, and made in his own favor, concerning his connection with the defendant in a material matter in dispute in the action, cannot be admitted for any purpose, there being no privity between such third party, and the plaintiff not being present at the time the declaration was made.

Error to Probate Court of Arapahoe County.

On the 3d day of June, 1873, Emmerson, the defendant in error, made his promissory note to Webber, the plaintiff in error, for \$1,094.87, payable July 1st, 1873, with interest at two per cent per month. To secure the payment of the note, Emmerson executed a chattel mortgage to Webber, on a lot of furniture, in a hotel being conducted by Emmerson. About the 27th of June, 1873, Emmerson went away, leaving the property in charge of one Allsberry. On the 2d day of July, 1873, Webber took possession of the goods described in the mortgage, and on the 15th of the same month sold them at public auction, and bought them in, but for what amount does not appear. In November, 1874, Webber commenced an action against Emmerson on the note in the probate court of Arapahoe county. The declaration consisted of a special count setting out the note and the common counts. The defendant pleaded the general issue, payment and a plea of set-off. In this latter plea the defendant averred the giving of the mortgage, "that by said mortgage it was provided that if the defendant should pay the note on the 1st day of July, 1873, then the mortgage to be void, otherwise to remain of force, and until default, defendant might hold possession of the furniture; but on default, or if the goods should be attached or claimed by any person or persons, or if defendant should attempt to sell or remove the goods without authority or permission of plaintiff in writing, then plaintiff might take possession of the furniture to his own use and sell the same for the

best price that could be obtained, and out of the money arising from the sale, pay the note and charges touching the same, and surplus, if any, to the defendant; that in pursuance of said mortgage, plaintiff took possession on default and proceeded to advertise the furniture as for sale, and on the 3d day of July, 1873, made a pretended sale thereof at public auction and bid it off for himself, and did then and there, under and by virtue of such pretended sale, convert all of the furniture to his own use, and did thereby then and there become liable to defendant for the full and reasonable value thereof; that said furniture was of the value of \$2,500, out of which defendant is ready and willing and offers to set off and allow plaintiff the full amount of the damages in the first count of the declaration mentioned, and asks judgment for the balance," etc.

A general denial was put in by the plaintiff to the special pleas. At the trial, Emmerson testified in his own behalf to having left the property in charge of Allsberry, thinking he would return in ten or fifteen days; that he last saw the property on the 27th of June, 1873, and that it was worth not less than \$2,000. Upon cross-examination, Emmerson testified as follows:

"On 27th June left property in charge of Allsberry. He took possession of premises night of 26th of June, but I left premises morning of 27th of June. Sold articles to him with certain conditions, understandings, and a certain arrangement; after this arrangement I left goods with him subject to our bargain that evening."

The re-examination was devoted to an explanation of the understanding or arrangement with Allsberry. Other evidence was also put in by the defendant for the purpose of showing that the sale to Allsberry was conditional only, and had not been carried out.

The testimony of the witness Stover, which is stated substantially in the opinion, was directed to the same end. The method adopted to exclude the defendant's evidence, as well as the character of the evidence, is discussed in the opinion.

The jury returned a verdict for the defendant in the sum of \$398.77. The plaintiff put in a motion for a new trial, the motion was overruled and judgment entered on the verdict. To reverse this judgment, the plaintiff sued out this writ of error.

Mr. E. P. JACOBSON, for plaintiff in error.

Mr. JOHN W. BLACKBURN, for defendant in error.

THATCHER, C. J. Many of the errors assigned being founded upon exceptions to the instructions of the court, and to evidence not properly taken in the court below, cannot appropriately be considered here with a view to a reversal of the judgment. But for the purpose of indicating what is the approved practice in such cases, we will briefly refer to the fatal defects in some of the exceptions upon which errors have been assigned.

An exception was taken to the instructions *en masse*, prayed by the defendant and given by the court. These instructions involve distinct legal propositions, and while in our opinion they substantially present the law of the case, we are not called upon to examine them with a view to determine. If any single proposition embraced in the charge is sound, a general exception "to said instructions," without either specifying the propositions deemed objectionable, or excepting to each and every of the instructions, is not available. *Decker v. Mathews*, 12 N. Y. 320; *Hunt v. Maybee*, 7 id. 273; *Gray v. The People*, 22 Mich. 220; *Thrasher v. Tyack*, 15 Wis. 258; *Mershow v. National Ins.Co.*, 34 Iowa, 88; *Johnson v. Jones*, 1 Blackf. 220.

A schedule of what purported to be the property described in the chattel mortgage executed by Emmerson to Webber was received in evidence after Emmerson had testified that he had made the schedule and felt confident that it was very nearly correct. The exception to the admission of the schedule is noted by the following memorandum in the bill of exceptions: "Schedule received in evidence and excep-

tion for plaintiff." It is unnecessary to say that this exception is not in due form. It is no such exception as this court can recognize. It does not appear that any objection was interposed to the receiving of the schedule. A party cannot silently consent to the admission of evidence and then take an exception. An exception duly reserved, implies that an objection has been previously made to the admission of the evidence, and that such objection had been overruled by the court. But we are not permitted to take any thing by inference. That an objection to the admission of the evidence was made at the trial must affirmatively appear. A bill of exceptions must be construed most strongly against the party excepting, and we can make no intendment in his favor. Again, the exception is general in its terms. The grounds of the objection are not specified. The attention of the court below and of the opposite party was not called to any particular objection, and, therefore, if any existed, no opportunity was given to remove it. This exception for these reasons cannot be considered. We will not pursue any further an examination of other exceptions, to which one or more of the same objections lie.

Where the evidence is clearly not competent in any view for any purpose, a general objection will be sufficient; but in all cases where the evidence is susceptible of being made admissible by the introduction of further testimony, the specific ground of objection must be stated. The true rule is laid down in *Cody v. Butterfield*, 1 Col. 384.

The motion to strike out certain testimony, covering as it does nearly all the material evidence in behalf of the defendant, is too broad. As when evidence is admitted without an exception properly reserved, it is esteemed to be received by consent of the party affected by it, and as much of the evidence admitted in behalf of the defendant in this case was pertinent and material, a general motion to strike out cannot be granted, nor will the court, upon such general motion, search the whole evidence, with the view to ascertain if any testimony was improperly admitted. The motion

should be specifically confined to the objectionable evidence.

The sole purpose for which evidence could be admitted of a sale of the mortgaged property by Emmerson to Allsberry, would be to show that the title to said property charged only with the lien of the mortgage, had vested by virtue of such sale to Allsberry; and that, therefore, if after such sale, Webber had converted the property to his own use without a sale under the mortgage, or had bought it under a mortgage sale, he would not be liable to Emmerson, but to Allsberry for the value of the chattels in excess of the amount due on the note at the time of such conversion, or such mortgage sale. In this view it was important that the character of the transaction between Emmerson and Allsberry should clearly appear. If the sale by Emmerson to Allsberry was *bona fide* and absolute, vesting the title in Allsberry subject to the lien, Emmerson under his plea of set-off could recover no judgment, unless for costs only, against Webber. If the mortgage sale had been conducted in strict accordance with law, and the property had been purchased, not by the mortgagee, but by one competent to buy, the liability of Webber would be measured by the value of the property, as determined by the price paid by the highest bidder, for the excess of which over and above the amount due on the note he would be required to account. But when the mortgagee, unmindful of his fiduciary relation, assumes, in the absence of an agreement with the mortgagor, to purchase the mortgaged property, and to appropriate it to his own use, he violates the trust reposed in him, and becomes liable for the actual value of the property at the time of such sale, without regard to the price bid.

The law prohibits a trustee, where interest and duty so clearly conflict, from purchasing and holding for his own use and benefit property toward which he sustains a fiduciary relation. Webber's liability arises, therefore, not from the purchase made at the mortgage sale, but from

the fact that he reduced to possession, and without warrant of law converted to his own use, the mortgaged property.

It was competent to show at the trial the character of the alleged sale of the property in question by Emmerson to Allsberry, as so much of its value at the time of its conversion, as exceeded the amount of Webber's lien, could not inure to the credit of Emmerson if he had before that time parted with the title, subject alone to the lien.

For the purpose of establishing the character of the sale, the defendant introduced the witness Stover, who testified to a conversation with Allsberry on the day of the mortgage sale. To the interrogatory, "What did Allsberry say?" a general objection was made, overruled and an exception taken. Is this question admissible for any purpose? We think not.

Allsberry, the witness testifies, declares that he was under no obligations to take the property, that he had already turned it over to the plaintiff, and that he would not have any thing more to do with it. This evidence, if it was admissible, tended to show that the sale to Allsberry had never been completed, that the title had never passed, and it may have influenced the verdict of the jury.

The witness Stover was not the agent of Webber. Webber himself was not present at the conversation, nor was there any privity between Webber and Allsberry. It is true that in certain cases the admission of third persons, *strangers to the suit*, are received in evidence, *e.g.*, in actions against a sheriff for not arresting a debtor, or for allowing him to escape. Statements made by the debtor acknowledging the existence of the debt, being sufficient to charge the debtor in the original action, are evidence against the defendant. 1 Greenleaf's Ev., § 181; 1 Phillips' Ev. 489.

So carefully is this principle guarded and restricted that even in the case of an escaped debtor, to bind the sheriff, the debtor's acknowledgment of the debt must have been made before his escape. *Rogers v. Jones*, 7 B. & C. 89.

The admission of the debtor in each case cited by Greenleaf and Phillips are clearly against his own interest. But this principle cannot be invoked in aid of the declarations and admissions under consideration. The declarations of Allsberry, made after he had parted with the possession of the property, amounted to a disclaimer of any liability on his part to Emmerson, and were, therefore, declarations in his own favor. They were improperly admitted in evidence. We discover no other material error in the record that we are at liberty to consider.

As the sufficiency of the plea of set-off was not raised in the court below, and has not been questioned here, we will not pass upon it.

As the jury may have been misled by the evidence of Stover, the judgment of the probate court must be reversed, with costs, and the cause remanded to that court for further proceedings according to law.

Reversed.

EXCEPTION TO EACH AND EVERY INSTRUCTION, where general charge is given, is insufficient if the objections are not specifically stated: *Schmidt v. Stecker*, 3 Colo. 274; *Wilson v. People*, 3 Colo. 321; *Kansas Pac. Ry. v. Ward*, 4 Colo. 35, 36; *Coon v. Ripden*, 4 Colo. 279; *Worton v. Siegel*, 5 Colo. 324; *Gibbs v. Wall*, 10 Colo. 157; *Kelth v. Wells*, 14 Colo. 328.

MELLOR v. VALENTINE.

1. Where one conveys the fee of an estate, the deed of which is recorded, and receives a bond to reconvey upon certain conditions, which is not recorded, he shall not be permitted in an action to charge the estate with a mechanic's lien, and, after standing silently by and seeing the work progress, to either defeat the lien or diminish his grantee's estate by the production of the unrecorded bond.
2. The fact that a contract for repairs is made with several, does not affect the lien, if one of the parties is the owner.
3. The legal effect of the seventh section of the Lien Act (1872, p. 151) is to give the mechanic a lien from the date the labor was commenced or the first of the materials furnished.
4. The manifest object of the same section (act 1872) is to protect the mechanic against injury by alienation during the progress of the work. Subsequent alienations are subordinate to the right of the mechanic engaged, and who continues to work under previous employment by the vendor.
5. Where the work done or materials furnished is continuous in its character, the contract must be regarded as an entirety, and the lien attaches for work done and materials furnished after as well as before the purchase.

6. It is essential that the contract be with the owner or the agent, and the mechanic must ascertain the nature of the interest in the land of the person with whom he contracts.

Appeal from District Court of Gilpin County.

PETITION for mechanic's lien was filed by Valentine, the appellee, in the district court of Gilpin county, against Young, Mellor and Jones. The petition alleges among other things: That petitioner, on the 11th day of June, entered into a contract with Nathaniel Young, who was then owner of an undivided one-half of a theater building, and was the owner of the ground on which said building stands, to work and labor for said Young as a carpenter and joiner in repairing said building at the agreed price of \$4.50 per day; that at the same time Young authorized petitioner to hire men to work for said Young in repairing said building, and to purchase and furnish materials for said repairing.

That in pursuance of such authority petitioner furnished materials and labor for said repairs, and employed certain carpenters and teamsters named in his petition, and that at the request of petitioner, as agent for Young, a number of persons furnished materials which were actually used in the repair of said building. That the parties furnishing labor and materials verified their claims as required by statute and then assigned them to petitioner, and that he claims to hold a lien therefor, that the several sums are due, etc. That defendants Mellor and Jones own an interest in the premises subject to his lien; that service of notice was had, etc., and prays a lien for work of petitioner, and for the labor and materials furnished by the others named, etc.

Young made default. Mellor and Jones answered that "Young, on the 11th day of June, '72, was not the owner of the said premises, and that they have no knowledge of the contract alleged, and neither admit or deny same, and neither admit or deny that petitioner was authorized to hire men or purchase materials, and neither admit or deny that the several persons furnished the labor and materials as charged in petition. Deny the verification and assignment

of the claims ; neither admit or deny whether the several amounts are due," etc. "That, on the 3d day of June, 1872, and for a long time prior thereto, Jones, defendant, owned the undivided one-half of the said theater building and the west half of the lot on which the same is built, and was then and there and for a long time prior had been in possession of the same. That on said 3d day of June, he sold and conveyed the same to Young, and that on the same day Young gave his bond to said Jones to re-convey said premises, and other property, to Jones, for the sum of ten thousand dollars, to be paid on or before the 1st day of August, A. D. 1872, which was duly filed in recorder's office on the 17th day of June, 1872.

That Jones paid Young said ten thousand dollars on the 17th day of June, 1872, and Young thereupon conveyed said premises to Jones, and that Jones afterward conveyed same to defendant Mellor.

That all said supposed liens are subject to said title so acquired by said Mellor ; that Jones has now no title to or interest in the premises."

After replication filed, the cause was referred to take proofs ; upon the coming in of the master's report, the cause was submitted upon the petition, answer and master's report, and the court rendered a decree granting a lien upon the west twenty feet of the lot upon which said building is situated, and ordering that defendants pay for the whole of said work, labor and materials, and in default thereof the part of lot owned by defendant Mellor be sold to satisfy the sum of \$706.89, and costs of suit. The deeds and the bond set up in the answer and produced in evidence describe the land as in the decree. Mellor appealed to this court.

It appeared that Mellor was in the building three or four times, and that Jones was there every day or two during the time the work was going on.

Mr. JAMES B. BELFORD and **Mr. CLINTON REED**, for appellant.

Mr. L. C. ROCKWELL, for appellee.

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ELBERT, J. Jones, by his recorded deed, conveyed the fee to Young, and thereby held him out to the world as the owner of the premises sought to be charged with this lien.

He cannot be permitted to stand by in silence and see the work go on, and afterward defeat the lien, or diminish Young's estate by the production of Young's unrecorded bond to re-convey. 1 Story's Eq. Jur. 385, *et seq.*; Phillips' M. L., § 225; *Higgins v. Furgeson*, 14 Ill. 269; *Donaldson et al. v. Holmes et al.*, 23 id. 88; *Wendall v. Rensselaer*, 1 Johns. Ch. 344; *Storrs v. Barker*, 6 id. 166; *Phillips v. Clark*, 4 Metc. (Ky.) 348.

For the purposes of this lien, and as against Jones and his grantees, Young must be treated as owner in fee of the property at the date of his contract for repairs.

The fact that the contract for repairs was with Allen, as well as Young, does not affect the lien.

If the contract be made with several parties, one of whom is the owner, it is sufficient. *Van Court v. Bushnell*, 21 Ill. 624; *Roach v. Chapin*, 27 id. 194.

The legal effect of section 7 of the Lien Act of 1872 is to give the mechanic a lien from the date the labor was commenced, or the first of the materials furnished.

The manifest object is to prevent wrong to the mechanic by alienations or incumbrances during the progress of the work. Subsequent alienations or incumbrances are not prevented, but made subordinate to the right of the mechanics who, at the time, were engaged in working, and continued afterward to work under previous employment by the vendor. Phillips' M. L., §§ 228-229; *Monroe v. West*, 12 Iowa, 119; *Miller v. Kaufman et al.*, 14 Md. 173.

It is objected that the lien was allowed for work done and materials furnished after the 17th of June, the date of the purchase.

Where the work done, or materials furnished, is continuous in its character, the contract is to be regarded as an entirety, and the lien attaches for work done and materials furnished, after, as well as before the purchase. Phillips' M. L., §§ 228, 229, 230; *Jones v. Swan*, 21 Iowa, 181; *Mon-*

roe v. West, 12 id. 119; *Milner v. Norris*, 13 Minn. 455; *Miller v. Kaufman et al.*, 14 Md. 173.

The rule is modified in this case by the fact that Jones and Mellor were cognizant of the repairs, and silently acquiesced in their continuance. Under the statute the notice is to be filed within forty days after the work is *completed*; in the case of sub-contractors, within twenty days after the *last* work is performed, or the *last* material furnished. The lien attaches from the time the work was *commenced*, or *first* of the materials furnished.

This language clearly contemplates an open current account, consisting of different items, furnished at different times, and that such an account be treated as an entirety.

This, however, in no wise dispenses with the necessity of showing a previous hiring, or contract with the owner or his agent under which the work was continuously done or materials continuously furnished.

That the work done and materials furnished by each original claim owner in this case were continuous, and each founded on a previous contract with the owner or his agent, is not called in question, except as to the claims to be now considered.

The account of Buel and Burlingame commenced on the 24th of June, seven days after the conveyance to Jones and Mellor, and cannot be said to be founded on a contract with the then owner or his agent.

That the contract should be with the owner or agent is essential. The law imposes on mechanics, like other persons, the necessity to ascertain for themselves the nature of the interest in the land to be improved, of the persons with whom they contract, and all negligence in this regard is charged to their account. Phillips' M. L., § 225.

The lien for this claim was improperly allowed.

The work of Silas W. Long and William H. Sebastian commenced on the 17th of June, the date of the conveyance to Jones and Mellor. To prefer the lien, we must say that the conveyance was subsequent to the commencement of the work; to prefer the conveyance, we must say that it

was previous to the commencement of the work. We are unable to say that either was the fact. They were concurrent as to the day, and there is nothing to show at what hour of the day the work was commenced, or the deed recorded. The *onus*, however, is on the lien claimant to establish his right to priority under the statute, and having failed in this the lien should not have been allowed as to these two claimis.

The decree of the court below will be modified, and the lien discharged as to the claims of Buel and Burlingame, Sebastian and Long.

It is also irregular in several particulars, unnecessary to specify, which will be corrected by the decree of this court.

In all other respects the decree of the court below is affirmed, and the appellant will be allowed his costs in this court.

Affirmed.

MECHANIC HAS LIEN FROM DATE labor was commenced or first material furnished: *Keystone Mg. Co. v. Gallagher*, 5 Colo. 27.

MELLOR v. VALENTINE.

One of several co-tenants may, if he will, improve the common estate at his sole expense, and if he assumes to do so, undertaking for himself alone, his co-tenants, being informed of this, are not bound to protest or object in order to avoid liability to those who conduct the labor or improvement. The moiety of the co-tenant in the premises is liable in his hands for the whole value of the improvements made at his instance.

UPON petition for rehearing the following opinion was delivered by

WELLS, J. Counsel err in supposing that Langrishe, the co-tenant of Young, is made party defendant to this petition. He is neither named as defendant, nor is process prayed against him; nor does the petition in any way indicate that Langrishe or his estate is sought to be charged; nor that he is in fact chargeable. The only averment which can be supposed to have reference to his liability is that in which it is asserted that during all the progress of the

work, Jones & Burrell were the agents of Langrishe, and had full knowledge of the contract before alleged, and that the work was being performed. Now, waiving all consideration of the sufficiency of the averment as to the agency, it is perfectly manifest that whatever effect the facts stated may have in proceeding for contribution, they are altogether ineffectual to make Langrishe liable to the petitioner. According to the petition, it was Young who employed petitioner and all the other mechanics and material men; of him alone were they at liberty to demand their recompense, and upon his estate alone the law gave the lien. The fact that Langrishe's agents, or Langrishe himself, was informed that his co-tenant had, on his sole credit, entered into engagements for the reparation and improvement of the common estate, and that the work was proceeding in pursuance thereof, would no more render him answerable to the mechanic, than would the same knowledge of repairs contracted for and proceeding upon premises in which he was in no manner interested. His silence or assent would deprive him of the action which, perhaps, he might otherwise have had, but it would have no greater effect.

One of several co-tenants may, if he will, improve the common estate at his sole expense, and if he assumes so to do, undertaking for himself alone, his co-tenants, being informed of this, are not bound to protest or object in order to avoid liability to those who conduct the labor of improvement.

If Young had assumed to contract on behalf of both himself and Langrishe, or if the petitioner and the other mechanics had performed the work in ignorance of the latter's interest, and Langrishe knowing this had silently permitted them to proceed, it might plausibly be asserted that he was estopped to traverse the assumed authority in the one case, or the sole proprietorship in the other. But nothing of this nature appears.

Unless, however, we fail to understand counsel, it is supposed that inasmuch as the improvements inure in part only

to the advantage of Young's moiety, the moiety is chargeable only in part, that is to say, to the extent of one-half part of the value of the improvements—even conceding that Langrishe was not party to the contract. This argument, if allowed to prevail, will have the effect to deny the lien altogether wherever the improvements are made at the instance of one or a part of several joint tenants, or tenants in common; for whatever may be the estate upon which it is charged, it is impossible to say that it can be given for the moiety, or any share or portion less than the whole of the mechanic's disbursements.

Wherever the statute affords the lien at all, it is by express words "for the amount and value of the work and labor so performed or materials furnished." Now the legislature have not in express words prescribed that improvements made at the instance of one tenant in common shall bind his share or interest; but if the case is to be excluded from the general words of the first section, it must be upon the ground suggested in argument, that the burden ought to be imposed only where it will be no more extensive than the benefit; that A's estate ought not to be charged with a lien for that share of the improvement which has inured to his co-tenant B. The same reason should exonerate the co-tenant from responsibility altogether; but the law has invariably regarded his contracts for the improvement of the common estate binding upon him, and it is not unfair to assume that the legislature contemplated the preservation of a just analogy between the remedy at common law and that afforded by the statute. Moreover, if the exposition of the statute contended for be a just one in the case of improvements made by one of the tenants in common, it would be reasonable to expect that no contradictory rule would be found expressly declared in other analogous cases. For example: if a tenant for life or for years procure substantial improvements or repairs to be made, it is manifest that as to a certain proportion, these inure to the reversioner, as essentially as in the present case one moiety of the labor and

materials expended by the petitioner has been appropriated to the estate of the co-tenant, Langrishe. Yet, by the express words of the statute, section 7, the particular estate is in such cases chargeable with the whole value.

Nor are we without direct authority upon the identical question now under consideration. In *Keller v. Drummond*, where the statute limited the *lien* to the estate of "the person in possession when the improvement was commenced," it was held that the contract of one in possession of the premises, though having a mere equity, and that as tenant in common with another, would bind his interest for the whole value of the material. 68 Penn. St. 452 and *Hillbourn v. O' Barr*, 19 Georgia, 592, is to the same effect. Mr. Phillips cites these cases without disapproval, and apparently regards them as a fair expression of the powers and liabilities of tenants in common in the absence of restrictive legislation. We are convinced, therefore, that upon reason and authority, the moiety of Young in these premises was liable in his hands for the whole value of the improvements made at his instance, and passed to the defendant Mellor burdened with the same charge.

The claim of *lien* filed by the petitioner, in pursuance of the second section of the statute, declares in the first instance for a *lien* upon the whole premises, and not upon the moiety of Young, and contains the following: "All of the above work and foregoing indebtedness was made by Nathaniel Young, owner of one-half of the said premises, and with the knowledge and consent of William Jones and James Burrell, as the agents of John S. Langrishe."

It is argued that inasmuch as by this notice the petitioner declared for a *lien* against the whole estate, and arising upon contracts with both the co-tenants, he is now restricted by this declaration, and can have no decree whatever until Langrishe shall be made a party and brought in; and that whatever is then found to be due, must, if any *lien* is allowed, be charged against the whole estate, and not against the moiety of Young.

The allegations of the notice respecting the connection of Langrishe with the employment are, as it seems to us, not different in effect, from the averments of the petition in respect to the same matter before considered. The claimant here, as in his petition, asserts that the indebtedness for which the *lien* is claimed was contracted by Young, the owner of one-half the premises, and that the agents of Langrishe consented. It is not stated that Langrishe was the proprietor of an interest; and if this had been stated, it is not at all clear that any one would, from the terms of this notice, be at liberty to conclude that Langrishe or his estate is sought to be charged. But even conceding that the terms of the notices are to be construed as importing, contrary to the fact, that the indebtedness arose upon contract with both the co-tenants, and the lien is claimed upon the whole estate, instead of Young's moiety, it by no means follows that petitioner is estopped from proceeding for the lien to which, had his notice accorded with truth, he would, upon the evidence in this case, have been entitled.

The statute, it is admitted, must be substantially complied with, for this is one of the conditions upon which the lien is given. But it seems to be safe to assert, that if the notice containing the substantial requirements of the statute go beyond these, and by inadvertence, or without fraudulent purpose, seeks to charge a larger interest on the estate than is, in fact, chargeable, or asserts a demand against those who are liable, together with those who are not, the mistake shall not deprive the mechanic of his lien, unless some third person has been misled to his prejudice. *Putnam v. Ross*, 46 Mo. 338; *Hauptman v. Coblin*, 20 N. Y. 247; *Hillbourn v. O' Barr*, 19 Ga. 591; *Tibbell v. Moore*, 23 Cal. 215, are in point.

Now, upon these authorities, it is impossible to deny the lien to the extent of Young's moiety; for the defendant Mellor, the only person as to whom the supposed overstatements of the notice can be alleged to have been prejudicial, purchased that interest while the work was still in progress, and before the claim of lien was even framed. He was not

misled by it in his purchase therefore, and that he was afterward induced to change his position in reliance upon the statements of the notice, is nowhere shown.

The petition for rehearing is therefore denied.

COTENANT — MECHANICS' LIENS. — To entitle a mechanic to a lien, it is sufficient if the contract be with the owner's authorized agent. And if one of several cotenants undertaking for himself alone contracts with a builder, a lien for the whole value of the improvements may be enforced against his moiety of such contracting party: *Poleon v. Orgera*, 11 Colo. 208; *Reo R. & M. Co. v. Musgrave*, 14 Colo. 83.

PATTON v. THE COEN AND TEN BROEKE C. M. Co., for use, etc.

1. When a cause is tried without the intervention of a jury, and no exception is reserved to the judgment, the sufficiency of the evidence to sustain the judgment cannot be inquired into. In the absence of such exception, however, this court may consider all assignments of error based upon exceptions properly taken on the trial, not requiring a review of the judgment upon the evidence.
2. An assignment may be made of any property of which the assignor has the actual or potential possession.
3. An agent's authority not coupled with an interest, being revocable at the pleasure of the principal, one dealing with such agent, after notice of revocation, does so at his peril.
4. Where an action is brought by one, for the use of another, it is unnecessary to allege the use, and if alleged, it need not be proved.
5. When a paper is admitted in evidence without objection, it must be held to be admitted by consent of both parties to the action, and to be what it purports on its face.

Error to Probate Court of Gilpin County.

THE facts are stated in the opinion.

Messrs. H. M. & W. TELLER, for plaintiff in error.

Mr. L. C. ROCKWELL, for defendant in error.

THATCHER, C. J. This is an action in assumpsit, brought by the defendant in error against the plaintiff in error, for the money claimed to be due to the Coen and Ten Broeke Carriage Manufacturing Company, for the use, etc., for a certain omnibus, lead bar, etc., sold and delivered by the defendant in error, to the plaintiff in error.

The record shows that Patton, through Abbott, a salaried agent of the company, ordered of the company at Chicago, Illinois, in May, 1874, a certain omnibus, etc., of the value of \$885, one-half to be paid in cash upon the receipt and acceptance of the omnibus, and the other half in sixty or ninety days, at the option of Patton, with interest at one per cent per month; that the omnibus, and other articles ordered, was shipped by the company, to Patton, in care of Abbott, June 17th, 1874, and were by Abbott received and delivered to Patton, June 29th, 1874; that on the 25th day of said month, at Central City, by an agreement between Abbott and Patton, Abbott receipted the bill for the same, and Patton drew his check for \$440 and his note for \$445, payable in ninety days, with interest at one per cent per month; the receipted bill, check and note were then deposited with J. S. Reynolds, cashier of the Rocky Mountain National Bank, with instructions to deliver to him, Patton, the receipted bill, and to Abbott, the agent, the check and note, if, upon the arrival of the omnibus, Patton should find it according to order, and accept the same. The omnibus arrived June 29th, and was accepted by Patton. Reynolds then delivered note, check, and receipted bill according to instructions. June 17th, the company drew two drafts on Patton in favor of the First National Bank of Chicago, one for \$440, payable at sight; the other for \$445, payable sixty days after date, with interest at twelve per cent per annum; and on the same day assigned its account against Patton to said bank by an indorsement on the back of the account. These two drafts were indorsed and transmitted to J. S. Reynolds, cashier, for collection, and presented to Patton for payment and acceptance; the one he refused to pay, and the other to accept, for the reason that he had given the order to the agent for the omnibus, and that he intended to settle with him alone. June 27th, Patton received a telegram from the company requesting him to honor their drafts, and informing him that Abbott had no authority to collect for the company.

This case was tried by the court without the intervention of a jury, and judgment was rendered in favor of the plaintiff. No exception was reserved to the judgment. In the absence of such exception, the fifth, sixth, seventh and eighth assignments of error, relating, as they do, to the sufficiency of the evidence to sustain the judgment, cannot be considered by this court.

By express enactment (R. S., ch. 70, § 22), where the trial is to the court, "the party excepting may assign for error before the supreme court any decision or opinion so *excepted to*, whether such exception relates to receiving improper, or rejecting proper testimony, or to the final judgment of the court upon the law and evidence."

While under this statute the failure of the party aggrieved to except to the final judgment at *nisi prius* precludes the appellate tribunal from reviewing such judgment upon the testimony adduced at the trial (*Phelps v. Spruance*, 1 Col. 415; *Liss v. Wilcozen*, 2 *id.* 85), it does not operate to prevent this court from considering assignments of error based upon exceptions duly reserved during the progress of the trial to the admission of improper testimony, or the exclusion of proper testimony.

As in cases tried by jury, if the aggrieved party fails to move for a new trial he is not held thereby to acquiesce in any of the errors committed during the trial, to which he may have excepted, but may have, under our practice, all such errors considered by the appellate court. *Kansas Pacific R. W. Co. v. Twombly's Administrator*, 2 Col. 559. So in cases tried by the court without a jury, in the absence of an exception to the final judgment, the supreme court may consider all assignments of error based on exceptions properly taken at the trial, being inhibited only from reviewing the judgment on the evidence.

In the cases decided by the Territorial supreme court, cited *supra*, the only question passed upon, involving a construction of section 22 of the Practice Act, related to the right of the supreme court to review a final judgment upon the sufficiency of the testimony, where no

exception had been taken to such judgment. The point here decided has not been presented or passed upon by the supreme court of the Territory.

Of the other errors assigned, the only one upon which plaintiff in error seems to rely in argument, and the only one in our opinion worthy of serious consideration, is the second assignment, viz.: "The court erred in admitting drafts or bills of exchange and the account sued on, and attached to the deposition of C. O. Ten Broeke." The objection to receiving in evidence the account sued on, on the ground that there was no sufficient proof of the assignment thereof, is not valid. The authority of C. O. Ten Broeke as secretary of the company to make the assignment for the company is established by his own testimony. But it is argued that the account was not assignable, as there was no claim against Patton *in esse* at the time the assignment was made; that until the acceptance of the omnibus by Patton there was no account due, or to become due, which could be the subject of assignment. This position is, we think, untenable. It was held in *Petch v. Tutem*, 15 M. & W. 109, that a tenant may assign his interest in crops to be grown in future years of his term. The future earnings of a railroad company may be assigned. *Bittenbender v. Sunbury & Erie R. R. Co.*, 40 Penn. St. 275. In the case last cited, the court says, "it may be remarked that an assignment may be well made of any property of which the assignor has the *actual* or *potential* possession." In the leading case of *Grantham v. Hawley*, Hobart, 132, it was held that a party who had an interest in land may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant, as a person may grant all the tithe-wool he may have in such a year, yet perhaps he shall have none. But a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter, for there he hath it neither actually nor potentially." The claim assigned by the plaintiff below had a potential existence, and, therefore, under the authorities just cited, was a proper subject of assignment. It was

an assignment valid in equity, which a court of law will protect. The account, in connection with the testimony of Ten Broeke, was admissible, if for no other purpose, to show Patton's indebtedness to the company.

Whether the drafts being unaccepted operated as an assignment *per se* of the company's demand, or tended to prove such an assignment, is a question upon which the authorities are in great conflict. As in the view we have taken of the case under the pleadings, it is unnecessary to decide this point in order to a just determination of the rights of the parties litigant, we shall not pass upon this question.

Even if there was error in receiving the drafts in evidence, the error is not of so material a character as to warrant this court in reversing the judgment. If the drafts had been rejected, we are constrained to conclude, from an examination of the entire record, that the court below could not have rendered a different judgment. The error, if error it was, by reason of the introduction of other evidence conclusive of the issues joined, became immaterial, and, therefore, is no ground of reversal. Indeed, under the issues formed, the question for whose use the plaintiff sues is not necessarily raised, and were we to reject all evidence relating to the assignment, the right of the company to recover would in no degree be impaired. In the case of *Zimmerman v.*

Wead, 18 Ill. 305, in which the declaration alleged that the action was brought for the use of the Illinois Central Railroad Company, says Judge CATON, speaking for the court: "That part of the declaration which declares the use to the Illinois Central Railroad Company is not for the benefit of the defendant, nor has he any thing to do with it, nor is he in any way interested in the declaration of use. That is allowed solely for the benefit of the *cestui que use*, and as between the parties to the action it need not have been inserted." The same doctrine is announced in *Cody v. Butterfield*, 1 Col. 385. It thus becomes apparent that even if no assignment of the account had been proved, the plaintiff might still recover, if the payment to Abbott was unauthorized.

The authority of Abbott to act as an agent being neither coupled with an interest, nor given for a valuable consideration, was revocable at the pleasure of his principal. *Hunt v. Rousmanier's Adm'rs*, 21 Wheat. 201; 1 Pars. on Cont. 69; and after notice of the revocation of an agent's authority has been received by a party dealing with the principal, such party must from that time forth, at his peril, deal with the principal alone. In the case of *Fitch v. Bunch*, 30 Cal. 208, Bunch, wishing to exchange fifty shares of mining stock for certain real estate, which was the *separate property* of the plaintiff, deposited the stock with one Norton, and the plaintiff and her husband, William Fitch, executed to Bunch a deed of the real estate, and deposited it with Norton, with the understanding that after an examination of the mining property, if it should prove satisfactory, William Fitch should give Bunch an order on Norton for the deed, and Bunch should give an order on Norton for the stock, which on presentation should be respected.

Both orders were given, but before they were given, the plaintiff commenced suit to restrain Norton from delivering the deed to Bunch; *Held*, that Norton was a mere depositary; that he possessed no power with respect to the deed, except as the agent of the plaintiff, and as her agent he was subject to her control; that she had a right to revoke his authority; that after such revocation "Norton had no authority to deliver the deed upon the order of the plaintiff's late agent; and that any attempted delivery would have been futile and would have passed no title, as it would not have been a delivery either by the grantor, or by any one duly authorized by her." It must be borne in mind, in this case, that the company, Abbott's principal, intervened two days prior to the delivery of the check and note, and notified Patton that Abbott's authority to collect was revoked, and thereby in effect prohibited him from assenting to the delivery of the check and note to Abbott.

But it is argued that as the telegram conveying notice of revocation was received without proof of its authenticity,

it is entitled to no weight. Patton himself testified that he received notice on the 27th day of June, A. D. 1874, by telegraph, that Abbott was not authorized to receive the money. To corroborate his statement, he introduced the telegram, which was as follows :

CHICAGO, *June 28, 1874.*

TO GEO. A. PATTON.

Honor our drafts, Abbott no authority to collect for us.

(Signed) COEN & TEN BROEKE C. M. CO.

It does not now lie in the mouth of the defendant, whose evidence it is, to question its authenticity. When a paper goes to the jury, or to the court, as in this case, without objection, it must be held to be admitted by the consent of both parties to the action, and to be what on its face it purports to be.

June 17th, A. D. 1874, the omnibus was shipped in Chicago to "George A. Patton, Denver, Colorado, care J. S. Abbott, agent." As appears by the company's letter to Patton, dated on the day of the shipment, and introduced at the trial by the defendant, the shipping receipt and the company's account against Patton were, on that day, transmitted to him. Abbott, a salaried agent, was, as the evidence clearly manifests, merely the conduit through which the omnibus was delivered. He had no interest that could in any way be affected by the revocation of his authority to collect. The argument that he had such an interest in the omnibus for freight charges advanced by him, as to entitle him to a lien, is not supported by the facts. It does not appear that he advanced freight charges, but on the contrary, it does appear by his own testimony that he gave the company credit for \$885, being the total amount of the bill against Patton, not the amount less freight charges, as it is reasonable to presume he would have done had he made advances. Had the authority been coupled with an interest and, therefore, been irrevocable, it was incumbent upon Patton to show it, which he failed to do. The revo-

cation of Abbott's agency to collect did not operate to prejudice the rights of any of the parties to the transaction. The agent, having no interest growing out of the contract of sale, could lose nothing.

Patton, by receding from the arrangement he had made with Abbott so far as related to the deposited note and check, as it was his duty to do after notice of revocation, would still have been entitled to the omnibus, at the price and on the terms agreed with the company. The relations of the parties were, therefore, such that the revocation could not, under the law, affect the rights of either Patton or Abbott. Before the known revocation of the agency of Abbott, delivery of the note and check to him would have been, as to Patton, a delivery to the principal; afterward it could have no such effect. It then became a mere payment to an unauthorized person and could not be held to extinguish Patton's indebtedness to the company. With full knowledge of the fact that Abbott had no authority to receive payment as agent of the company, Patton, regardless of the rights of, and notice from the company with which he dealt, adopts a course of action which he well knew must operate to divert the money from his vendor. The instructions given to the depositary to deliver the note and check to Abbott, who was known to both Patton and Reynolds as the agent of the company in the premises, were in effect (after the known revocation of Abbott's agency) instructions to deliver them to the company or its order; but so far as the evidence shows, Patton failed to communicate to the depositary that Abbott was no longer authorized to receive the note and check. On the contrary, without disclosing the revocation of Abbott's agency to collect, he apprises the depositary of his acceptance of the omnibus and leaves him to infer that Abbott is still agent to collect *quoad* that transaction, and, as such agent, entitled to receive the note and check. Under such circumstances, can it be asserted that the payment to Abbott

wholly unauthorized as he was to receive it, as Patton well knew, satisfied the company's demand against Patton?

We are of opinion that this question must be resolved in the negative. It was a payment at the instance of Patton and in his own wrong, of which he cannot be permitted to take advantage.

Failing to discover any error in the record of a character that would warrant a different judgment in the court below if the cause were to be remanded, we are all of opinion that the judgment should be affirmed. *Affirmed.*

ACTION FOR ANOTHER'S USE. *Board of Commissioners v. Sloan*, 5 Colo. 29.
ASSIGNMENT: *Chamberlain v. Gilman*, 10 Colo. 100.
SUFFICIENCY OF EVIDENCE TO SUSTAIN JUDGMENT: *Barker v. Hamilton*, 3 Colo. 282; *Hopple v. Best*, 4 Colo. 666; *Leas v. Drinker*, 6 Colo. 666; *Colorado Springs Co. v. Hopkins*, 5 Colo. 210.

SCHMIDT et al. v. STECKER.

1. Where an exception goes generally to the whole charge which contains distinct propositions, and there is one proposition in the charge that is sound, the exception will not avail.
2. The fact of an alleged alteration of the bond upon which this action was founded having been fairly submitted to the jury, they being the judges of the credibility of the several witnesses, this court will not set aside the verdict.

Appeal from District Court of Arapahoe County.

STECKER, the appellee, obtained a decree in the district court, in December, 1874, for the sum of \$1,014 $\frac{42}{100}$ against Schmidt, one of the appellants. Schmidt appealed to the supreme court, giving bond in \$2,000 with Rohlfling and Mahr as sureties. Failing to comply with the conditions of the bond, Stecker commenced his action of debt on the bond at the April term, 1876, of the district court of Arapahoe county. The cause was tried at the September term, 1876, resulting in a verdict for the plaintiff, upon which judgment was rendered in his favor for \$1,354.07. To reverse this judgment, Schmidt, Rohlfling and Mahr appeal to this court.

Upon the trial in the court below, the defendants introduced evidence to show that an alteration had been made :

in the bond in a material particular after the same had been executed, which was controverted by the plaintiff successfully before the jury. In this court, the appellants urge that the verdict was against the evidence, and also assign error upon the instructions given to the jury, to which they excepted generally and which was as follows :

“ In case you find for the plaintiff, he is entitled to recover the amount of the decree.....\$1,014 44
Interest on the same since February 2, 1875..... 162 93
Cost in district court..... 228 20
Less amount which the evidence satisfies you the
defendants or either of them have paid damages
awarded in the supreme court..... 150 00
Interest on that sum from Feb. 19, 1876..... 7 60
Costs in the supreme court..... 17 10

And find the amount of all these items as the damages which the plaintiff is entitled to recover.”

Messrs. BROWNE & PUTNAM, for appellant.

Mr. SAM. P. ROSE, for appellee.

WELLS, J. The court below instructed the jury that if they should find for the plaintiff, they would allow a specified sum as damages for the breach of the bond. In another part of the charge the several items constituting these damages were set forth. Inasmuch as, upon this point, there is no conflict in the evidence, and the amount finally awarded does not appear to exceed the just measure of the plaintiff's damages, we probably ought not to reverse the judgment upon this ground. But the plaintiff in error having excepted generally to the whole of the charge, is not in position to assign error upon any part of it. *Webber v. Emmerson*, decided at this term (*ante*, p. 248).

The question as to the alleged alteration in the bond was fairly submitted to the jury. Whether they have properly resolved it depends altogether upon the credit to be given

to the several witnesses, and upon this, we see no reason to overrule the conclusions of the jury.

Judgment affirmed with costs.

Affirmed.

PEABODY v. THATCHER et al.

1. The statute (R. S., p. 513, § 41) provides that "appeals to the supreme court from the district court shall be allowed in all cases where the judgment or decree appealed from shall be final, and shall amount, exclusive of costs, to the sum of \$20, or relate to a franchise or freehold."
2. Parties cannot confer jurisdiction over the subject-matter of an action by consent.

Appeal from District Court of Pueblo County.

Messrs. SYMES & DECKER, for appellant.

Mr. CHARLES E. GAST, for appellees.

WELLS, J. The judgment below was for costs merely, and does not relate to a franchise or a freehold.

No appeal lies, therefore. Rev. Stat., Ch. lxx., § 41.

It is true the defendant below has joined in error, and so has consented to the appeal. The doctrine of *Mollandin v. The Colorado Central Railroad Co.* (*ante*, p. 173), however, is that such consent is ineffectual to confer jurisdiction. We are unable to follow those courts which announce a contrary doctrine.

Appeal dismissed.

PARTIES CANNOT CONFER JURISDICTION over the subject-matter of an action by consent, or by joinder in error: *Francis v. Wells*, 4 Colo. 274; *Thorne v. Ormner*, 6 Colo. 39; *Halt v. Fay*, *Rock C. M. Co.* 6 Colo. 81; *Crane v. Farmer*, 14 Colo. 286.

THE COLORADO SPRINGS CO. v. HEWITT.

1. A motion to set aside a default must be supported by an affidavit and be made of the term at which the judgment is entered.
2. In case of default the proper practice is to swear the jury "to assess the plaintiff's damages," not "to try the issues."

3. Upon judgment by default in the probate court when the damages do not rest in computation, the writ of inquiry should be issued according to the practice of the district court, and the inquisition should be by a jury of twelve men.

Error to Probate Court of El Paso County.

THIS was an action on the case brought by Hewitt, the appellee, against the Colorado Springs Company, and judgment taken by default. A motion to set aside the default was overruled.

MESSRS. DAVIDSON & HARRISON, for plaintiff in error.

MESSRS. HOLLINGSWORTH & DANFORD, for defendant in error.

ELBERT, J. The motion to set aside the default was not of the term at which the judgment was entered, nor was it supported by affidavit, and was properly overruled. R. S., § 16, p. 506.

The proper practice would have been to swear the jury "to assess the plaintiffs' damages" and not to "try the issues," but we are not prepared to say that this irregularity is sufficient ground for reversal.

At common law, upon judgment by default, a writ of inquiry was necessary, and issued to ascertain the damages of the plaintiff.

This mode of procedure was modified and adopted by section 15 of the Practice Act, R. S. 506, as the practice of the district courts of the late Territory.

By section 28 of the Probate Act (R. S. 526), the rule of practice and proceedings, prescribed by law for the government of the district courts, were prescribed also for the government of the probate courts, which were clothed with common law jurisdiction by act of March 3d, A. D. 1863.

Considered with reference to these provisions, upon judgment by default in a suit pending in a probate court, where the damages did not rest in computation, a writ of inquiry according to the practice of the district courts was, without

question, the proper mode of procedure. A question is made, however, in view of other statutory provisions. Section 32 of the Probate Act, R. S. 527, provides that no grand or petit jury shall be summoned to attend the terms of the probate court, but if either party shall demand a jury, a jury shall be summoned as in cases before a justice of the peace.

Section 25 of the Justices' Act, R. S. 401, provides for a jury of six, or twelve, if a less number be objected to. It is claimed that in virtue of these provisions the inquisition, in case of judgment by default in the probate court, may be by a jury of six. We do not think such a view authorized. The manifest object of section 32 is to provide for a jury to perform the duties of a regular panel, to wit: the trial of issues. There is evidence of this in the form of the writ, which is prescribed by the statute, and runs as follows: "To make a jury between said parties in a plea of —, because as well the said plaintiff as the said defendant have put themselves upon the country for trial." At common law a jury summoned by writ of inquiry in case of default had no necessary connection with the regular panel. Did they serve on or constitute it in part or whole, it was in virtue of the writ of inquiry, and not in their character as regular jurors.

Judgment by default is incomplete: the *right* of the plaintiff to recover is established, but the quantum of damages sustained by him is not determined, hence the judgment at common law was "that the plaintiff ought to recover his damages, but because the court knew not what damages the said plaintiff hath sustained, therefore the sheriff is commanded that by the oaths of twelve honest and lawful men, he inquire into the said damages and return such inquisition into court." 2 Black. Com. 398.* The writ employed the same language and was a mere warrant to the sheriff to assess damages, and was the equivalent of a rule for the clerk to assess where they lay in computation. *Cook v. Tuttle*, 2 Wend. 289.

The sheriff presided at the inquisition, but his authority

was ministerial and not judicial. *Tilletson v. Cheatham*, 2 Johns. 270. It could be executed before his deputy as well. Tidd's Pr. 575.

The finding was intended merely to inform the conscience of the court. *Ward v. Haight*, 3 Johns. Cas. 80. It could be executed at any place in the county, 2 Ld. Ray. 1449, and after the regular panel had been discharged. *Ætna Insurance Co. v. Phillips*, 27 Ill. 71.

In cases of legal difficulty it could be executed before the judge, who presided in the place of the sheriff, and certified the inquisition. *Ellsworth v. Thompson*, 13 Wend. 658. The jurors could not be challenged, "because," in the language of the case in 3 Salk. 81, "this is only an inquest of office," but the sheriff in his discretion might admit the challenge.

This summary of rules, modified perhaps in some particulars by modern practice, shows the distinct and individual character of the proceeding: That while the inquisition was at common law subject in many respects to the same laws and conditions as a trial by jury at *nisi prius*, it was in its writ, its object, its presiding officer, its place of meeting, and its mode of procedure a distinct and separate proceeding, with a well-defined practice. Having been adopted into and made a part of the practice of the district courts by designation, and made applicable to the practice of the probate court by the provisions of section 28 of the Probate Act, we cannot hold it changed in an essential feature by intendment. *Jones v. Stevens*, 1 Col. 67; *Davis v. Bangor, etc., Railroad Co.*, 60 Me. 303; *Jennings v. Asten*, 5 Duer, 696.

This inquisition should have been by a jury of twelve men, according to the practice of the district court.

The judgment is reversed with costs, and the cause remanded that proceedings may be had on the judgment by default according to law.

Reversed.

BARTELS et al. v. HOEY.

A motion in this court to dismiss an appeal for want of prosecution and for the taxation of costs cannot be entertained where it is apparent on the face of the record that this court has no jurisdiction of the appeal.

Appeal from District Court of Pueblo County.

MESSRS. BLAKE & JACOBSON, and Mr. BENJAMINE MATTHEW, for the motion.

ELBERT, J. This cause was docketed by the appellee, who moves to dismiss it for want of prosecution. Want of jurisdiction is apparent on the face of the record. § 5, R. S. 537, cited by counsel, is not applicable.

An appeal did not lie to this court in this case. A dismissal for want of prosecution would be inapt, as such an order implies prosecution of the suit by the appellant legally possible. The suit must be dismissed for want of jurisdiction, apparent on the face of the record.

Upon the power of the court in such a case to award the defendant costs, there is some conflict in the decisions, but the great weight of authority is to the effect, that when a cause is dismissed for want of jurisdiction, costs cannot be awarded. *Hornthall v. The Collector*, 9 Wall. 566, and cases there cited; 2 Woodb. & M. C. C. 187; 3 Sum. C. C. 473; 2 Mass. 207; 23 Pick. 110. (*Contra*, but based on statute, 8 Metc. 370; 4 Gray, 201.) 1 Wis. 511; 4 id. 188; 3 N. H. 130; 4 id. 281; 21 Ark. 264; 26 id. 315; 2 Yerg. 579; 3 Litt. (Ky.) 331; 1 Verm. 488; 7 Cow. 423; 5 id. 33; 1 Conn. 40; 8 id. 165; 2 Fairf. 234; 24 Me. 332; Wright (O.), 417.

These decisions generally proceed upon the ground that the court has possession of the case, and that there can be no judgment where there is no jurisdiction. Whatever may be the hardship, it is difficult to escape the logic of this conclusion.

In the case of *Busham v. Rangely*, 2 Woodb. & M. C. C. R. 187, WOODBURY, J., after an elaborate review of the

decisions of the different States, correctly, as we think, states the general conclusion as follows: * * * * "No court can award them (costs) without a special statute broad enough for the purpose * * * * notwithstanding, then, the equities in favor of giving costs where a party has been put to expense in a case dismissed for want of jurisdiction, and notwithstanding the broader discretion in courts, over costs, in chancery than at common law, there is a defect of power, to adjudicate or award costs to either side, where there is no power to adjudicate on the merits, and where the cause is dismissed on account of the want of any such power. * * * * It might be expedient for congress and the State legislature expressly to authorize a court to give costs in such cases, as they must hear and decide the question whether they have jurisdiction or not, and may well allow the costs of doing that, if the legislative power pleases, and even the costs of the whole proceeding."

In this view of the law we have searched in vain for some statutory provision that should allow us to award costs in this case. § 18, R. S. 156, does not aid us. No fair or usual construction of the language or legal phrases employed in that section can be held to include a case dismissed for want of jurisdiction, and could it be held that the section named did not exclude the application of other sections of the act to cases in this court, there is nothing in the entire act to authorize a different result.

Costs denied.

COSTS—ON DISMISSAL FOR WANT OF JURISDICTION NO COSTS CAN BE AWARDED: *Dover v. Montirugon*, 4 Colo. 256; *Kent v. Labette Co. Commrs.* 42 Kan. 547, citing the principal case.

MERCHANTS' DISPATCH AND TRANS. CO. v. CORNFORTH.

1. The employment of a common carrier is a public employment, and while he may, by special agreement, excuse himself for *accidental losses*, he is responsible for all damages occasioned by negligence or misfeasance, either of himself or servants, and cannot divest himself of this liability either by special contract or notice.

2. When a common carrier accepts delicate fruits for transportation half across the continent in the winter season, the character of his employment, independent of any contract, clearly implies that he will ship them in such vehicles, and exercise such diligence as may be reasonably necessary for their safe passage to their destination.

Error to Probate Court of Arapahoe County.

ACTION in assumpsit against a common carrier to recover damages for not safely and securely delivering certain goods. The cause was tried to the court, and the plaintiff had judgment for \$750. The facts are sufficiently stated in the opinion, the principal point presented in the argument being upon the right of a common carrier to limit his liability by contract or notice.

Messrs. HUGHES & WELBORN, and Mr. SAM P. ROSE, for plaintiff in error.

Mr. JOHN W. BLACKBURN, for defendant in error.

THATCHER, C. J. The Merchants' Dispatch and Transportation Company is a common carrier. Birks Cornforth, the defendant in error, who was the plaintiff in the court below, through their agents, Raymond Bros., bought a car load of fruits, consisting of oranges, lemons, and bananas, of Underhill & Stewart, in New York city. The fruit was delivered to and shipped by the plaintiff in error, from New York to Denver, in the month of February, A. D. 1874. The evidence shows that Raymond Bros. entered into an oral contract with the company to ship the fruits in a refrigerator car through to Denver without change; that subsequently, *and after the fruit was loaded in the car*, a bill of lading, made out by the company in the name of Raymond Bros., was delivered to them, on which was printed this, among other conditions: "The company will not hold itself liable at all, for injury to any article of freight during the course of transportation, occasioned by the weather." On the bill of lading was written the words

“general release,” the import of which was explained in the evidence to be, that the common carrier was released from all loss or damage happening to the shipment under the bill of lading.

In our view, so far as the rights of the parties are concerned, it is immaterial whether the oral contract entered into between the company and Raymond Bros., or the stipulations in the bill of lading control. In either event the result will be the same, as becomes evident when we consider the nature and extent of a common carrier's liability, which is established by law, and within certain limits fixed by considerations of sound public policy, independent of contract. The employment of a common carrier is a public employment. The duty he owes as such is a public duty. The obligations the law casts upon him he cannot throw off at pleasure. To a limited extent only can he avoid responsibility. With a zealous eye the law keeps vigil over the public weal, and will not permit a carrier to enter into a contract which will exempt him from liability so far as his duty is of a public character. No special notice brought home to the customer can relieve, no contract can exonerate a common carrier from the consequences of his failure to exercise that degree of diligence to which he is bound by the nature of his employment. While by special agreement he may excuse himself for *accidental losses*, he will nevertheless continue responsible for all damages occasioned by negligence or misfeasance in him or his servants. 2 Kent's Com. 607. In the leading English case of *Wyld v. Pickford*, 8 Mees. & Welsb. 443, Baron PARKE, referring to the extent to which a carrier would be liable, after notice to the customer, says “he still undertakes to carry for hire, and is therefore bound to use ordinary care in the custody of goods, and their conveyance to and delivery at their place of destination, *and in providing proper vehicles for their carriage*. It is enough to prove an act of ordinary negligence; and after such notice, it may be that the burden of proof of damage or loss by the want of such care would lie on the plaintiff.”

The doctrine that a common carrier cannot divest himself of liability either by special contract or notice, where damage or loss results from his fraud, negligence, or misfeasance, may now be considered as well established in this country. *Sager v. The Portsmouth S. & P. and E. R. R. Co.*, 31 Me. 228; *Kallman v. W. S. Express Co.*, 3 Kan. 211; *Pratt et al. v. Ogdensburg and L. & C. R. R. Co.*, 102 Mass. 557; *Farnham v. Camden and Amboy R. R. Co.*, 55 Penn. St. 58; *Indianapolis Railroad v. Allen*, 31 Ind. 394; *Berry v. Cooper*, 28 Ga. 543.

In the well-considered case of *Railroad Company v. Lockwood*, 17 Wall. 357, the court arrives at the following among other conclusions, as to the liability of common carriers: "*First*. That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law. *Secondly*. That it is not just and reasonable in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."

Applying these principles, the case before us is one of no great difficulty. There is some evidence that the fruit was packed in a refrigerator car in New York city; such a car, as the testimony establishes, is usually employed in the winter for that purpose, it being well adapted to exclude the cold. The evidence conclusively shows that when the fruit reached Denver, it was in an ordinary box car, and badly frozen. There were apertures in the car through which the cold and snow entered. There was snow all around the boxes of fruit. It appears in evidence, that fruit shipped in a common box car will freeze in ordinary winter weather, and if shipped with due care in a refrigerator, or other car adapted to keep out the cold, it will not freeze in severe winter weather.

Was the company guilty of negligence?

When a common carrier accepts for transportation in the winter season, to ship half across the continent, delicate fruits, the character of his employment, independent of any

contract, clearly implies that he will ship them in such cars and exercise such diligence as may be reasonably necessary for their safe passage to their destination. Having failed to do this he cannot escape liability. In the case of *Wing v. The New York and Erie R. R. Co.*, 1 Hilt. 241, where by the negligence of the carrier a certain lot of potatoes was frozen, the court says: "The fact that they were perishable imposed upon the defendant more than ordinary care and diligence, as mere bailees, and the obligation to deposit them most securely against cold. That it would take longer to do it does not relieve them of the duty. The intensity of the cold created also the obligation of additional vigilance, and what was usual, was not the consideration. What was necessary to be done, under all the circumstances, was the true criterion."

The rule here adopted, that the degree of care and diligence to be exercised by the carrier must be commensurate with the nature of the trust, is salutary and just.

The company, as appears from the evidence, was guilty of the most culpable negligence in transporting the fruit in a car wholly unfit for the purpose, in the winter season. It follows from what we have before said, that the company is liable for loss occasioned by such negligence.

Let the judgment of the court below be affirmed, with costs.

Affirmed.

TUCKER et al. v. McCoy.

1. A bill of complaint to quiet title to a lot within the town site of Georgetown under the act of the legislative assembly of February 11th, 1870 (Laws of 1870, p. 150), must, among other things, aver the entry to the town site under the act of congress of March 2d, 1867; that the corporate authorities gave due notice of the entry, and that the complainant filed his statement in writing with the corporate authorities within ninety days. All adverse claimants who filed within the time limited should be made parties to the suit.
2. A party defendant seeking specific relief in a suit in chancery must do so by cross-bill, and must state the grounds upon which he relies for affirm-

ative relief with the same strictness required of the complainant in the original bill, except that he need not show the grounds of equity to support the jurisdiction of the court.

Appeal from District Court of Clear Creek County.

TUCKER and another, the appellants, filed their bill of complaint against McCoy, the appellee, in the district court of Clear Creek county, to quiet title to certain lots in Georgetown, Colorado, alleging title by purchase, occupation and improvements under the laws of Colorado and the acts of congress. McCoy filed his answer to which the complainants replied, and the cause was referred to a special master to take proofs. Upon the hearing had upon the bill, answer, replication and master's report, the defendant had a decree that he was "entitled to receive from the corporate authorities of the town of Georgetown, a deed" for the premises in controversy, and that he have and recover costs, etc.

Mr. L. H. SHEPARD, for appellants.

Mr. L. C. ROCKWELL, for appellee.

THATCHER, C. J. The act of the general assembly, approved March 11th, A. D. 1864, prescribing rules and regulations for the execution of the trust, arising under the act of congress, passed May 23d, A. D. 1844, authorizing the entry of town sites, was revived with a few amendments, Feb. 11th, A. D. 1870, and made specially applicable to the disposition of lands and lots in the town of Georgetown by the corporate authorities thereof, under the act of congress of March 2d, A. D. 1867, entitled "an act for the relief of the inhabitants of the cities and towns upon the public lands." If either the complainant or respondent is entitled to relief, it can only be granted pursuant to the provisions of the said act of February 11th, A. D. 1870. If neither the complainant nor respondent avers and proves a compliance with the requirements of this act, the court is with-

out authority to decree that a deed be executed to either party.

To entitle the complainant to maintain his suit under this act, it is, *inter alia*, necessary: first, that the town site of Georgetown should have been entered under the act of congress, entitled "an act for the relief of inhabitants of cities and towns upon the public lands;" approved March 2d, 1867. That it was so entered is not averred in the bill. Second, that the corporate authorities should have given public notice of such entry by posting notice thereof in at least three public places in such town, and by publishing such notice in a newspaper in the county in which the town is situated. Upon this point the bill is silent. Third, that the complainant should have, *within ninety days* after the first publication of such notice, filed in the office of such corporate authorities, a statement in writing signed by him, containing an accurate description of the particular parcel or parts of land in which he claims to have an interest. A failure to file the statement within the time prescribed operates to bar forever the right of the claimant, both at law and in equity. *Cosfield v. McClelland*, 1 Col. 372; same, 16 Wall. 335.

The bill does not aver that the complainant, within the time limited, even if notice was ever given, filed his statement. Fourth, that all the adverse claimants who filed their statements within the time limited should be made parties to the suit. For aught that appears in the bill, McCoy may not have been the only adverse claimant.

The rules of chancery pleadings, which demand accuracy and exactness of statement as well as completeness, order and method in setting forth the grounds of suit, have been disregarded in drawing the bill. It is obvious from what we have said that the court below would not have been warranted in entering a decree in favor of the complainant, even if every allegation in the bill had been sustained by proof.

The answer asks that the bill may be dismissed, but

prays for no affirmative relief. Upon this answer the court below was not authorized to grant specific relief, as it did by its decree. By section 5 of the revived act of March 11th, 1864, it is provided that the "pleadings and proceedings in such action shall be as in cases in chancery, except that oral testimony may be introduced upon the trial of the cause." It is a well-settled rule in chancery pleadings that when a defendant seeks specific relief it must be sought by a cross-bill. Story's Eq. Pl., § 398a; *McConnell v. Smith*, 23 Ill. 611.

Without it his rights cannot be enforced. The defendant, who becomes *pro hac vice* complainant, must in his cross-bill, with the same strictness as the complainant in the original bill, display the grounds upon which he relies for affirmative relief, excepting only as it is an auxiliary suit, he is not required, as against the complainant in the original bill, to show the grounds of equity to support the jurisdiction of the court. Story's Eq. Pl., § 399; 2 Daniel's Ch. Pl. & Pr. 1549.

Had the pleadings been framed as herein indicated, and had evidence supplemental to the proofs now before us been adduced in support of the additional averments, we would not feel at liberty to disturb the decree. But under the circumstances the decree must be reversed, and the cause remanded with directions to the court below to allow the complainant to file an amended bill, and the defendant to file a cross bill, without prejudice to the testimony already taken.

Reversed.

TOWN SITE: *Mills v. Buttrick*, 4 Colo. 123, 126.
IN EQUITY: *Mills v. Buttrick*, 4 Colo. 124; *Abbott v. Monti*, 3 Colo. 563; *Monti v. Bishop*, 3 Colo. 606; *San Juan & St. L. M. & S. Co. v. Finch*, 6 Colo. 223.

SEARS v. SMITH et al.

1. A tenant under a lease for a year, holding over in the absence of a new agreement, holds the premises subject to the covenants and conditions in the original lease, provided the landlord assents by receipt of rents, or like significant act.
2. A mere notice by the tenant to the landlord that he will at the expiration of the term hold under a different tenure, is not sufficient to create a new lease without the consent of the landlord.

3. Questions of fact should be left to the determination of the jury.
4. A verbal lease for the period of one year, to begin *in futuro*, is not void under the Statute of Frauds in this State.

Error to Probate Court of Arapahoe County.

THE plaintiff in error brought an action before a justice of the peace, against the defendants in error, to recover certain rents, and obtained judgment. The defendants in the action appealed to the probate court. In the latter court the defendants obtained a verdict upon which judgment was subsequently entered in their favor for costs. To reverse this judgment the plaintiff prosecutes this writ of error.

MESSRS. SAYRE, WRIGHT & BUTLER, for plaintiff in error.

MR. C. S. THOMAS, and MR. T. M. PATTERSON, for defendants in error.

THATCHER, C. J. If a tenant under a lease for a year holds over after the expiration of his term, in the absence of a new agreement, he holds the premises subject to the covenants and conditions contained in the original lease. The holding over rests, not upon the former lease, but upon a new contract which the law implies to be for the same time, and upon the same terms with the lease under which the premises were held the preceding year. *Bacon v. Brown*, 9 Conn. 334; *Laguerenne v. Dougherty*, 35 Penn. 47; *McKinney v. Peek*, 28 Ill. 174.

This doctrine must be understood with the qualification that the landlord consents to the holding over, by the receipt of rents or other like significant act; otherwise, if the tenant holds over, he holds over as tenant at sufferance. Smith's Landl. and Ten. *219; Tyler on Ej. and Ad. En. 221.

The court below, in framing its instructions for the jury, proceeded upon the theory that a mere notice given by the

tenant to the landlord, that he would, at the expiration of his term, hold under a different tenure, was of itself sufficient to create a new lease without the consent of the landlord. This is erroneous. To make the error apparent it is only necessary to consider the instructions upon which the plaintiff in error chiefly relies in argument as a ground for reversal.

On behalf of the defendant the court gave the following instruction: "If the jury believe from the evidence that sometime in June, 1873, either Smith or Doll, the defendants in this action, notified the plaintiff that they would not rent the premises for another year; and that they would remove as soon as they could obtain a more suitable place of business; and would only rent from month to month, after February 1, 1873, then if the defendants paid all rent due until February 1, 1874, and removed therefrom prior to February 1, 1874, and gave the plaintiff ten days' notice of such removal, and in the latter part of January, 1874, offered the possession of said premises to plaintiff, which possession was refused, then you should find for the defendants."

The annual lease introduced in evidence expired July 1st, 1873, upon which day the new term must have commenced. In no view of the evidence could it have begun on February 1st, 1873, five months prior to the termination of the written lease. This instruction countenances the idea that a landlord may be bound without his consent to the terms of a contract which his tenant may propose. The question, which is one of fact, whether the landlord assented to or acquiesced in the proposed new contract, was by this new instruction taken from the jury, whose peculiar province it was to determine it.

The tenants' offer to lease from month to month may, consistently with this instruction, never have been accepted; nay, more, it may have been expressly rejected. Unless the landlord assented to or acquiesced in the new terms proffered by the tenant, the holding over was under the implied contract raised by law, that the terms and conditions should

remain the same as under the lease for the first year. This instruction was well calculated to mislead the jury.

The instruction that a verbal lease for the period of a year, the term to begin *in futuro*, is void, is not, we think, founded upon a proper construction of our law, which is essentially different from the English statute and the statutes of many of the States on the same subject.

By section 6, R. S., p. 338, cli. 38, it is provided that no estate or interest in lands, other than leases for a term not exceeding one year, shall be created, unless by act or operation of law, or by deed subscribed by the party to be charged. Section 8 of the same chapter declares: "Every contract for the leasing for a longer period than one year * * * shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing and be subscribed by the party by whom the lease is to be made." These are the only sections in the chapter that relate to the matter under consideration.

In England and many of the States, the term for a verbal lease is limited to a certain period "from the making thereof." Under such statutes it has been held that a verbal lease for the entire term limited by law could not begin *in futuro*. The omission of these words in our statute is of peculiar significance. We cannot conceive that they were omitted without design. The business experience of mankind, as well as the general custom prevailing here, teach us that a yearly term is very rarely commenced on the day the lease is made.

To protect leases for a year, whether the term begins *in presenti* or *in futuro*, we may reasonably conclude that the legislature, with a knowledge of this business experience and general custom, framed these sections.

Nor do we think that the second provision in section 12 of the same chapter, that "every agreement, that by the terms is not to be performed within one year from the making thereof, shall be void, unless," etc., is entitled to any weight in determining the question under discussion. It relates to contracts of a different nature. From its colloca-

tion in the chapter, from its context in the same section, and from the further controlling consideration that a verbal lease for the period of a year is elsewhere in the same chapter by apt words specifically provided for, it is evident that the agreement referred to in this provision is in no way connected with the leasing of lands.

In New York and Iowa, where similar statutes have been enacted, omitting like our own the words "after the making thereof," it is held that a verbal lease for the term of a year, to begin in the future, is valid. *Young v. Dake*, 5 N. Y. 463; *Sobey v. Brisbee*, 20 Iowa, 105.

Nor is this construction obnoxious to the objection that a lease for the term of a year, to begin subsequent to the making thereof, creates an estate whose duration exceeds a year. Every lease creates an estate; but the estate created is inseparable from the term, and as to its duration is measured by the term. The estate begins and ends with the term.

It cannot be asserted that because the lease is made one day for a certain period of time to commence on a subsequent day, that the *interim* between the execution of the lease and such subsequent day is any part of the term.

Let the judgment of the court below be reversed with costs, and the cause remanded for further proceedings according to law.

Reversed.

BARKER, Trustee, v. HAMILTON.

An infant is incapable of an admission which will affect her own rights, much less can her admissions be used against a third party who assumes to stand as her trustee. The admission of such evidence in a trial to the court, where the exception reserved to the finding is sufficient, may be reviewed on error.

Error to Probate Court of Arapahoe County.

THIS was an action of replevin brought by Barker, the plaintiff in error, as trustee of Hattie Mix, an infant, against

Hamilton, the defendant in error. The declaration was in the *cepit* and *detinet* pleas; *non cepit*, *non detinet*, property in defendant, and property in a third party. Upon the trial in the probate court, without a jury, the court found "that the property was not in the plaintiff," awarded a writ of *retorno habendo*, and gave judgment for costs against the plaintiff. Exception was taken and the plaintiff sued out this writ of error.

The witness, Bentis, testified on behalf of the defendant, among other matters, that Mrs. Mix, the mother of the beneficiary, claimed the goods and exercised control over them, whether with the knowledge of the beneficiary, the witness could not say, and that Mrs. Mix delivered to the witness, at the time of the removal, certain of the goods in controversy, and that "Hattie was there, and did not interpose any objection."

Objection and exceptions were duly made and taken to this testimony.

Mr. SAM. P. ROSE, for plaintiff in error.

Mr. V. D. MARKHAM, and Messrs. MILLER, BECK & CLOUGH, for defendants in error.

WELLS, J. The court below permitted the defendant, for the purpose of impeaching the trust asserted by the plaintiff, to give in evidence the admissions of the infant beneficiary, implied from her conduct. In this there was certainly error. The infant was incapable of an admission which should affect her own rights; much less can her admissions be used against a third person, who assumes to stand as her trustee.

This error is reviewable here, even though we should hold the exception, which the plaintiff reserved to the finding, insufficient to take the case out of the doctrine of *Phelps v. Spruance*, 1 Col. 414, and even if we examine the whole record — as for this purpose, according to the case of *Patton v. The Coen & Ten Broeke Co.*, we may do, it is impossible

to say with confidence that the testimony so improperly received has not affected the result.

Judgment reversed with costs, and cause remanded for a new trial.

Reversed.

VANCE'S HEIRS v. MARONEY et al.

1. A writ of error must describe specifically the record and judgment, and the cause wherein such judgment was rendered, and must set forth the parties to that proceeding, and must show to whose injury the error alleged has intervened.
2. As to the defendant in error, the writ of error has no office to perform; the defendant in error, who conceives himself entitled to be relieved of the burden of sustaining the record, should address his motion to the *scire facias*, if he appears in pursuance of that writ, or to the assignment of errors, if he appears voluntarily.
3. A writ of error lies to review the proceedings and judgment in one matter only; several judgments between different parties are not examinable upon a single process.

Error to Probate Court of Gilpin County.

Mr. L. C. ROCKWELL, *pro se*, now moved the court to dismiss the amended writ of error in this proceeding, as to him, for the following reasons:

"*First.* Because the *scire facias* does not follow the writ of error, as to the parties defendant."

"*Second.* Because said Rockwell was not a party to the proceeding below, nor the judgment or proceedings below brought to this court by this writ of error."

"*Third.* Because the writ of error brings to this court other and different parties than those to the judgment below, and because the record shows that the said Rockwell has no interest in this proceeding."

WELLS, J. The office of the writ of error is to cause the removal of the record and judgment sought to be reviewed, and to commission the court in which it is returnable, to examine the errors alleged. It must describe specifically

the record and judgment, and the cause wherein such judgment was given, and must, of course, therefore set forth who were parties to that proceeding. It must also show to whose injury the error alleged has intervened, and the parties so named are the plaintiffs in error. It need not, however, and indeed never can show who are the defendants in error; for as to them it has no office to perform; it is not directed to or served upon them, nor are they in any way required to answer to it; and while the party prevailing in the court below may be, and in most cases is the defendant in error, it is not invariably so; *e. g.*, if the prevailing party below die after judgment given, the executor, where the judgment is *in personam* for damages or the like, or the heir, where lands are recovered, are the necessary parties defendant to the writ of error. In such case the death, heirship, and the like are averred or suggested, sometimes in the assignment of errors, as it seems, but more frequently in the *scire facias* to hear errors, and at one of these stages in the process are set forth, for the first time, the names of those whom the party complaining would call upon to respond to his complaint. It is manifest, therefore, that the defendant in error, who conceives himself entitled to be relieved of the burden of sustaining the record, should address his motion to the *scire facias* if he appears in pursuance thereof; or to the assignment of errors where he appears voluntarily. The motion is therefore inappropriate; all the causes assigned thereunder are in point of law impossible. The writ of error can neither follow nor depart from the *scire facias*, as to the parties defendant in error; nor bring to this court either the parties below or different parties.

Inasmuch, however, as the points relied upon were fully argued, it is proper, that in order to avoid further delay, we should express ourselves at this time.

The writ of error lies to review the proceedings and judgment or decree in one matter only: several judgments between different parties, even in the same court, are not examinable upon a single process.

In the present case, the order of the probate court, allowing Mr. Rockwell's demand, is entirely distinct, in legal effect, from the decree given upon the petition of the administrator.

The creditor of a decedent may present his demand for allowance in the probate court, or he may, at his pleasure, bring an action thereon in the district court. If the decedent, in his life-time, might have been subjected to an action in another county than that of his residence, it is probable that the administrator would be liable to the same action in like manner. If several such judgments should be recovered in several counties, and if the administrator should afterward be decreed to make sale of the lands of his decedent, for their satisfaction, it would scarcely be supposed that one writ of error could bring all these several judgments and the decree of sale at one time to this court.

The record of the allowance of the claim of Mr. Rockwell is a record as essentially distinct from the decree of sale, as the judgment of the district court in the case supposed.

We must, however, be understood to pass upon the question of the power of the court to review the judgment upon which the decree of sale is founded.

It may be that we have power to enter upon such an examination, as has frequently been asserted elsewhere, but if so, it must be exercised as incidental merely to the review of the decree of sale.

The clerk will, therefore, be directed to strike from the amended writ of error the name of Mr. Lewis C. Rockwell, and the motion to quash will be overruled.

Mr. Rockwell having been the purchaser at the sale, which is now brought in question, it was at first thought that perhaps it might be necessary upon this account to join him in the *scire facias*. If, however, he can, by virtue of his position as the purchaser, be compelled to defend this writ of error, it will follow, inasmuch as the rights of the parties must be reciprocal, that he and all those whose rights

may in any respect be affected are necessary parties, and must be summoned in order to make the decree of this court effectual upon them ; a position which cannot be admitted.

Mr. Rockwell will, therefore, be permitted to withdraw from the defense, if he shall signify his desire so to do, but inasmuch as it was proper for the plaintiff to warn him of this proceeding, in order that he might have opportunity to defend the decree, he will not be allowed costs.

WART OF ERROR LIES to review the proceedings and judgment in one matter only; several judgments between different parties are not examinable upon a single process: *Bloom v. Strickler*, 12 Colo. 181.

WOLFLEY et al. v. LEBANON MINING Co.

The power of the court to correct a misprision of the clerk at a subsequent term, and make the entry of the judgment and other proceedings correspond with the facts, is undoubted.

Appeal from District Court of Clear Creek County.

Mr. W. TELLER now moved to strike the additional record from the files.

Mr. L. C. ROCKWELL, *contra*.

ELBERT, J. At the February term, A. D. 1876, of the supreme court, a motion was interposed by the appellee to dismiss the appeal upon the ground, among others, "That the order allowing the appeal did not fix the amount of the appeal bond."

Upon suggestion of counsel for appellant, it was ordered by the court that the motion stand continued until the next term of the court, to enable the appellants to move the district court to amend the order. The supplemental record, which we are asked to strike from the files, is as follows :

Lebanon Mining Company of New York	} <i>Ejectment.</i>
v.	
Melvin A. Skinner & Louis T. Wolfley.	

At this day this cause came on for hearing, on motion of defendant to reform and correct the record in this cause, so

it will show that the penalty of the appeal bond was fixed by the court at the time of praying the appeal at the June term, A. D. 1875, at \$300, and it appearing to the court that at the time said appeal was prayed to the supreme court, on the 30th day of June, A. D. 1875, the penalty of the appeal bond was fixed by the court at \$300, but that the clerk, in making up his record, omitted to embrace and embody that portion of the order in the record.

It is, therefore, ordered and adjudged by the court, that so much of the record as relates to the appeal to the supreme court, and entered on the 30th day of June, A. D. 1875, be, and the same is hereby amended, so as to read that the penalty of the bond is fixed at the sum of \$300.

And it is further ordered and adjudged that the appeal of the defendants be granted in this cause, and the penalty of the appeal bond be in the sum of \$300, to be approved by the clerk of this court, and that this order be entered of record now on this 10th day of June, A. D. 1876, as to the 30th day of June, A. D. 1875.

The objection that the record of the court below could not be amended as above, at a subsequent term of the court, is not well taken.

The power of the court to correct the misprision of the clerk at a subsequent term, and make the entry of the judgment and other proceedings correspond with the facts, is undoubted. Freeman on Judgment, § 72.

In the case of *Doane et al. v. Glenn et al.*, an order allowing a bill of exceptions to be filed in vacation, was omitted from the record by mistake of the clerk, and it was held that the court could at a subsequent term allow the record to be amended by inserting such order *nunc pro tunc*. 1 Col. 454.

To enable the appellant to move for this amendment, and to file the record showing it in this court, was the object of the order at the last term of the court, and as a matter of fact the record was filed with the consent, in open court, of the counsel for appellee.

The record does not show that the plaintiff below had any notice of the motion to reform the record, but the question of notice is not raised by the motion.

Motion to strike from the files

Denied.

POWER OF COURT TO CORRECT MISPRISON OF CLERK at a subsequent term, and make the entry of the judgment and other proceedings correspond with the facts, is undoubted: *Pleyte v. Pleyte*, 14 Colo. 586. Where evidence was improperly incorporated in the bill of exceptions, a continuance was granted to allow the appellee an opportunity to apply to the court below to amend the bill of exceptions: *Knox v. McFerran*, 4 Colo. 343.

LILLEY et al. v. RANDALL.

1. In case of fraudulent representations about the quality of the thing purchased, the vendee may rescind the sale, or he may retain the property and recover damages for the fraud, or he may *recoup* damages if sued by the vendor for the price.
2. Where a defendant elects to affirm a sale after discovery of the fraud, the right to rescind thereby becomes extinguished, but the right to *recoup* may remain.
3. In such case the measure of damages would be the difference between the value of the thing sold at the date of the sale, and what the value would have been had the representations been true, with such special damages as were the *natural* and *probable* consequences of the fraud.
4. Damages arising from a resale to a third person with warranty, and not arising out of the natural and probable consequences of the fraudulent representations of the original vendor are too remote.
5. In an action by the vendor to recover the price of the thing sold, the defendant, if he would *recoup*, must give notice thereof.

Appeal from District Court of Arapahoe County.

THIS was an action of assumpsit brought by Randall, the appellee, against Lilly and Chatfield, the appellants, upon two certain promissory notes. The declaration contained two special counts upon the notes, and the common counts. The defendants pleaded the general issue and two special pleas averring that the notes were made and delivered by the defendants to the plaintiff as part of the consideration to be paid by the defendants to the plaintiff as the consideration for the sale and delivery by plaintiff to the defendants of a certain band of California horses, numbering three hundred and forty-nine head, the total consideration for which purchase was the sum of \$9,423, and setting up,

by way of defense, certain breaches of warranty in the quality of the horses, total failure of consideration, and fraudulent representations made by the plaintiff at the time of sale. Demurrers were interposed to the pleas, the demurrers sustained, and the defendants elected to abide by the pleas. The cause was then tried on the general issue only. Under this issue the defendants offered to prove in mitigation of damages, "that when the agreement was made and the horses delivered, the plaintiff falsely and fraudulently represented to the defendants that the said band of horses had all been lassoed and examined in California, as to their age and sound condition before he had left California for Colorado Territory, the spring previous, and that none of said horses were unsound or above the respective ages of six and seven years. That two hundred and fifty were old and unsalable at any price, and fifty were unsound and of no value whatever,—all of which was then well known to the plaintiff, and unknown to defendants; that said horses were wild and untamed California horses, running at large on the prairie, and that it was then impossible for the defendants to examine them, and relying on the false and fraudulent representations of the plaintiff, were by means thereof induced to enter into the agreement and receive the horses from the plaintiff as sound, healthy and young horses, when, in truth and in fact, three hundred of said horses were not of the age and quality as the same had been warranted by the plaintiff, and were unfit for use. Also that the defendants sold said horses and warranted them to be sound and not over seven years of age, and that they made the said warranty relying on the truth of the representations of the plaintiff. That the defendants were afterward required to rescind the sale and take the horses back in consequence of their unsound condition and their age, and that they had suffered damages in consequence to the amount of \$10,000."

The court rejected this offer of proof, and the plaintiff obtained a verdict in \$8,847.94. A motion for a new trial

having been submitted and overruled, judgment was entered on the verdict, and the defendants appealed to this court.

Messrs. BROWNE & PUTNAM, for appellants.

Messrs. SAYRE, WRIGHT & BUTLER, for appellees.

ELBERT, J. The demurrer to the two special pleas of the defendants below was properly sustained.

The second plea is a plea of *total* failure of consideration, whereas the matters alleged, properly pleaded, amount only to a partial failure.

The third plea is a plea of fraud, not affecting the execution of the notes, but the quality and value of the horses for which the notes were given.

It is not necessary, as claimed by counsel for the appellees, that the plea should allege a return of the horses, or an offer to return.

In case of fraudulent representations about the quality of the thing purchased, the vendee may rescind the sale, or he may retain the property and recover damages for the fraud, or he may *recoup* in damages, if sued by the vendor for the price. Benj. on Sales, 452; Sedgw. on Dam. 359.

The defendants having elected to affirm the contract after discovery of the fraud, the right to rescind was extinguished but their right to *recoup* remained unimpaired.

In such case the measure of damages would be the same as in an original action, that is to say, the difference between the true value of the horses at the date of the sale, and what the value would have been, had the representations been true, with the addition of such special damages as were the *natural* and *probable* consequences of the fraud. *Sharron v. Mosher*, 17 Barb. 520; *Wheeler v. Randall*, 48 Ill. 182; *Sherrod v. Langdon*, 21 Iowa, 518.

The damages, however, sought and claimed by this plea, are damages arising from a resale of the horses to a third person with warranty, which they afterward, as they aver,

were required to rescind, and "compelled to take the horses back in consequence of their unsound condition and their age," and that in consequence they were damaged in the sum of \$10,000.

The rule, as stated above, requires that the damages should be the *natural* and *probable* consequences of the fraudulent representations. We do not think the damages sought by this plea were within the rule. They are remote and by no means the natural or probable result of the fraud claimed. Such a rule might subject the vendor to the most unconscionable damages by reason of a sale to a third person, paying extravagant prices for horses. It would be to make the judgment, or want of judgment of a third person purchasing the horses, the standard by which to measure the liability of the vendor for his fraud.

The plea is therefore bad, and the demurrer was properly sustained.

Upon the trial the defendant offered to prove under the general issue in *mitigation of damages* "that the said several promissory notes described in the plaintiff's declaration, and each of them, were executed by defendants for a part of the purchase-money of a certain band of California horses, bought by them from plaintiff, for the sum of nine thousand four hundred and twenty-three dollars, of which sum, one thousand four hundred and twenty-three dollars was paid at the date of the purchase, and for the balance of which said notes had been given; that when said agreement was made and the horses delivered, the plaintiff falsely and fraudulently represented to the defendants that the said band of horses were sound, and not over the ages of six and seven years respectively; that a large number of said horses were unsound, and old, and unsalable, to wit: three hundred of them, which defects and facts were known to the plaintiff and unknown to defendants, and that defendants, relying on these false and fraudulent representations alone, they purchased said horses, and that because of said defects the consideration of said purchase to the amount of said promissory notes had failed."

The exclusion of this testimony is assigned for error.

In the case of *Withers v. Green*, 9 How. 113, Mr. Justice DANIEL states the American doctrine of *recoupment* as follows: "That upon the principles of justice and convenience, and with a view to prevent litigation and expense where fraud has occurred, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defense, by a party when sued on such contract, and that he shall not be driven to a cross action."

The question here presented is not the right of the defendants to recoup their damages, but whether they could avail themselves of this defense under the plea of *non assumpsit*.

Mr. Sedgwick says: "As to the way in which the defense of *recoupment* is to be set up, it is now settled, that evidence to support it, if total and going to the whole action, will be received under the general issue, but where it is only partial, it cannot be pleaded, and notice must be given with the plea." Sedgwick on Dam. 542. In New York, notice is an essential feature of the practice, and so in most of the other States. *Ib.*; *Burton v. Stewart*, 3 Wend. 236; *Whitebeck v. Skinner*, 7 Hill, 54; *Mayor of Albany v. Trowbridge*, 5 id. 71; *Wellsville v. Geisse*, 3 Ohio St. 536; *Hearton v. Colgrove*, 3 Ind. 266; *Estep v. Morton*, 6 id. 489.

The doctrine of notice is founded on the plainest considerations of justice. The end is to guard against surprise and the allowance of ill-founded claims of damages, without giving the plaintiff a fair opportunity to contest them. And while on the one hand the tendency has been to enlarge and favor defenses by way of *recoupment*, on the other, the necessity of protecting the rights of the plaintiff against surprise has become more prominent, and the requirement of notice very generally insisted upon as essential to the protection of plaintiffs. The English rule, while recognizing the general doctrine of *recoupment*, is equally careful in guarding the rights of the plaintiffs.

Mr. Justice DANIEL, in the same case of *Withers v. Green*, after a review of the English decisions respecting *recoupment*, says: "It would seem then fairly deducible from the reasoning of the English judges * * * * that this defense * * * * would be deemed permissible whenever it could be alleged without danger of surprise, and consistent with safety to the real rights of the parties, and it appears to be a deduction equally regular, that where notice of the defense was given, either by pleading or other effective proceeding, neither surprise nor any other invasion of the rights of the parties could occur or be reasonably apprehended."

On principle, we doubt whether notice should be dispensed with in any case where this defense is sought to be interposed, and is not specially pleaded, except perhaps where the suit is on a *quantum meruit*, where the plaintiff is supposed to come prepared to show his right to recover, and to encounter any and all objections in conflict with the position he assumes and must maintain.

The exception made respecting "evidence which is total and going to the whole action," is questioned in the case of *Wellsville v. Geisse*, 3 Ohio St. 536, and appears to be in conflict with the doctrine laid down in several New York cases. *McCullough v. Cox*, 6 Barb. 391; *Nichol v. Dusenbury*, 2 Comst. 382; *Burton v. Stewart*, 3 Wend. 236. This last case holds the doctrine, that where the defendant retains the property, he cannot say that the property is valueless, or treat the sale as void; and the two former cases, that *recoupment* can never be in bar of the action. As *recoupment*, even as enlarged in its meaning by modern usage, signifies nothing more than a reduction of damages, logically, it would seem to follow that it could not be had under a plea, the office of which is to set up a complete bar. *Wellsville v. Geisse*, 3 Ohio St. 536, and cases above cited.

It will be observed that the evidence offered by the defendants under the general issue was in mitigation of damages; an offer going only to reduce the amount of the

plaintiff's claim, and not to destroy the cause of action entirely.

Of this defense there was no notice, and the evidence was properly excluded.

The motion for continuance was based on the absence of witnesses whose testimony, as set forth in the affidavit of Lilley, had they been present, could not have been received under any issue made by the defendants.

The judgment of the court below is affirmed, with costs.

Affirmed.

FOR FRAUDULENT MISREPRESENTATIONS OF QUALITY, the vendee may reject the goods or retain the goods and recover damages for fraud, or recoup damages if sued by the vendor for the price: *Harford v. Cramer*, 7 Colo. 489.

HITTSOON v. BROWNE et al.

1. To entitle a person to practice as an attorney at law in the courts of record of this State (except in the county courts) he must be duly licensed and enrolled as an attorney.
2. An unlicensed person cannot recover compensation for professional services, nor can he be permitted to assume the calling and office of an attorney by the mere shift of using the name of a qualified person.
3. The association of a licensed attorney with one who does not fill this character will not give a joint action in the names of the two for counsel rendered or service performed by either or both, nor afford a lien to the two, for fees in respect to such counsel or service upon a judgment recovered by the qualified person.

The cases of *Harland et al. v. Libienthal*, 53 N. Y. 440, and *Turner and Smith v. Reynall*, 14 C. B. (N. S.) 328, distinguished.

Appeal from District Court of Arapahoe County.

THE bill in this case states that complainants, as copartners, as Browne & Putnam, on the 21st of April, 1873, as attorneys, were retained by one Polly A. Shortridge to collect a promissory note signed by James Patterson, payable to one G. W. Arnold, for the sum of \$1,000; that in pursuance of such retainer, they brought a suit in the probate court of Arapahoe county, and that at the June term, 1873, a judgment was rendered in favor of said payee for the use of said Shortridge, for \$466.72 and costs. That on the 25th

of June, 1873, defendant prayed an appeal, and on the 8th of July, 1873, filed his appeal bond, and on the 6th day of October, the papers were filed in the district court. And that on the 8th day of May, 1874, at the April term of said district court, said appeal was dismissed on motion of complainants, as such attorneys, with a *procedendo* to said probate court. That an execution was issued against Patterson and returned unsatisfied. That on the 24th day of August, 1874, said Putnam, on behalf of said firm, brought an action in said district court of Arapahoe county on said appeal bond, against said Patterson as principal and John Hittson and Samuel Singer as sureties, and on the 28th of November, 1874, at the September term of the court in that year, said Arnold recovered a judgment for the use of said Polly A. Shortridge against said Hittson for the sum of \$575.61 and costs. That the complainants paid advance costs to the clerk, the sum of \$2, on behalf of said plaintiff. That the judgment so rendered in said district court, but on what day is unknown, the said Shortridge received from said Hittson satisfaction thereof, and has satisfied the said judgment in the probate court in full, but has never paid complainants their fees and moneys expended. That the complainants' fees and services in said cause in the probate court were worth \$85, and their fees and expenditures necessarily made to the action on the bond were worth the sum of \$87. That the same has not been paid. That the satisfaction of such judgment was made by said Shortridge and Hittson for the purpose of cheating complainants out of their fees and expenditures, amounting in the aggregate to \$197, of which Hittson, before he paid the judgment, had notice by virtue of the statute.

PRAYER. That Hittson be made defendant to the bill, and for process, etc. And that an account be taken of what is due to complainants, that the same be declared a lien on said judgment in their favor, and that the satisfaction of said judgment to the amount of their lien be set aside, and that said Hittson be decreed to pay the sum found to be

due to them, and in default thereof, that payment of said sum be enforced by execution. Prayer for general relief.

Hittson appeared and in his answer disclaims any knowledge as to whether complainants were partners or licensed attorneys, and as to whether they were retained to collect such note, or brought any suit thereon, or that judgment was recovered in the court or at the time stated against Patterson, or an appeal was prayed, or bond filed in the district court, or that such an appeal was dismissed and execution issued as stated in the bill, and submits to strict proof.

Admits that he was sued and impleaded with Patterson and Singer by one Arnold for the use of said Shortridge, and that judgment was obtained against him in said district court at the term and for the amount stated. But as to what attorneys brought the same, or whether on an appeal bond does not know. Admits that he paid and satisfied the judgment so obtained in said district court against him and said Shortridge, satisfied the same on the records on the 12th of December, 1874, but knows nothing as to the satisfaction of said judgment in the probate court, but submits to strict proof, etc. That the defendant knows nothing of any services rendered by complainants to Shortridge in such suits, or if rendered, how much they were worth, and submits to proof, etc. Denies all knowledge that said Shortridge was indebted to complainants for services in said suit in said district court at the time of the entry of satisfaction of the judgment therein and all notice of the same, and that the complainants had, prior to such payment, given to defendant any notice of such claim, or filed any petition or notice in said cause, in which the judgment was so satisfied in said district court, to enforce the lien, or notify defendant thereof. Denies that he procured satisfaction to be entered by Shortridge of the judgment in said district court with a view to cheat the defendants. Submits that complainants do not show themselves entitled to relief, that the bill shows defendant was not a party to said suit in the probate court in which judgment was rendered against Patterson, and

that said Putnam alone performed the services as stated in the bill in which judgment was obtained against the defendant in the district court, and the defendant ought not to be charged, etc., and claims the same benefit as though he had demurred, and denies complainant's right to enforce lien, etc.

After replication filed, the cause was referred to a master to take proof. The hearing was upon the bill, answer, replication and master's report, and a decree rendered that the complainants were, at the time of the filing of the bill, and the entry of satisfaction of the judgments, entitled to liens on the judgments in the district and probate court in the bill mentioned, which was well known to the defendants, and declaring the same to be a lien to the extent of the sum of \$199, and setting aside and canceling the entry of satisfaction to that extent, on the said judgment in the district court, and awarding execution for the said sum and costs, if not paid in twenty days.

It appeared in the evidence, among other things, that the complainants had been retained as alleged in the bill; that the complainants had advanced \$2 in costs; that the services in the probate court were worth the sum of \$85; on the appeal in the district court, \$25; and in the action on the bond, including certain expenditures, \$87. That both complainants appeared as copartners in the action on the note, but in the district court, Mr. Putnam alone appeared in behalf of the firm. That Mr. Browne was not a member of the bar, although a copartner of Mr. Putnam and equally interested with him in the fees.

Messrs. MILLER & CLOUGH, for appellant.

Messrs. BROWNE & PUTNAM, *pro se*.

THATCHER, C. J. The law is jealous of her votaries: Her chosen priests alone are permitted to enter her solemn temple, and minister at her sacred altars. Without her sanction, courts should not recognize the right of any one to appear and prosecute or defend causes which necessarily

relate to so many of the varied and complex concerns of life, from the highest and most important, to the lowest and least significant. A lawyer, duly accredited, holds a station among men that stimulates him to a strict and honest performance of his imperious duties. The pride and dignity of character inspired by the high and honorable position to which he, by virtue of his office, has attained, affords a guaranty that the great interests committed to his hands affecting alike the rights of person and property, will be managed with scrupulous integrity and with the utmost skill and ability he can command. Animated by an enlightened sense of the delicate and grave responsibilities resting upon the legal profession, our legislators, with provident care, have thrown around the practice of law in Colorado extraordinary safeguards for the purpose of protecting both the public and the members of a worthy profession.

To entitle any one applying for admission to the bar of Colorado to a license, it is necessary that this court shall be satisfied by competent evidence prescribed by statute that the applicant is a person of good moral character and either that he has been engaged in the study of law for two successive years prior to the making of such application, or "that he has been regularly admitted an attorney at law in a court of record within the United States." The purpose of these requirements is manifestly two-fold. The license furnishes the evidence that the law demands for the security of the public, *first*, that the holder thereof is a person of probity of character; and *second*, that he is skilled in the law, and, therefore, qualified to practice as an attorney and counselor. Every person without license is prohibited from "commencing, conducting or defending any action, suit or plaint, in which he is not a party concerned in any court of record (the county court excepted) within this State." R. S., p. 65, § 1.

Any lawyer when admitted must also be enrolled to entitle him to practice. R. S., p. 66, §§ 4 and 5.

Thus carefully have our law makers adopted every precautionary measure to assure the pure and safe administration of justice and to shield suitors in our courts from the fraud and imposition that might otherwise be practiced upon them by persons who are either dishonest or not learned in the law, persons who not acting under the sanctity of an oath, and not being officers of, cannot be held to such immediate and strict accountability by, the court.

Not only are unlicensed persons prohibited from practicing, but the statute also provides that "if any person not licensed as aforesaid shall receive any money or species of property as a fee or compensation for services rendered by him as an attorney or counselor at law within this State, all money so received by him shall be considered as money received to the use of the person paying the same, and may be recovered back with costs of suit, by an action for money had and received * * * and the person receiving such money or property shall forfeit three-fold the amount or value thereof," (R. S., p. 68, § 12) to be recovered by an action of debt *qui tam*.

Even without the statute just quoted, an unlicensed person can, under our law, recover no compensation for professional services. "In general, when the law prohibits an act, no one can have the aid of the law to recover compensation for doing it." *Ames v. Gilman*, 10 Metc. 243.

One who has the temerity to attempt to practice in the face of the statutory prohibition not only cannot recover for his services, but in the event of collection without suit, he subjects himself to the penalty fixed by law.

If either Browne or Putnam were incapable of entering into a valid contract when the suit on the appeal bond was brought and the services were rendered in the district court in said suit, a joint right of action could not have accrued to them for such services. A joint right of action, in a law firm, for professional services implies a joint right to contract and a consequent joint right to sue.

It is not enough that one member of the firm in his indi-

vidual capacity might have entered into a valid contract and enforced the same in court.

By our statute an unlicensed person labors under a disability to contract or sue.

To affirm the decree of the court below is to assert that the disability may be removed and the law evaded by an unlicensed person entering into partnership with a duly admitted attorney. Unless Browne and Putnam, Browne not being a member of the bar when the services were performed, could have maintained an action against Polly A. Shortridge for fees claimed to be due in the suit upon the appeal bond, Browne and Putnam are not entitled to a lien upon the judgment obtained in that suit. That such a joint suit could not have been maintained, one of the partners being under a statutory disability, we think is apparent. "If two sue as co-plaintiffs, in a personal action, a plea that one of them is an outlaw will, if established, defeat or suspend the suit as to both. For as they sue jointly, and of course assert a joint right, they must recover jointly or not at all in that suit." Gould's Pleadings, 225 ; Com. Digest, Abatement, E. 2.

The authorities upon which the appellees rely for the contrary doctrine when closely examined will be found to be mere *obiter dicta*.

In the case of *Harland et al. v. Libienthal*, 53 N. Y. 440, in which the court held that a law firm, one member of which had been duly licensed, may recover in a joint action for services rendered by the firm, there was the absence of a prohibitory statute. The remarks of the court, that if there had been a prohibitory statute or a rule of court forbidding an unlicensed attorney to practice, the fact that one member of the firm had been duly admitted would relieve from its effect, were entirely extrajudicial.

In the case of *Turner & Smith v. Reynall*, 14 C. B. (N. S.) 328, the firm of Turner & Smith, medical practitioners, brought an action against a patient for attendance and medicine. When the cause of action arose, Turner alone

was registered. The day before the suit was brought, Smith had himself registered. The act of parliament (32, §§ 21 and 22 Vict., ch. 98) provided that "no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance or for any medicine *unless he shall prove upon the trial that he is registered under the act.*" As both had registered before suit brought, ERILE, C. J., said, "Both, therefore, had strictly complied with the words of the act, and both * * * were entitled to sue." It will be readily seen that neither of these cases is, in principle, analogous to the one before us. The supreme court of Illinois, construing a statute like our own, declares that if an attorney has "incurred any liability by practicing and receiving fees, or if he seeks to recover for services performed as an attorney before his name was entered upon the roll, the court could not aid him by permitting the entry to be made *nunc pro tunc*. *Ex parte Fellows*, 2 Scam. 369.

In *Robb v. Smith*, 3 Scam. 47, construing the same act, the court, after declaring that the statute has "imposed a disability upon 'the agent'" which destroys all right, privilege and capacity in him to assume or act in that character in relation to the conduct of legal proceedings, says, "this act was passed, we believe, in a spirit of liberality toward suitors, and for their protection against the practices of those who might seduce their confidence and induce them to trust the latter in the management of important interests when suitors could not possibly ascertain the skill and qualifications of those in whom they confided, or their acquaintance with the most intricate, difficult and important of human sciences." Mr. Browne could, under no circumstances, have a right of action for professional services rendered while he was not a member of the Colorado bar.

To say that he may circuitously and jointly with another have such right by forming a copartnership with one under no such disability is to declare that he may defeat the evident purpose of the statute, that he may do that indirectly which the law will not permit him to do directly. The

most absurd consequences would result. One under the ban of the statute, either by reason of not being a regularly admitted attorney or by reason of being disbarred, might at once form a copartnership with a licensed lawyer and reap the fruits to which he only is entitled under the statute who possesses an unrevoked certificate of admission which proclaims to the public that its holder is a man of probity and learned in the law.

Whether section 17, chapter VIII, R. S., 1868, *in the absence of notice to the judgment debtor*, gives an attorney a lien upon the judgment obtained by such attorney, is a question not now necessary to determine.

The decree of the district court must be reversed with costs and the cause remanded, with directions to the court below to dismiss the bill without prejudice to Mr. Putnam.

Reversed.

WELLS, J. An unlicensed person cannot be permitted to assume the calling and office of an attorney by the mere shift of using the name of a qualified person.

The association of a licensed attorney with one who does not fill this character will not give a joint action in the names of the two, for counsel rendered or service performed by either or both, nor afford a lien, to the two, for fees in respect of such counsel or services, upon judgment recovered, by the qualified person.

In the present case, therefore, if there is any lien for the services rendered in the action upon the appeal bond, it is in favor of Mr. Putnam alone, for the value of the services which he individually performed, and as the evidence does not distinctly inform us what his services were in that action, or their value, it is impossible to save his rights in the present proceedings, even if the case stood in unexceptionable attitude in all other respects.

Doubtless the complainants may have their joint action against Mrs. Shortridge for the value of their services rendered in the first action, but having reference to the

terms of the appeal bond, in which he became surety and upon which alone his liability can be predicated, I do not see how the appellant can be charged with this demand.

For these reasons I concur in the result announced in the opinion of the chief justice. I do not, however, at present agree that an attorney may not, in a conceivable case, enforce a lien upon the judgment given on an appeal or writ of error, or on the bond given in such case, for fees accruing to him in the original action, though he had no connection with the subsequent process.

ATTORNEY—COMPENSATION.—An unlicensed person cannot recover compensation for services rendered as an attorney: *Bachman v. O'Reilly*, 14 Colo. 43. But a joint action will lie for a balance agreed upon between a client and one accountant and two attorneys, for services in adjusting accounts, drawing papers, and giving advice: *Leichsenring v. Allen*, 12 Colo. 166.

MOFFAT et al. v. DICKSON.

1. In pleading to the jurisdiction of the court, under the statute (R.S., p. 500. § 2), an averment that "the contract upon which said cause of action was brought, and no part thereof was made specifically payable in said county," is obnoxious to demurrer as being uncertain and repugnant.
2. A rule to plead issuably instanter, means within twenty-four hours; and to enter judgment of default within that time, under such a rule, is error.

Error to County Court of Summit County.

ASSUMPSIT was brought in the county court of Summit county, by Dickson, the defendant in error, against Moffat and Shrock, the plaintiffs in error. Summons was issued directed to the sheriff of Jefferson county, service was had, and the defendants appeared and pleaded to the jurisdiction. The plaintiff demurred generally, and assigned special causes of demurrer to this plea. The demurrer was sustained, and defendants were ruled "to plead over forthwith," and the defendants not complying with the rule, on that same day judgment was entered by default. Damages were assessed by the court in \$360.00, and judgment rendered against the defendants in that amount. To reverse this judgment the defendants sued out this writ of error.

Messrs. HORNER, ELLIOTT & HAYNES, for plaintiffs in error.

Messrs. BENEDICT & PHELPS, for defendant in error.

ELBERT, J. The demurrer to defendant's plea was properly sustained. The averment that "the contract upon which said cause of action was brought and no part thereof was made specifically payable in said county," is uncertain and repugnant. It is an averment that the contract, as an entirety, was payable in said county, but that no part of it was payable there. It cannot be aided by intendment, and that construction is to be adopted which is most unfavorable to the party pleading.

Upon sustaining the demurrer the court ruled the defendants to answer over *forthwith*, and upon failure to answer over entered judgment of default, upon the same day and at the same sitting of the court. This is assigned for error. *Forthwith* has a relative meaning, and will imply a longer or shorter period, according to the nature of the thing to be done. This is denominated its *effectual* and *lawful meaning*. Bouvier defines it "as soon as by reasonable exertion confined to the object, it may be accomplished. This is the import of the term. It varies, of course, with any particular case." It has been defined as meaning "with all reasonable celerity." *Burgess v. Bartefer*, Mann. & G. 493. It is synonymous with immediately, and immediately has been construed to mean "such convenient time as is reasonably requisite for doing the thing." *Pybus v. Milford*, 2 Lev. 77. In a case of a "covenant to *forthwith* put premises in repair," it was held to mean reasonable time for that purpose, and not a day or a week." *Pitman v. Sutton*, 9 Carr. & Payne, 706. Where a fire occurred on the 15th of June, and the insured knew it on the 18th, and sent notice on the 23d, it was held a sufficient compliance with the condition of the policy requiring notice of loss to be given *forthwith*. *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468. A rule of court required the report on exceptions to be delivered to the party obtaining the reference, who was *forthwith* to file the same in the proper office. It was construed to mean within twenty-four hours. *Champlin v. Champlin*, 2 Edwards' Ch. R. 329.

An order was made by the court directing a party "to

deposit a paper in his possession with the master forthwith," and upon failure to comply with the order within an hour after notice, the party was committed for contempt. *The People ex rel. Morrison v. Brown*, 4 Paige, 404. These cases show that regard must be had to the nature of the act, or thing to be performed. While the term is imperative and admits of no unnecessary delay, it imposes nothing but due diligence, to be measured by the circumstances of each particular case. A rule to plead forthwith is not, therefore, to be construed as requiring a plea *eo instanti*. Time is necessary to examine the declaration, and consider of and frame the pleas, and under the rulings in analogous cases the time should not be held to mean less than twenty-four hours, and might import, in a case of intricacy and difficulty, a longer period. A rule to plead issuably, *instantanter*, means within twenty-four hours. 1 Tidd's Practice, 567*, and also when used in chancery orders. 2 Barb. Ch. Pr. 588.

Where used in a rule to plead, we see no good reason for saying that one term shall import a shorter time than the other. In this view, the court entered judgment by default against the defendants before the expiration of the time allowed for filing their pleas, and this was error.

The judgment must be reversed with costs, and remanded for further proceedings according to law, the defendants having leave to plead in bar, on or before the first day of the next regular term of the court below.

Reversed.

CHAPIN et al. v. WHITSETT.

1. Explanatory or directory matters inserted in parenthesis in forms for legal instruments or process, are not matters of substance.
2. A chattel mortgage given to secure the payment of several promissory notes, and providing, "that in case default shall be made in the payment of said notes, or either of them, according to their tenor," etc., then the mortgagee to take possession, etc.. *Held*, optional with the mortgagee to take possession upon default of payment of any note secured, or await the maturity of the last note.

Error to District Court of Arapahoe County.

ON the 15th day of September, 1874, one John H. Speed executed and delivered to Chapin and Gore, the plaintiffs in error, a chattel mortgage of certain property then in Speed's possession, to secure the payment of twenty-four promissory notes, of even date with the mortgage. These notes were payable, the first, one month after date, the next, two months after date (a note falling due each month), the last, payable twenty-four months after date. The mortgage contained the usual conditions of use and possession in the mortgagor until default, or the goods should be claimed or attached by any other person, etc. On the 7th day of November, 1874, Speed executed and delivered to Whitsett, the defendant in error, a mortgage of the same chattels. Some time prior to May 24th, 1875, Whitsett took possession of the goods, Chapin and Gore after demand brought their action in replevin. Upon the trial the chattel mortgage of September 15th, 1874, given by Speed to Chapin and Gore, was not admitted in evidence for the reason of an alleged defective acknowledgment, which is stated in the opinion. The court below found the property in the defendant, and gave judgment for costs against the plaintiffs, and they prosecute this writ of error.

Messrs. HORNER & HAYNES, for plaintiffs in error.

Messrs. SMITH & MACON, for defendant in error.

ELBERT, J. Section 2, chapter 14, R. S. 102, provides that the justice taking the acknowledgment of a chattel mortgage "shall certify the same in substance, as follows: this mortgage was acknowledged before me by A. B., (the mortgagor) this — day of —."

The chattel mortgage of the plaintiff in error was excluded at the trial in the court below, for the reason that the words "the mortgagor" do not appear in the certificate of acknowledgment. This was error.

The words are in parenthesis, and serve only to explain

and direct that the name of the mortgagor is to be inserted instead of A. B. Throughout the statutes, and in every legal form-book, wherever a form is prescribed for legal instruments or process, explanatory or directory matter is thus inserted in parenthesis, and is not of substance.

Had the importance of having the identity of the party acknowledging the instrument with the party subscribing it appear in the certificate of the justice, been present to the minds of legislators, and had it been their intention, as urged by counsel, to so prescribe, it is but fair to presume that they would have indicated it in some much more definite and certain manner, as well as have prescribed words of certification, which would have accomplished the object sought.

It is urged, however, that it was the duty of the plaintiffs, as mortgagees, to have taken possession of the mortgaged goods, upon default in the payment of any one of the several notes secured, and that it was not optional with them to await the maturity of the last note before taking possession, and that, consequently, the admission of the mortgage in evidence could not have availed them. The mortgage provided that "in case default shall be made in the payment of said notes, or either of them, according to their tenor, * * * * then it shall and may be lawful for the said parties of the second part, or assigns, to take immediate and full possession of the whole of said goods and chattels to their own use, and sell the same," etc., etc.

This provision does not impose an obligation, but confers an option, and under it the mortgagees could take possession of the mortgaged property upon default in the payment of any note secured, or they could await the maturity of the last note, without forfeiture of their lien. *Barbour et al. v. White et al.*, 37 Ill. 164; *Cleaves v. Herbert*, 61 id. 126.

The judgment is reversed with costs, and case remanded for further proceedings according to law.

Mr. Justice WELLS having been of counsel did not sit in this case.

Reversed.

COOPER et al. v. AMERICAN CENTRAL INS. CO.

1. The district court of one county cannot lawfully continue in session therein after the day appointed by law for the holding of the court in another county in the same district.
2. This court will take judicial notice of the terms of the district courts in the several judicial districts, as fixed by law.
3. A judgment of the court, to be valid, must be pronounced by the court, at a time and place appointed, and in the form required by law.
4. A writ of error will lie to review what assumes to itself the force of an adjudication at law, although upon the face of the record it may want the essentials of validity.

Error to District Court of Pueblo County.

THIS is a writ of error to the district court of Pueblo county, to reverse a judgment rendered in the above cause by Hon. JAMES B. BELFORD, associate justice at the December term, A. D. 1874, of said court. The cause was tried by the court, without the intervention of a jury, and is brought here upon errors assigned, which are all substantially of a like import, viz: that the judgment in said cause is *coram non judice*, being entered when the court *in fact* was not in session, and when *in law* it could not be in session in Pueblo county. That the said judgment by the record thereof does not appear to be the sentence or consideration of the law as to the matters in controversy, but the mere personal order of the presiding justice, not rendered in term time, nor in court, but filed in vacation in the clerk's office.

MR. CHAS. E. GAST, for plaintiffs in error.

MESSRS. BLAKE & JACOBSON, and Mr. BENJ. MATTICE, for defendant in error.

ELBERT, J. In this case the judgment appears to have been rendered and entered of record in vacation. The record does not show when, in fact, the court did adjourn, but this court takes judicial notice of the terms of the

district courts in the several judicial districts, as fixed by law.

The December term of the district court for the county of Pueblo commenced on the second Tuesday of December, 1874. The January term of the same court for the county of Las Animas commenced on the first Tuesday of January, 1875. Sess. Laws, 1874, p. 88. The district court for one county cannot lawfully continue in session therein, after the day appointed by law for the holding of the court in another county in the same district. *Grable v. The State*, 2 Green, 559; *Archer v. Ross*, 2 Scam. 303.

By fixing the time for the commencement of the term of the court in one county, the law, by necessary implication, limits the duration of the term of the court immediately preceding in another county of the district, and unless sooner terminated by adjournment, the term will expire, by limitation of law, at the time fixed for the succeeding term.

The December term, 1874, of the district court for the county of Pueblo, at which this case purports to have been tried, could not, therefore, have extended beyond the first Tuesday in January, 1875, the day fixed by law for the commencement of the term in Las Animas county. The first Tuesday in January, 1875, was the 5th day of the month.

The issues were made up at the June term, and the cause continued to the December term, 1874.

An entry on the 11th day of January, 1875, shows that the defendants on that day filed their motion for a new trial, and this is the first intimation which the record gives that a trial had been had. The next entry is to the effect that afterward, and on the 19th of January, 1875, the associate justice presiding at the December term, 1874, of the district court of said Pueblo county "filed in the office of the clerk thereof a certain judgment," which is set forth in *extenso*, and which recites in substance that on the ——— day of December, 1875, being one of the regular days of the said December term, the cause came on for trial, that the jury

was waived, and the trial had to the court, and the issues found for the plaintiff, and that there was due from the defendants to the plaintiff the sum of \$612.81; that the defendants filed their motion for a new trial, and that the same was overruled; that thereupon it was ordered, adjudged and decreed that the plaintiff do have and recover of and from the defendants the sum of \$612.81 and their costs; that an appeal was prayed and allowed, and thirty days given to file bill of exceptions. This is signed by the judge, and dated January 13, 1875.

Under date of January 19th, the record further recites that "under instructions *received* with said judgment," from the judge, and at the request of the plaintiff's attorney, the clerk of said court made the following entry upon the records of said court: "On this 19th day of January, 1875, a judgment rendered by the Hon. J. B. BELFORD, associate justice of the supreme court of Colorado Territory, and judge presiding at the December term, 1874, of the district court of the third judicial district of Colorado Territory within and for the county of Pueblo, *was received* by the clerk of said court, which said judgment was in the words and figures following." The judgment which follows is the one already adverted to. From these recitals, it is evident that the judgment was not rendered in open court, during the term, but in vacation.

The recitals, that on the 19th day of January, 1875, the judge presiding at the December term, 1874, "filed in the office of the clerk thereof a certain judgment;" that afterward, "under instructions" from the judge, the clerk of said court entered the judgment of record, stating that it was a judgment *received* on the 19th of January from the judge presiding at the December term, are inexplicable, if the judgment was rendered in open court during the term.

It is true that the judgment so "filed by the judge," and "received" and entered by the clerk as above indicated, purports on its face to recite a judgment rendered at the December term, but it also recites that the motion for a new trial was overruled, and the record shows that the motion

was not filed until after the term had expired by limitation of law.

The term is designated as the December term, 1875, instead of 1874, but it is not necessary to consider the effect of this evident misrecital.

A judgment is the sentence of the law pronounced by a court of competent jurisdiction, as the result of proceedings instituted. It is a judicial act, and to be valid must be pronounced by the *court*, at a time and place appointed by law, and in the form it requires. In the case of *Skinner v. Beshoar*, 2 Col. 385, it was held that error will lie to review what assumes to itself the force of an adjudication in law, although upon the face of the record it may want the essentials of validity.

Judgment

Reversed.

Chief Justice THATCHER, having been of counsel, did not sit in this case.

JUDGMENT RENDERED IN VACATION IS VOID: *Fulley v. Oddy*, 4 Colo. 109; *Francis v. Wells*, 4 Colo. 374; *Terpening v. Holton*, 9 Colo. 315. But a writ of error will lie to review a judgment so rendered: *Bean v. People*, 6 Colo. 100.

THE GOLDEN PAPER Co. et al. v. CLARK.

1. In an action against a corporation, if the president be not found, the sheriff may, under the statute (R. S., p. 501, § 4), serve process upon any officer or agent of the corporation.
2. Applications by a ministerial officer for leave to amend his return upon process are generally regarded with liberality. Justice, not only to the officer, but to the parties, requires that if he has committed a misprision he should have an opportunity to correct it.

Error to Probate Court of Jefferson County.

ASSUMPSIT on a promissory note brought by Clark, the defendant in error, against the Golden Paper Co. and A. P. Anderson, plaintiffs in error, impleaded with Reuben C. Wells. The question presented by the record is to the sufficiency of the service of process upon the defendants below. The return of the officer was as follows:

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“ TERRITORY OF COLORADO, } ss.
County of Jefferson. }

“Served the within summons by delivering a copy thereof to A. P. Anderson, and by delivering a copy of the same to Frank A. Hartzell, who is and was an agent of the Golden Paper Company — Ezekiel Hartzell, the president of said Company, not found in my county. Reuben C. Wells not found in my county. Dated this 19th day of February, A. D. 1875.

“ W. L. SMITH,
Sheriff of Jefferson County.”

Afterward, the sheriff was permitted to amend the return “according to the facts,” by inserting immediately after the name of the defendant Anderson, the words “and by reading this summons to him.” Default was taken against the company and Anderson, and damages assessed against them in favor of Clark, in the sum of \$463.20, for which amount, together with costs, judgment was entered. The plaintiffs in error contend that there was no sufficient service of process out of the probate court, and in consequence the proceedings were *coram non judice*.

Mr. A. H. DEFRANCE, and Mr. D. E. PARKS, for plaintiffs in error.

Mr. HUGH BUTLER, for defendant in error.

WELLS, J. 1. The return of service upon the corporation defendant seems to us to be sufficient. The fair interpretation of the fourth section of the Practice Act (Revised Statutes, chap. 70, § 4) requires that service shall be made upon the president, if found. If the residence of the chief officer, in the county to which process is issued, shall preclude service upon any other official or agent, it will be an easy matter for the corporation to avoid service altogether. If the president be not found, the sheriff is under no obligation to distinguish between the other officials; he may serve any officer or agent; for so is the letter of the statute.

The case of *The Illinois Telegraph Company v. Kennedy*,

24 Ill. 319, which was cited in argument, does not bear upon this question.

2. Applications for leave to a ministerial officer to amend his return upon process are generally regarded with liberality. What is asked in such a case is not a peremptory direction, but permission merely. It is the officer who finally determines the question of fact, and upon his memory, good faith and sense of official responsibility, the court and all parties must in general depend for the truth of his acts. Justice not only to the officer, but to parties, requires that if he has committed a *misprision*, he should have opportunity to correct it. Even if the party to be affected may of right appear to and resist such application, as to which we express no opinion, it is not apparent that in the present case the defendant has been injured by the refusal of the court below to accord him this privilege. No suggestion was made of the matters proposed to be established by the testimony of the witnesses offered, but the same witnesses had given their affidavits as to the circumstances attending the alleged service. These affidavits were exhibited at the hearing and are embodied in the bill of exceptions. It is fair to assume they contain the substance of what was proposed to be shown by examination of the witnesses. Now upon this showing the court would not have been justified in refusing the sheriff the leave asked. It was the memory of the sheriff against that of the defendant, and there was not the slightest occasion to suspect the good faith or sincerity of the officer. Certainly no reason can be assigned to accord conclusive effect to the deposition of the defendant.

If the officer still remained sufficiently confident in his own recollection of the facts to make the proposed amendment, justice to the plaintiff required of him that he should do so; and of the court, that he should have permission accordingly. The defendant, if wronged, is not without remedy.

The judgment will be affirmed with costs.

Affirmed.

AMENDMENTS OF RETURN OF PROCESS ARE ALLOWED with great liberality: *McClure v. Smith*, 14 Colo. 301.

HOLLIDAY et al. v. KIRK et al.

"On the opening of court and for one hour thereafter, motions and demurrers in their order shall be heard, and at no other time during the term unless specially ordered." *Held*, under this rule, that the plaintiffs below were at liberty to move against their adversary's pleas on the same day on which they were filed.

Error to County Court of Arapahoe County.

It appears from the record that the defendants below filed their pleas on January 8th, 1877, and that on the same day the plaintiffs filed their motion to strike said pleas from the files; that said motion was taken up by the court on the same day, in the absence of the defendants, and sustained; that said motion was heard within a short time after the filing of said pleas in the morning hour, after the hearing of motions and demurrers in other cases which had before been set for that day; that there was no special order of the court entered to hear said motion; that at the time said motion was heard there was pending and undetermined other motions and demurrers that had been filed prior to that day, and which had not been specially set down by the court for hearing at other times subsequent to that day; that said court had adopted certain rules of court to take effect on and after the first Monday in December, 1875; that the first of said rules was as follows:

"On the opening of court and for one hour thereafter, motions and demurrers in their order shall be heard, and at no other time during the term unless specially ordered."

That said rule was in force at the time said pleas and motion were filed and determined; that the defendants by their counsel came into court just as said motion had been determined, and then and there objected to said motion having been submitted and determined, but the court overruled said objection, to which the defendants excepted; that the defendants also excepted to the ruling of the court in sustaining said motion, striking said pleas from the files and entering judgment *nil dicit* in said cause.

Messrs. BUTLER & WRIGHT, for plaintiffs in error.

Messrs. SYMES & DECKER, for defendants in error.

WELLS, J. Conceding the doctrine contended for, that the rules of court in general apply in all cases alike, and bind not only counsel and suitors, but the court also, it is not apparent that in the present case the rule of court relied upon was violated. The plaintiff below was at liberty to move against his adversary's pleas on the same day on which they were filed. There is nothing in the rule quoted nor in the facts presented in the bill of exceptions to prevent a disposition of that motion during the morning hour of that day, without special assignment of it. The rule itself was an assignment of all issues of law, pending motions and demurrers for the morning hour of each day until disposed of.

The fact that issues of law in other cases had been set for hearing at a later day did not affect the question.

Judgment affirmed with costs.

Affirmed.

WILSON v. THE PEOPLE.

1. The Constitution of this State (art. 1, § 23) limits the number of persons to constitute a grand jury to twelve, nine of whom must concur in finding a bill, but the mode of selecting the jurors, until altered by law, remains the same as provided by the Territorial statute. This court is not permitted to presume, in the silence of the record, that the court adopted an illegal method in convening the grand jury.
2. Where it does not affirmatively appear that the grand jury is an unlawful body, any irregularity in selecting and impaneling it should be raised before plea by a challenge to the array. Where it is apparent on the face of the record that the grand jury could not have been a legal body, advantage may be taken of the defect by motion in arrest of judgment.
3. An affidavit in support of a motion for continuance on the ground of the absence of a witness, which fails to show that due diligence was used to procure the attendance of the witness at the trial, and which discloses neither the name of the witness, nor his place of residence, nor any ground for belief that his attendance may be secured at a subsequent term, is properly overruled.

4. When the calling of a witness, whose name is not indorsed on the back of the indictment, occasions no surprise to the prisoner, nor makes other preparation necessary to the defense, there can be no good reason to withhold the testimony, if material or important to the prosecution.
5. When a statement by the prisoner's counsel, of what a witness would swear to (it being favorable to the prisoner), is admitted in evidence, the admission of such statement cannot be construed as being in conflict with section 16 of the Bill of Rights, which provides that the prisoner shall have the right to meet the witnesses *against* him face to face.
6. Until the judges of the several district courts established by the constitution were elected and qualified the jurisdiction and powers of the former judges within their respective districts, as constituted by the general assembly of the Territory, continued unchanged.
7. Section 20 of article VI of the Constitution, which declares that until the general assembly shall provide by law for fixing the terms of courts, the judges of the supreme and district courts shall fix the terms, etc., has exclusive reference to the courts created and the judges provided for in that article.
8. If any distinct proposition in a charge to the jury is sound, an exception to the charge *en masse* will not be considered.
9. The district court has authority (Laws of 1876, p. 65), in certain cases specified in the statute, to appoint some one to discharge the duties of the office of district attorney *pro hac vice*. When such an appointment is made, and in the absence of any thing in the record to the contrary, this court must presume that one of the statutory grounds existed when the appointment was made.

Error to District Court of Jefferson County.

At the October term, 1876, of the district court of Jefferson county, the sheriff returned a *venire* for a grand jury of nineteen served. Twelve of these were selected, impaneled and sworn. They returned an indictment into court against the plaintiff in error for an assault with intent to murder. The defendant below was arraigned, pleaded not guilty, and being put upon trial was convicted. Motions for a new trial and in arrest of judgment were severally interposed and overruled; judgment was entered on the verdict and the defendant sentenced.

Messrs. BROWNE & PUTNAM, for plaintiff in error.

A. J. SAMPSON, Attorney-General, for defendant in error.

THATCHER, C. J. The grand jury system established by the Territorial legislature was materially modified by the constitution. At the common law a grand jury was composed of not more than twenty-three nor less than twelve good and lawful men, although twenty-four were usually summoned. If but twelve grand jurors constituted the panel they must have concurred to find an indictment. If the panel was made up of a larger number, twelve at least out of that larger number must have concurred.

Under the Territorial statute a grand jury was composed of not less than sixteen nor more than twenty-three persons, twelve of whom, the common law number, were required to concur to find an indictment. By our Constitution (section 23, article 1) a grand jury is declared to consist of twelve men, any nine of whom concurring may find an indictment. The record affirmatively shows that the sheriff returned into court a writ of *venire facias*, which had issued for the summoning of a grand jury to attend at that term, and that by his indorsement on said writ, he had, in pursuance thereof, summoned nineteen persons. The writ is not set out in the transcript, nor need it be, unless there is some special reason for so doing. *Mackey v. The People*, 2 Col. 17.

Sufficient, however, appears, to evince that the grand jury was not summoned with reference to the constitutional requirement, which limits that body to twelve men. It is obvious that the sheriff, by virtue of a *venire facias* issued for twenty-three persons, pursuant to "an act to provide for the selection of jurors to serve in the district courts" (Session Laws 1874, p. 170) had summoned the nineteen jurors in attendance. Under this act the jurors must have been selected at the preceding April term of court several months before the change was made in the grand jury system, by the adoption of the Constitution. This act is still in full force except in so far as it is in conflict with that instrument. The mode of selecting jurors is not altered, but the panel of the grand jury is limited to twelve persons. To effectuate the purpose of the legislature in prescribing a

particular mode of selecting jurors, the court may have, of the nineteen in attendance, selected the first twelve that had been drawn from the box, by the clerk of the district court at the April term, if their names in the order in which they were drawn had been preserved. Or the court may for some sufficient reason, by virtue of its common-law power, which is recognized by the statute, have ordered a special *venire*, under which the sheriff may have summoned the identical panel that found the indictment. *Stone v. The People*, 2 Scam. 328. It is unnecessary to speculate as to the precise mode adopted by the court to secure a legal grand jury, or to express an opinion as to what was the proper mode under the peculiar circumstances, or even to decide affirmatively that another mode than either of those above suggested was not the only course open to the court.

Every reasonable intendment must be made in favor of the regularity of the record. The record asserts that the grand jury of twelve men were selected and chosen according to law, but as to the particular manner of selecting them, it does not speak. We are not permitted to presume, in the silence of the record, that the court adopted an illegal method in convening the grand jury.

It is said in *Chase v. The State*, 46 Miss. 697: "A grand jury was impaneled under the supervision of the court, and the presumption is not an unreasonable one, that a legal grand jury was organized according to law," the record not showing to the contrary.

Where it does not affirmatively appear that the grand jury is an unlawful body, any irregularity in selecting and impaneling it should in general be raised before plea, by challenging the array, and not by a motion in arrest of judgment. Wharton's *Crim. Law*, § 469, and cases cited; 1 Bishop's *Crim. Pro.*, § 887, and cases there cited.

The case before us comes within the general rule.

Where, however, it is apparent upon the face of the record, that the grand jury finding the indictment could not have been a legal body, *e. g.*, where the statute enacts that a grand jury shall consist of not less than thirteen, nor more than

eighteen persons, and the record shows that the indictment was found by a grand jury composed of nineteen persons, advantage may be taken of the defect by a motion in arrest of judgment. *Miller v. The State*, 33 Miss. 356.

The denial of the motion for a continuance on the ground of the absence of a witness was not error. The affidavit did not set up sufficient facts to warrant the court in continuing the cause. From the affidavit it appears that the prisoner neither knew the name of the witness, his place of residence, nor where he could probably be found. So far as the affidavit shows, no inquiries were ever made to ascertain his whereabouts. No efforts were made to secure his attendance at the trial. There is a total want of that degree of diligence which the law enjoins upon him who asks the interposition of the court to delay a cause. For any thing set up in the affidavit there are no reasonable grounds for believing that the evidence of the unnamed witness could ever be made available.

It is assigned for error that the court, without notice to defendant, permitted Dr. Dorman, whose name was not indorsed on the indictment, to testify. His evidence was directed to a description of Morganstine's wounds. It could not well have operated to surprise the defendant. In the case of *Perry et al. v. The People*, 14 Ill. 498, the court says: "The notice by copy is intended for the protection of prisoners, by enabling them to prepare their defense against the accusation by the mouths of these witnesses. Courts will see that this protection is afforded them. But when the calling of other witnesses occasions no surprise, nor makes other preparation necessary to the defense, there can be no good reason for withholding material or important testimony for the prosecution." Having reference to the character of his testimony, and to the fact that there is nothing in the record to indicate that the defendant was taken by surprise, we see no error in the court permitting the witness to testify.

It is objected that the court erred in admitting in evidence the written statement made by the prisoner's counsel of

what John Healey would have sworn to, if present. No application for a continuance was made on the ground of the absence of Healey. The counsel's written statement, even if it had been sworn to by the prisoner, did not contain sufficient to authorize a continuance. The statement, through the indulgence of the court, was admitted as evidence in behalf of and not *against* the accused. Our Constitution (§ 16 of Bill of Rights), which in this respect is declaratory of the common law (Bishop's Crim. Pro., § 1090, and cases there cited) provides, "that in criminal prosecutions, the accused shall have the right to meet the witnesses *against* him face to face." This wholesome and beneficent provision, one of the objects of which is to secure to the defendant the right to probe his accusers by a thorough cross-examination, is not in conflict with the action of the court in receiving evidence in the prisoner's favor, and at his instance evidence which could not possibly operate to his prejudice.

Until the judges of the several district courts established by the Constitution were elected and qualified, the jurisdiction and powers of the former judges within their respective districts, as constituted by the general assembly of the Territory, continued unchanged. Section 5, Schedule of Constitution. The Constitution did not contemplate the re-assignment of the late Territorial judges, by reason of the formation of four judicial districts. Until the district judges should be elected under the State organization, one for each of the four districts, the three Territorial judges within the boundaries of their assigned districts, which as to them were in no way disturbed by the Constitution, were clothed with the same powers, and authorized to exercise the same jurisdiction as before the adoption of that instrument. That Jefferson county, after the election and qualification of the district judges under the State organization, formed part of the first judicial district, and that prior thereto, after the admission of the State, in virtue of the provisional arrangement, made by the Constitution, it formed part of the second judicial district, are not thought to be material. The important fact remains that

Amherst W. Stone, at the date of the proclamation by the President of the United States declaring the admission of Colorado into the Union, was the duly constituted judge of the district court in and for Jefferson county, and as such authorized to sit at the trial of Wilson.

Section twenty of Article VI of the Constitution (concerning the judicial department), which declares that "until the general assembly shall provide by law for fixing the terms of the courts aforesaid, the judges of the supreme and district courts respectively shall fix the terms thereof," does not relate to the former judges. It has to do exclusively with the courts created and the judges provided for in that article. Reference must be made to the schedule to determine what change, if any, was wrought in the functions, powers and jurisdiction of the late Territorial judges, continued in office under the State organization, until they were superseded by the judges elected under the Constitution.

As we have already seen in the respects named, no change was made. Section one of the *schedule* provides: "That all laws in force at the adoption of the Constitution shall, so far as not inconsistent therewith, remain of the same force as if this Constitution had not been adopted." At the date of the adoption of the Constitution, the Territorial law then in force, fixing the terms of court in the several districts, required a term to be held in Jefferson county, beginning the first Monday of October. The term of court at which Wilson was tried, was held at that time. This was in strict accordance with law.

A general exception was taken to the instructions *en masse*.

We have decided at this term, in the case of *Webber v. Emerson* (*ante*, page 248), that such an exception, if any distinct part of the charge is sound, will not be considered. This exception comes within the rule there laid down.

The indictment was signed "R. S. Morrison, district attorney, specially appointed."

By an act of the general assembly, approved January

22, 1876, "in regard to district attorneys," it is provided that if the district attorney be interested, or shall have been employed as counsel in any case, which it shall be his duty to prosecute or defend, or if he be sick or absent, the court shall appoint some person to discharge the duties of the office *pro hac vice*. Here is ample power to appoint specially a prosecuting officer, which the court called into exercise. The presumption is that one of the statutory grounds existed when the appointment was made. The record shows that Mr. Morrison, acting under the eye of the court, was recognized as its legally appointed prosecuting officer, and this court will intend, there being nothing in the record to contradict it, that he legally exercised the functions of that office. *Isham v. The State*, 1 Sneed, 111; *Eppes v. The State*, 10 Tex. 474.

Let the judgment of the district court be affirmed, with costs. *Affirmed.*

LEGAL ORGANIZATION OF GRAND JURY IS PRESUMED in absence of evidence to the contrary: *Parker v. People*, 13 Colo. 158.

CALLING WITNESS WHOSE NAME IS NOT INDORSED ON INDICTMENT, IF IT OCCASION NO SURPRISE TO PRISONER, IS NOT ERROR: *Minch v. Colorado*, 8 Colo. 446.

GREGORY v. GERMAN BANK OF DENVER.

1. Section fifteen (R. S., p. 121), prescribing the liability of trustees of corporations, arising from a failure to publish an annual report, is penal in its nature; the liability is not founded upon contract, but arises from misconduct in office. The repeal of such a statute, without any saving clause in the repealing statute, sweeps away all inchoate rights arising under the statute so repealed. There can be no such thing as a vested interest in an unenforced penalty.
2. A legislature cannot bind a succeeding legislature to a particular mode of repeal.

Appeal from District Court of Arapahoe County.

THE appellee had judgment in the court below, for \$2,899.25, from which an appeal is prayed to this court. The case is sufficiently stated in the opinion.

Messrs. HUNT & MARKHAM, and BROWNE & PUTNAM, for appellant.

Messrs. SYMES & DECKER, for appellee.

THATCHER, C. J. This is an action in assumpsit, brought by the German Bank of Denver, against Jacob Gregory, one of the trustees of the Colorado Brewing Company, a corporation organized under the laws of Colorado. It is founded upon an alleged infraction of section fifteen of chapter XVIII, entitled corporations (page 121, R. S. 1868), which enacts as follows: "Every such company shall annually, within twenty days from the 1st day of January, make a report which shall be published in some newspaper published in the town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital, and of the proportion actually paid in, and the amount of existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on; and if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made."

This section is identical with section twelve, page 57, Laws of New York, 1848, which is still in force.

This statute is, we may say, self interpreting. Its language is unambiguous. The liability of the trustees arising from a failure to publish an annual report is in no way related to the loss that creditors of the company may sustain by reason of such violation of the statute. The joint and several liability attaches to the trustees, not because creditors of the company contracted with them, not because the corporation is insolvent, but because they neglected to perform a duty enjoined by law. It cannot be said that creditors of the company contracted with reference to any indemnity afforded by this section.

Until the 20th day of January of each year, contracts are

entered into with the corporation without regard to the possible failure of the trustees to publish their annual reports, and their consequent liability for the debts of the company. This statute is in its nature penal. It prescribes a determinate penalty for neglect of a duty, imposed by law, upon the trustees of companies organized under our general incorporation act. The amount of the forfeiture is measured by the aggregate debt contracted by the company. The liability is not founded upon contract, but arises from misconduct in office. As the trustees who make default in publishing the report are wrong-doers, if the penalty, or any part thereof, should be recovered from any one of them, he could not, without a special statute, compel the others to contribute. *Andrews v. Murray*, 33 Barb. 354; *Hill v. Frazer*, 22 Penn. 320.

In New York, the section under discussion is held to be a statute for a penalty or forfeiture. *Wiles et al. v. Suydam*, 64 N. Y. 177; *Miller v. White et al.*, 50 id. 137; *Merchants' Bank v. Bliss*, 35 id. 412; *Garrison v. Howe*, 17 id. 466.

The supreme court of New Jersey, in the case of *Derrickson v. Smith*, 27 N. J. 176, in which an action was brought against a trustee of a New York corporation, founded upon the statute in question, says: "It is not claimed that the defendant, by the act of incorporation, is individually liable as a corporator, for the debts of the body corporate, or that his liability attached as a necessary result of the contract made by the company. His liability results from the failure of the trustees to comply with the requirements of the statute. It is in fact a penalty inflicted upon the trustees for the failure to perform a duty enjoined by the statute. It is immaterial whether the penalty be a specified sum, or the payment of the debts of the corporation. In either case, it is a penalty imposed by statute. * * * This being a suit to enforce a penalty inflicted by a statute of the State of New York, it is clear that it cannot be enforced in this State. Penal laws are strictly local, and affect nothing more than they can reach." See, also, *First National*

Bank of Plymouth v. Price, 33 Md. 487; *Halsey v. McLean*, 12 Allen, 438; *Harrisburg Bank v. Commonwealth*, 26 Penn. 451.

Upon reason and authority we are constrained to the conclusion that the statute is in its nature penal.

The general assembly, Feb. 11, 1876 (§ 1, p. 49, Session Laws 1876) amended this section by limiting the liability of trustees in default, to those debts "that had been contracted or incurred, since the publication of the last annual report, and for all that should be contracted before such report should be made." This amendment went into effect on the day of its passage, and was the law up to March 1st of the same year. On the same day, February 11th, 1876, the legislature (Session Laws 1876, page 41) passed an act entitled "an act to amend chapter eighteen of the Revised Statutes of Colorado Territory, entitled 'corporations' (Session Laws 1876, page 41), of which sections three and seventeen are as follows: 'Section three, section fifteen of the act to which this is amendatory is hereby amended by striking out of said section every part thereof after the words 'carried on' in the twelfth line thereof, and the following is enacted instead of the part so stricken out, viz: 'and if any such company shall fail so to do, the president and secretary of such company shall forfeit and pay the sum of two hundred dollars, and shall be jointly and severally liable in an action of debt, at the suit of the People of the Territory of Colorado therefor; and when such sum shall be collected, it shall be paid into the Territorial Treasury, to the credit of a fund for the use of the public schools of this Territory.'"

"Sec. 17. This act to take effect on the 1st day of March, 1876." Under this law, the forfeiture, if enforced, instead of going to the creditors of the company, went to the credit of a fund for the use of public schools.

If the German Bank is entitled to recover from Jacob Gregory, its right is based upon a statute that had passed out of existence long before it had obtained judgment in the court below. The creditors no longer had any right to pursue the trustees. All judicial proceedings after the repeal were

without authority of law. The right of the creditor to proceed against the trustee depended *exclusively* upon the statute, and when it ceased to exist, all proceedings commenced under it, in the absence of a saving clause in the repealing statute, fell with it. Inchoate rights arising under the statute were swept away. No right can be said to have *accrued* to creditors under the statute, unless before its repeal such right was carried into judgment. There is no such thing as a vested interest in an unenforced penalty. Sedgw. on Stat. Law, 111; *Norris v. Crocker*, 13 How. 429; *Gaul v. Brown*, 53 Me. 496; *Curtis v. Leavitt*, 15 N. Y. 152; *Nichols v. Squire*, 5 Pick. 167; *Bay City R. R. Co. v. Austin*, 21 Mich. 391.

It was not competent for the general assembly of 1868 to trammel any succeeding legislature. Every legislature, subject only to constitutional restraints, is as supreme in its own sphere as any of its predecessors or successors. So far as section 21, page 122, R. S., prohibits any future legislature from altering, amending, or repealing the chapter in which it is found, except in the manner and to the extent therein prescribed, it is certainly nugatory when applied to penal sections. If a legislature has the right to bind a succeeding legislature to a particular mode of repeal, it would result practically, that it might at pleasure enact irrepealable statutes. Were the courts to sanction such a doctrine the most disastrous consequences might be expected.

As the legislature of 1876 repealed, without a saving clause, the penal statute upon which the German Bank founds its action, we are of opinion that its suit cannot be maintained. The judgment of the court below must be reversed with costs.

Reversed.

VESTED INTEREST IN UNENFORCED PENALTY cannot exist, and the repeal of a statute prescribing a penalty, without any saving clause, sweeps away all inchoate rights in the penalty: *Denver & Rio Grande Ry. Co. v. Colorado*, 11 Colo. 600.

PARLIN v. AUSTIN.

In an action of replevin (affidavit having been filed, and the writ issued and served on the defendant and the property) the failure of the officer to select appraisers, or the failure of the appraisers to discharge their duties as required by the statute (Laws 1876, page 116), are not grounds for quashing the writ.

Error to County Court of Boulder County.

MOTION in the county court to quash the writ of replevin. The cause was originally commenced before a justice of the peace, from whose judgment an appeal was taken. The defendant insisted as ground for his motion that the property seized had not been appraised as required by the statute. The motion prevailed, and the cause was dismissed. The plaintiff then sued out this writ of error.

Mr. ALPHEUS WRIGHT, for plaintiff in error.

Messrs. BERKLEY & BLAKE, for defendant in error.

THATCHER, C. J. The affidavit was filed and the writ of replevin issued from the justice court on the 4th day of September, A. D. 1876, returnable on the 11th day of the same month. September 6th the writ was served on the defendant, and the property therein described was seized and retained by the constable until the return day of the writ. When the officer selected the appraisers, the record does not show.

It does appear that on the day of the trial, the appraisers, having taken the required oath, valued the property seized, and that on the same day the constable delivered the property to the plaintiff, he having given the bond prescribed by law. It is the declared intention of the statute, that if the defendant in replevin shall give the statutory bond within three days "after the service of the writ upon such property," the same having been appraised, the property seized shall be delivered by the officer to such defendant (Sess. Laws of 1876, page 116, § 2).

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The property was not appraised within the time limited by the statute. No opportunity was, therefore, given to the defendant to assert the right vouchsafed by the statute, as the agent of the law, the officer, is enjoined to select the appraisers, whose duty it is to value the property replevied. If either the officer or the appraisers, or both, failed in their duty, the affidavit having been made and filed, and the writ having been issued and served upon the defendant, and the property having been seized in pursuance thereof, was the court warranted, for either or both of these reasons, in dismissing the writ? We think not.

If the officer fails to perform his duty, to the injury of the defendant, an action will lie against him; but the plaintiff, to whom no fault is to be imputed, so far as the record discloses, should not be made to suffer unnecessarily for the negligence of either an officer of the law or of the appraisers.

The motion asked too much. As under the statute the defendant was first entitled, upon giving bond, to have the property turned over to him, and as, through what appears to be negligence of the officer, no opportunity was ever given to furnish a bond, the court on motion of defendant might and should have ordered the plaintiff to deliver the replevied property to the defendant, upon his giving the statutory bond, unless indeed, upon hearing the motion, it should have appeared to the court that the defendant had signified his intention to the officer not to give bond. This would have restored the parties to their rights so far as it was in the power of the court to restore them.

The judgment of the court below must be reversed, and the cause remanded for further proceedings according to law.

Reversed.

IN REPLEVIN, OFFICER'S FAILURE TO GIVE DEFENDANT OPPORTUNITY to execute the statutory bond and retain possession is not ground for dismissal of the writ, but the proper practice is for the defendant to appear before the court and move the restoration of the property to him on giving bond: *Robinson v. Austin*, 3 Colo. 378; *Wyatt v. Freeman*, 4 Colo. 15.

FOOTE v. WALKER et al.

Under the act of 1870 (p. 69, Sess. Laws), and the act of 1874 (p. 67, Sess. Laws), making the first named act applicable to the county of Rio Grande, all appeals from justices of the peace in that county should be taken to the probate court.

Appeal from District Court of Rio Grande County.

FOOTE brought unlawful detainer against Walker and another, before a justice of the peace of Rio Grande county, and prevailed. The defendants perfected an appeal to the district court. At the August term, 1876, Foote moved to dismiss this appeal, asserting as the ground of his motion, that no appeal lay to that court. The motion was denied, and this is assigned for error.

Mr. M. S. TAYLOR, for appellant.

Mr. V. D. MARKHAM, for appellees.

WELLS, J. Section 8 of the act of February 9, A. D. 1870 (acts 8th Sess., p. 69), regulating the civil jurisdiction of the probate court of Arapahoe county, provided that all appeals from the judgments of justices of the peace in that county should be taken to the probate court. The act of February 10th, 1874 (acts 10th Sess., p. 67), made this act applicable to the county of Rio Grande. The jurisdiction conferred by the former act was in the beginning exclusive, and as to the county of Arapahoe, certainly deprived the district court of jurisdiction to entertain these appeals. *Farley v. The People* (ante, p. 65).

But intermediate the two acts quoted, the act of February 9, A. D. 1872 (acts 9th Sess. 100, § 4), had provided in general terms that thereafter in all cases of forcible entry and unlawful detainer, or unlawful detainer of lands tried and determined before any justice of the peace, either party might appeal to the district court of the proper county. This act was of course from the date of its approval of

effect within all the territory afterward erected into the county of Rio Grande, and so remains to this day, unless limited in its operation by the act of 1870. But the act of 1870 was itself, it is said, modified by the act of 1872, as to the class of cases designated in the latter act, so that in Rio Grande, after its adoption there, as in Arapahoe before, the appeal lay either to the probate or to the district court.

The precise question presented is, therefore, whether by the act of 1872 it was the purpose of the legislature to deprive the probate court of Arapahoe county of the exclusive jurisdiction which it before possessed, of appeals from the judgments of justices of the peace within that county, and to give an appeal in the action of forcible entry and detainer, and unlawful detainer from justices of the peace to the district court. The answer to this question must be in the negative.

Without laying special stress upon the general doctrine that repeals by implication are regarded with disfavor; or to the other doctrine that special statutes shall, in the absence of negative words, prevail over general statutes even though subsequent in point of time; which last doctrine is perhaps scarcely applicable here, inasmuch as both statutes are in a sense special; let us consider what was the controlling purpose in the instance of the two enactments. This, it is conceived, is the true criterion. For the former having prescribed special regulations as to a particular matter, the latter ought not to be held to abrogate these, if the legislative mind appears not to have been directed to them. Now, in the enactment of 1870, the animating purpose was to effect such a distribution of the judicial powers within the county of Arapahoe, as should promote dispatch in the business of the courts; and enable those ministering therein to accomplish, so far as might be, their function of according justice to all, promptly and without delay.

In the preceding sections of the act the legislature had enlarged the jurisdiction of the court in civil causes to the utmost limit of their power under the Organic Act, and in the section in question, they direct all appeals to the in-

ferior court with the double purpose: 1st, to relieve the district court of the small causes, which before that had too often engrossed the attention of that court to the neglect of more considerable matters; and 2d, to afford a more speedy trial of these lesser causes and thus diminish the temptation to litigious appeals, or appeals for delay merely. This, as pertaining to the history of the legislation of the Territory, it is supposed, we may judicially notice. But if we are not at liberty to look beyond the face of the statute for the purpose which dictated it, the same conclusion is inevitable; for to say otherwise is to say that while affecting to employ themselves in regulating and disposing the jurisdiction of the several courts, the legislature were in fact contriving to put money into the pockets of a particular official. It is impossible to impute motives so unworthy.

Now in the act of 1872 the main design would seem to have been, 1st, to enlarge the time of perfecting the appeal from judgments given in the action of unlawful detainer; 2d, to prescribe a rule by which the penalty of the appeal bond should be ascertained, and 3d, to set a limit to the amount of such penalty, beyond which the magistrate should not pass.

By the Revised Statutes, chap. 35, § 5, which was before the rule, the appeal was required to be perfected within five days. The act of 1872 enlarged this period to ten days. The Revised Statutes required bond for the payment of the rents accrued, and double rents accruing subsequent to the bringing of the action; and the act of 1872 contains the same requirement. The former, however, omitted to prescribe any rule by which the court or justice should ascertain the penalty of the bond, and left it discretionary to demand bond in whatever sum caprice might suggest. These several defects in the Revised Statutes are corrected by the act under consideration; and while by a liberal construction it is possible to say that the legislative purpose included not only the amendment of the defects of the statute in the respects adverted to, but also the abridging the jurisdiction of the Arapahoe probate court in the matter of

appeals, we think the better view must limit the statute to the former purpose alone ; for it would seem that if they had regarded the jurisdiction of the probate court as inconveniently large, the remedy would have been afforded in a statute directed expressly to the correction of this inconvenience ; and if, in the opinion of the assembly, experience had shown the probate court of Arapahoe county to be an unworthy depository of the jurisdiction over this particular class of cases, it is improbable that original jurisdiction thereof would have still been continued. From the light which the statute affords, therefore, it seems that in the enactment of the act of 1872, the legislative attention was not drawn to the jurisdiction of the Arapahoe probate court ; and that no purpose was entertained to abbreviate that jurisdiction as it then and thereafter existed. After this statute, therefore, the act of 1870 retained the same effect which it had possessed before ; appeal from all judgments of justices of the peace in that county, as well in the action of unlawful detainer as in other actions, lay to the probate, and not to the district court ; and the statute being transported to the county of Rio Grande with the same effect, took away the appeal to the district court, which in that county the act of 1872 had previously given.

The judgment of the district court is therefore reversed, and the cause will be remanded with directions to the district court to dismiss the appeal, and award *procedendo* to the justice of the peace having jurisdiction, to enforce the judgment from which the appeal was taken. Appellant to recover costs.

Reversed.

HOLLIDAY et al. v. UNION BAG AND PAPER CO.

1. A party seeking exemption from the liability of a general partner under the act of 1874, respecting limited partnerships, must show a strict compliance with the act.
2. The statute does not require that the capital should be paid in cash, but when it is paid in property it should be so stated, and its cash value given.

Error to Probate Court of Arapahoe County.

THE Union Bag and Paper Company brought an action in assumpsit for goods sold and delivered, against Holliday, Pratt and Williams, as copartners, doing business under the firm-name of Holliday & Co. On the trial, which was by the court, the plaintiff recovered judgment for \$1,742.96 and costs, and the defendants sued out this writ of error to reverse this judgment.

It appeared in evidence at the trial that the credit had been given defendants because Williams was a partner and the plaintiff "had faith in his responsibility." Williams was called as a witness on behalf of the plaintiff and testified:

"I commenced doing business with the defendants in May, 1876. I put \$12,000 worth of groceries into the firm.

Q. What part was in groceries?

[Defendant objected; objection overruled and exception taken.]

A. I held the notes of Mr. Holliday for \$12,000 for cash advanced him in the business. When the copartnership of Holliday & Co. was formed, I gave him up his notes, thereby paying up my capital as special partner in the firm. I did not take charge of any part of the business until October or November, 1875. I took charge of a portion of the stock then to pay the debts of the firm to other parties as far as possible; I expected certain profits from the partnership when I made the agreement; we put \$22,000 into the business; I did not make any contracts for them before October first; I did not sell any goods; Holliday and Pratt were the managers; they frequently asked me questions in relation to the business, and I may have answered them, but I did none of the business.

Cross-examined: The invoice turned in by Holliday was largely in excess of the amount due me, but certain debts had to be paid; I put fully \$12,000 into the business in groceries; the firm remained in business as wholesale and

retail grocers about six months; the stock put in my hands was to pay Holliday & Co.'s debts.

Re-direct examination: Of course I considered the \$12,000 in groceries my capital in the business; years before I was in partnership with Holliday and took his notes to settle accounts between us; there were six or eight thousand dollars' worth of groceries, besides my interest in the firm; the debts were perhaps equal to the value of the balance of the groceries.

Re-cross examination: Holliday's debts were all paid out of the excess of groceries turned into the firm of Holliday & Co."

MESSRS. SAYRE, WRIGHT & BUTLER, for plaintiffs in error.

MESSRS. SYMES & DECKER, for defendant in error.

ELBERT, J. The first and second assignments are abandoned by the plaintiff in error, and the only question to be resolved is the liability of the defendant Williams.

A party seeking exemption from the liability of a general partner under the act of 1874, respecting limited partnerships (Session Laws, 200) must show a strict compliance with its requirements.

At common law, a partner was liable *in solido* for the debts of the firm. In relaxing this rule, the legislature has adopted a system of precautions essential for the protection of the community. The statute provides for a limited liability, but upon conditions; and he who invokes its protection must show that he has both strictly and substantially complied with the conditions, upon which alone, immunity from his common law liability is granted. *Haviland v. Chase*, 39 Barb. 283; *Argall v. Smith*, 3 Denio, 435; *Richardson v. Hogg*, 38 Penn. St. 153; *Haggerty v. Porter*, 103 Mass. 17; *Pierce v. Bryant*, 5 Allen, 91.

The 7th section of the act requires from the special partner an affidavit, stating "that the amount in money, or property at cash value, specified in the certificate to

have been contributed by such special partner, has been actually and in good faith contributed and applied to the common stock of such partnership." The 8th section provides "that if any false statement shall be made in such certificate or affidavit, all persons interested in such partnership shall be liable for all the engagements thereof as general partners."

The affidavit of the special partner Williams, attached to the certificate in this case, states that he "has contributed to the said firm of Holliday & Company the sum of twelve thousand dollars, which said sum has been actually and in good faith contributed to the business and applied to the common stock of said firm." The only interpretation to be given to this language is, that it was \$12,000 in cash.

Whether the contribution of Williams to the capital stock was in groceries or in the notes of Holliday, which he surrendered, and for the amount of which he received credit on the books of the new firm, can make no difference. In either view, the certificate and affidavit contains, within the meaning of the statute, a false statement, and in such case, the statute is explicit, that all interested in the partnership shall be liable as general partners.

The statute does not require that the capital should be paid in cash, but it obviously was intended, that when it was paid in property it should be so stated, and its cash value given. One of the essential precautions of the law is, that public notice must be given of the amount paid in, so that the public may be enabled to estimate correctly the credit to be given to the firm, and it is not difficult to see that \$12,000 in cash would form a very different basis of credit from \$12,000 in groceries or promissory notes. It was the evident intention of the legislature to prevent parties putting in property of uncertain and estimated value and calling it cash, thus obtaining a credit to which their capital would not entitle them.

It can make no difference that Williams acted in good faith, and supposed the property contributed worth \$12,000.

A special partner cannot be permitted to publish to the world that he has contributed \$12,000 in cash to the capital stock of the firm, when, in fact, he has only contributed property which he valued at that sum. To allow it would be to invite and encourage fraudulent practices under the act.

The judgment of the court below must be affirmed with costs.

Affirmed.

LEHOW v. SIMONTON et al.

1. A plea of set-off setting up a promise good in parol, by the common law, need not show a compliance with the requisites of the statute of frauds. The statute prescribes a rule of evidence, and not a rule of pleading.
2. A third party for whose benefit a simple contract has been entered into for a valuable consideration, moving from the promisee, and upon which the third party might maintain an action against the promisor, such third party may, when sued in assumpsit by the promisor, plead by way of set-off the damages arising from the non-performance of the contract made for his benefit, and if he omits to aver in his plea to whom the promise was made, it will be taken to have been made to the party from whom the consideration proceeded.

Error to Probate Court of Arapahoe County.

To a declaration containing the common counts in assumpsit, a plea of set-off, among others, was filed, setting forth that "the plaintiff Simonton, and one W. G. Phifer, then and there, to wit, at the county of Arapahoe aforesaid, being copartners in the city transfer business, under the name and style of the City Transfer Company, were before the commencement of this action indebted to him, the defendant, in the sum of \$2,000 for goods, chattels and effects before that time sold and delivered by the defendant to the said Simonton & Phifer at their request. * * * * And being so indebted and being the owners of a large amount of partnership property of great value, to wit, of the value of \$6,000, the plaintiff, William H. Pierce, then and there, to wit, long prior to the commencement of this suit and

after the accruing of the indebtedness of said Simonton & Phifer as aforesaid, in consideration of the conveyance, assignment and delivery to him by the said Phifer of the one undivided half of the said copartnership property of the said Simonton & Phifer, the same constituting all of the interest of the said Phifer in the said copartnership and property, and in the further consideration of the forming then and there of a partnership between the said Thomas H. Simonton and William H. Pierce, in the transfer business, theretofore conducted by the said Simonton & Phifer as aforesaid, all of which was then and there done, the said William H. Pierce then and there, and as a part of the consideration of the said purchase, assumed the payment of the undivided one-half of the said indebtedness of the said Simonton & Phifer, to the defendant, and jointly with the said Simonton, then and there promised, agreed and undertook to pay the said indebtedness of the said Simonton & Phifer, to this defendant, whereby the plaintiffs, long prior to the commencement of this action, were, and still are, indebted to this defendant in said sum of \$2,000 in manner aforesaid.

Which said indebtedness and sums of money so due the defendant from the plaintiff as aforesaid, exceed the damages sustained by the plaintiffs, * * * * and out of which said sums of money the defendant is ready and willing and hereby offers to set off and allow to the plaintiffs the full amount of said damages," etc.

A demurrer to this plea was sustained, which is the only question presented by the record.

Messrs. BLAKE & JACOBSON, for plaintiff in error.

Messrs. CHARLES & DILLON, for defendants in error.

WELLS, J. 1. Whatever may be the general rule in the case of a plea, it is certain that the declaration in counting upon a promise good in parol by the common law, need not show a compliance with the requisites of the statute of frauds. The statute prescribes a rule of evidence, and not a

rule of pleading. Steph. Pl. 313,* 374 *; Brown on Stat. of Frauds, § 505; 1 Chit. Pl. (16th Am. Ed.) 245.* Now the plea of set-off is in the nature of a declaration, and in respect to the degree of certainty required, is governed by the same rule. Waterman on Set-off, § 646. The question, whether the undertaking mentioned in the plea is within the statute of frauds, does not arise.

2. It seems to be the settled doctrine of the courts of England at this day, that a stranger to the consideration cannot enforce the contract by an action thereon in his own name, though he be avowedly the party intended to be benefited. 1 Chit. on Cont. (11th Am. Ed.) 74. In this country there are many cases which assert the same rule. *Salmon v. Brown*, 6 Blackf. 347; *Britzell v. Fryberger*, 2 Cart. 176; *Clapp v. Lawton*, 31 Conn. 103; *Conklin v. Smith*, 7 Ind. 108; *Mellen v. Whipple*, 7 Gray, 321; *Robinson v. Reed*, 47 Penn. St. 115; *Exchange Bank v. Price*, 107 Mass. 42; *Warren v. Bachelder*, 15 N. H. 129; *McLaren v. Hutchinson*, 18 Cal. 81, and some others which are not accessible to us.

But as respects simple contracts, the decided preponderance of American authority sustains the action of the beneficiary. 1 Pars. on Cont. 467 *; 1 Chit. Pl. (16th Am. Ed.) 5 n. (n. 1); 2 Greenl. Ev., § 109; *Thorp v. The Keokuk Coal Co.*, 48 N. Y. 253; *McDowell v. Lear*, 35 Wis. 175; *Bowhannan v. Pope*, 42 Me. 93; *Joslyn v. N. J. Car Spring Co.*, 36 N. J. L. 141; *Myers v. Lowell*, 44 Mo. 328; *Saunders v. Clason*, 13 Minn. 379; *Thompson v. Gordon*, 3 Strobl. (S. C.) 196; *Scott's Adm'r v. Gill*, 19 Ind. 187; *Allen v. Thomas*, 3 Metc. (Ky.) 198; *Draughan v. Bunting*, 9 Ired. 10; *Hendricks v. Lindsay*, 3 Otto, 143; *Beasley v. Webster*, 64 Ill. 458; *In re Rice*, 9 Bankr. Reg. 375; *Bagaley v. Waters*, 7 Ohio St. 369, and many others in the reports of the same courts, are to this effect. To harmonize the decisions is impossible. The doctrine of those last quoted, while confessedly an anomaly, seems to us the more convenient. It accords the remedy to the party who in most instances is chiefly inter-

ested to enforce the promise, and avoids multiplicity of actions. That it should occasion injustice to either party seems to us impossible.

3. The plea fails to show to whom the promises relied upon were made; but this is equivalent to stating a promise to the party from whom the consideration proceeded. 1 Chit. Pl. (16th Ed.) 309* (k.); and according to *Delaware and Hudson Canal Co. v. Westchester Bank*, 4 Denio, 97, this is the proper form of the averment.

Judgment reversed with costs, and cause remanded.

Reversed.

CONTRACT, WHO MAY SUE ON.—A third party, for whose benefit a simple contract has been entered into for a valuable consideration moving from the promisee, may sue in his own name, or may plead the contract by way of set-off: *Green v. Richardson*, 4 Colo. 586; *Green v. Morrison*, 5 Colo. 20; *Hexter v. Clifford*, 5 Colo. 172.

THE BOARD OF COUNTY COMMISSIONERS OF ARAPAHOE COUNTY v. CUTTER.

1. A promissory note due from a resident of Colorado to a resident of California is in no legitimate sense the property of the debtor, and is not subject to taxation under the laws of Colorado (Sess. Laws, 1870, p. 88), although the note is secured by trust deed upon real estate within the jurisdiction of the taxing power.
2. When taxes are paid under protest, no demand is necessary before bringing suit to recover back the money so paid. The protest by the tax payer is of itself sufficient notice to the treasurer that he regarded the tax as illegal, and that he would enforce his rights if need be by an appropriate proceeding.

Appeal from District Court of Arapahoe County.

THIS was an action in assumpsit for money had and received, etc., by Cutter against the Board of Commissioners of Arapahoe county, to recover certain taxes paid by him under protest. The plaintiff had judgment below, and the Board of Commissioners appealed to this court.

Mr. W. B. MILLS, for appellant.

Messrs. BROWNE & PUTNAM, for appellee.

THATCHER, C. J. It is enacted by section three of "an act to provide for the assessment of and collection of reve-

nue" (Session Laws, 1870, page 88), "that all property, both real and personal, *within the Territory*, not expressly exempt by law, shall be subject to taxation." By section eleven of the same act it is provided that all personal property shall be listed in the county where it shall be on the 1st day of May of the then current year. The plaintiff in the court below, residing in California, May the 1st, 1874, held promissory notes executed by different parties in Arapahoe county, and generally secured by trust deeds upon real estate situate in that county. These notes were assessed as the property of Mr. Cutter, and the taxes thereon were paid by him to the treasurer of Arapahoe county, under protest. Were these *choses* in action, owned by a non-resident, subject to taxation under the laws of Colorado? Were they personal property within the Territory within the meaning of the Revenue Act?

Personal property which has a *locus* here is without doubt subject to taxation under our revenue laws, which, while they, in general, can have no extra-territorial force, may reach all property within the State without reference to the residence of the owner. A herd of cattle, a flock of sheep, a stock of merchandise owned by a non-resident, but kept within the State, are proper subjects of taxation. But debts due from a resident of Colorado to a resident of California are in no legitimate sense the property of the debtor. They belong to the creditor. They have no *situs* apart from the residence of their owner. Although the *situs* of the real estate by which the notes were secured was within the jurisdiction of the taxing power, the debts evidenced by the notes were the principal things, and the trust deeds securing them were mere incidents, depending for their very existence upon what they secured. The liquidation of the debts would at once cancel the trust deeds. A trust deed itself is but a *chose* in action attached to the person of its owner. A debt is invisible and intangible, following the creditor's domicile, and wherever that may be, is within reach of the taxing power. But as the domicile of the owner of the *choses* in action

upon which taxes were paid, was in California, it cannot be said that they constituted property *within* the late Territory of Colorado, and were, therefore, the subject of taxation here. *Railroad Company v. Pennsylvania*, 15 Wall. 300; *City of Davenport v. The Mississippi and Missouri R. R. Co.*, 12 Iowa, 539; *City Council of Augusta v. Dunbar*, 50 Ga. 393; *The People v. Eastman*, 25 Cal. 601; *Hayne v. Delieesseline*, 3 McCord, 373; *Johnson v. The City of Lexington*, 14 B. Mon. 521.

As the taxes were paid under protest no demand was necessary before bringing suit. The object of a demand is to give the party on whom it is made an opportunity to refund, without the expense incident to litigation, the taxes that had been illegally exacted. But where the taxes are paid under protest to the treasurer, who is armed by the law with authority to coerce payment, no further demand is required. Payment under such circumstances cannot be considered voluntary. The protest by the tax payer is of itself a notice to the treasurer that he regards the tax as illegal, and that he intends, if need be, to enforce his right by an appropriate proceeding.

The judgment of the court below must be affirmed with costs.

Affirmed.

GILLETT et al. v. GAFFNEY et al.

1. Title by occupancy of land subject to entry under the acts of congress, as town sites, must under the statute (1 Sess. Laws, p. 168) of Colorado, be held to be descendible. Such title possesses, under the statute, the legal character of real estate.
2. Except as against the United States, and subject to defeat by abandonment, the *bona fide* occupant will hold his land by a tenure as secure against attack as the owner of the fee at common law. There is nothing in the law which obliterates its legal character upon demise, and there is nothing that invests it with a different character upon transmission to the heir.
3. If one co-tenant acquire an outstanding title he will be considered as holding it in trust for his co-tenant. But in case of co-tenancy of land, with

the fee in the United States, one co-tenant, by compliance with the requirements of the statute (R. S. 619 *et seq.*), having acquired title, cannot be held to come within the rule touching co-tenants as trustees, in case of the acquisition of an outstanding title.

Thus, where A and B are co-tenants of land subject to entry as a town site, and before the entry is made A dies, leaving heirs, and B conveys to C an undivided half of the land, and B and C thereafter acquire title from the government, the heirs of A having taken no steps to that end: *Held*, that C held his moiety free and discharged from the claims of B's heirs.

4. Where one has a power coupled with an interest in lands, his deed of the lands making no mention of the power, will convey only his own interest. Thus, where A and B are co-tenants of lands owned in partnership, and A dies, leaving heirs, and B as surviving partner, and having power to convey, conveys an undivided moiety to C, describing himself as surviving partner merely: *Held*, that B conveyed only his own interest, and the conveyance operated only to sever his relation as co-tenant with the heirs of A, and as surviving partner of A, he held the remaining moiety in trust for the heirs of A, and that in such case B, also dying, his heirs took the estate charged with these equities, and held the same in trust for A's heirs, subject, however, to the debts of the late firm of A and B.
5. A deed duly recorded is constructive notice of its existence and contents to all persons claiming what is thereby conveyed under the same grantor, by subsequent purchase, but not to other persons; and in this case: *Held*, that the adult heirs of A, being strangers to the conveyance from B to C, could not be held to notice of such recorded deed, and be thereby barred by the statute of limitations, of their action against B's heirs.

Appeal from District Court of Arapahoe County.

JAIRUS RICHARDSON and Hawley H. Gillett were copartners doing business in the city of Denver, from 1860 to the 29th of January, 1865. The premises occupied by them during this term are the premises in controversy, and were possessed and occupied by the firm under title from the Denver Town Company, the fee being in the United States. On the 29th of January, 1865, Richardson died leaving Maria E., his widow (now Maria E. Gaffney), and three minor children, his heirs, who are the complainants in this suit. After the death of Richardson, Hawley H. Gillett continued the business, and in July, 1865, conveyed to his brother, George Gillett, a one undivided one-half of the premises occupied by the late firm. Prior to this convey-

ance, and on the 6th of May, 1865, the probate judge of Arapahoe county entered the town site of Denver, under the act of congress of May 28, 1864. On the 11th day of August, 1865, Hawley and George obtained from the probate judge a deed of the premises to themselves. They continued to occupy and enjoy the same until the 13th day of September, 1868, at which time Hawley died, leaving Emma, his widow, and two minor children, his heirs, who, together with George Gillett, the complainants allegè, have held, occupied and enjoyed the premises in controversy, to the exclusion of the complainants, and who, together with John W. Webster, the administrator of Hawley, are made parties defendant. The bill prayed a partition of the estate, or sale in the event that partition could not be made without injury, and also that the court might decree that the legal title now held by said George Gillett, and the said heirs of Hawley, to the said real estate, "is so held in fraud of the rights of complainants, as to one undivided moiety thereof; and that the same be taken and held by the court here as in trust as to the said moiety for the use of complainants, according to their respective interests; and that such order and decree may be made in the premises as will vest the title to said moiety in the complainants, according to their respective interests therein; and that the said defendants, or such of them as have received the rents and profits of said real estate from the time of the death of said Jairus Richardson hitherto, be compelled to account for the same, and pay to the complainants the share of the same to which they may be found entitled," etc.

Webster demurred, the demurrer was overruled; he declined to answer, and a decree was taken against him *pro confesso*. The other defendants answered. After replication filed the cause was referred to a master to take proof. The cause was finally submitted upon the bill, answer, replication and master's report, and a decree was rendered that the title to the undivided one-half of the premises was "in the defendant George Gillett, free and discharged of any lien or claim of lien of the complainants; that the legal

title to the other undivided moiety of said lands, premises and appurtenances at the time of the death of Hawley H. Gillett, deceased, was vested in him, and he held the same in equity as surviving partner of the firm of Richardson & Gillett, the members of which firm had theretofore been composed of Jairus Richardson, then deceased, and the said Hawley H. Gillett, deceased, both late of the county of Arapahoe and Territory of Colorado; that the said Jairus Richardson, at the time of his death, left him surviving his widow, now being the complainant Maria E. Gaffney, and the other complainants, his children and only heirs at law; that the said Hawley H. Gillett, deceased, at the time of his death, left him surviving the said defendant, Emma Gillett, his widow, and the said defendants, John A. Gillett and Hawley H. Gillett, his children and sole heirs at law. That the said Hawley H. Gillett, in his life-time, as said surviving partner of said firm, settled up and adjusted the affairs of said firm with the administrator of said Jairus Richardson, deceased, leaving the title to the last-mentioned undivided moiety of said real estate vested in him as equitable assets of said firm, undisposed of in trust for himself and the said widow and children of the said Jairus Richardson, deceased. That at the death of said Hawley H. Gillett, deceased, the title to the said last-mentioned moiety descended to the said heirs at law of the said Hawley H. Gillett, in trust for themselves and the said widow of the said Hawley H. Gillett and the said complainants, according to their respective interests." It was further ordered that this last-mentioned moiety be sold by the master, and the proceeds be brought into court to be distributed. To reverse this decree the appellants prosecute this appeal.

Mr. V. D. MARKHAM, and Mr. JOHN W. WEBSTER, for appellants.

Mr. H. P. BENNET, and Mr. E. L. JOHNSON, for appellees.

ELBERT J. The bill in this case seeks the declaration of a resulting trust and an account of rents and profits.

Whatever may have been the intention of the pleader, the bill will not admit a broader decree.

Jairus Richardson died in January, 1865, leaving the complainants as his heirs at law. Prior to, and at the time of his demise, he was the copartner of Hawley H. Gillett, whose administrator, widow and heirs are defendants. They pursued their partnership business in shops erected on the premises in controversy, which they occupied as tenants in common, under purchase and conveyance from one Curtis. During the co-occupancy, and at the time of Richardson's death, the fee was in the United States. In the May following the Denver town site was entered by the probate judge, in trust, under the Denver town site act of May 28, 1864. Subsequently the premises were conveyed to Hawley H. Gillett and his brother George by the probate judge, under circumstances hereafter more fully explained.

The widow and heirs of Richardson file their bill to recover the undivided half of the premises.

At the threshold they are met with the objection that their ancestor was not possessed of a descendible estate in the property to which they seek to establish their claim as his heirs.

We do not understand the counsel for appellants seriously to question the character of an occupant's interest as property, but to challenge its character as *real estate* descending to the heirs. In view of the universality of titles by occupancy in our State, the question is of deep interest.

Upon the organization of the Territorial government in 1861, the fee to the lands within its borders was in the general government. They were newly subjected to the dominion of man. Settlers located upon farming lands, upon mining claims and town lots, and claimed them in virtue of this occupancy. The general government, by beneficent laws, provided for surveys, for homesteads and pre-emp-tions, for entry in person and in trust, all looking to the acquisition of the fee by the occupant, and placing it within easy reach. Having the fee in view, in many instances,

large sums were invested, and not unfrequently, these claims and their improvements constituted the entire property of the occupant. Thus a new wealth was produced, and extensive and valuable interests grew up, springing out of, and attached inseparably to lands, and dependent entirely upon title by occupancy. It was the universal tenure by which lands were held and enjoyed. At common law, right of occupancy, strictly so called, was limited to the single instance, where a man was tenant *pur autre vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, in this case on the death of the tenant during the life of the *cestuy qui vie*, it did not descend, but he who first entered on the land might lawfully retain possession by right of occupancy, so long as the *cestuy qui vie* lived. 2 Black. Com. 258. There is nothing in the law of this right as it existed at common law, applicable to the right of occupancy as it is understood and exists here.

Distinct from this, was title by possession, and where a mere naked possession, without apparent right, or shadow, or pretense of right to hold or continue such possession, it was the lowest and most imperfect title known to the common law. The legal owner could put an end to the possession at any time by entry, but until some act was done by him to divest this possession, and assert his title, such actual possession was *prima facie* evidence of legal title in the possessor, and by lapse of time, and negligence of the owner, it ripened into a perfect title. If the disseizor or other wrong-doer died, possessed of the land, whereof he too became seized by his own unlawful act, the right of possession descended to the heir, and he could not be divested by entry, but only by action at law. 2 Black. Com. 195*, 196*.

The deduction sought to be drawn by counsel for appellees, from this common law doctrine, in favor of the descendibility of the possessory rights of occupants, as they exist here, is not perhaps without force, reference being had to the character of the two estates. In the one case, posses-

sion was illegal, and there was *ouster*; in the other possession is legalized, and there is no *ouster*. The occupant becomes so, without any one having ceased to be so. These differences add to the character of the title we are considering, and place it on a higher footing than that at common law. True, no lapse of time will give the occupant of any part of the public domain a perfect title as against the United States, and the possibility of a perfect title by *lapse of time* and *neglect* of the owner of the fee does not exist. The possibility of a perfect title, however, by *consent* and *act* of the owner does exist, in fact is made possible by the legislative will. Possibility of perfect title is replaced by legal right to acquire perfect title. Place the descendibility of the title of the disseizor at common law upon what ground you may, it is difficult to discover or imagine any plea for investing it with this quality, that would not equally, if not more strongly, apply to title as it exists here.

It appears to us, however, that in the absence of statutory provisions, the descendibility of such estates might be placed on other and more satisfactory grounds. Feudal reasons have disappeared, and the peace, good order and stability of society, its prosperity secured by invoking the highest endeavors of its individual members by securing to them and their descendants the fruits of their labors; the superior claims of kindred, over strangers, founded on natural laws, are among the chief considerations upon which the laws of descent now exist. These considerations are as potent and imperative respecting the titles we are considering as they can be in the case of a fee. The common law has been adopted only in so far as it is applicable to existing conditions. Its rules, whether technical or otherwise, cannot be allowed to imperil great interests.

In the case of the *Merced Mining Co. v. Fremont*, 7 Cal. 325, Mr. Justice BURNETT says: "The sentiment, that courts are bound to take judicial notice of the political and social condition of the country which they judicially rule, is as just as it is concise and appropriate; and courts knowing the social and political condition of the country, are equally

bound to apply the rules of law and the principles of enlarged reason to the new circumstances of a people."

Where statutory provisions are wanting, we think these considerations would afford safe and tenable ground upon which the descendibility of these titles might be maintained and vindicated. *Beckett v. Silorer*, 7 Cal. 229; *Merritt v. Judd*, 14 id. 63; *Hughes v. Divillin*, 23 id. 507; *Hale & Norcross G. & S. Mining Co. v. Story County*, 1 Nev. 106; *Coy v. Coy*, 15 Minn. 119.

We prefer, however, to rest our decision on statutory provisions. The condition of titles before described made title by occupancy of paramount importance, and its legal status claimed the attention of our first legislature. It was a labor of the first necessity, and under the ample grant of legislative power, extending to all rightful subjects of legislation, we are not surprised to find all laws upon the subject, tending to one end, and showing a clear purpose to put the *bona fide* occupant of the public domain, as far as lay in its power, upon a footing of security.

Among the first acts passed was "an act declaratory of the rights of occupants of the public domain, except as against the United States." After recognizing the paramount right of the United States, the first section declares, "that as between all the good citizens now residing in, or who may hereafter come to reside in this Territory, and as between them, or any of them, and others having or claiming, or now or hereafter pretending to have or claim, any right to occupy, possess and enjoy any portion of the public domain situate within the boundaries of this Territory, and as between each and every of them and all other persons, associations, corporations and powers, except the government of the United States, the right as the same may exist under the local laws to occupy, possess and enjoy any tract or portion thereof, shall be respected in law and equity in all the courts and tribunals of this Territory as a chattel real *possessing the legal character of real estate.*"

The closing phrase of this section is remarkable, except in the light of the end which the legislature had in view.

The legal character of a chattel real at common law was personalty, and had the phrase "possessing the legal character of real estate" been omitted, title by occupancy would have been personalty under this act; been dealt with as such, and descended as such. This phrase clothes it with the different and higher character of real estate. That such was the design and intention of the legislature, we find abundant evidence in other provisions of this and other statutes.

The next section provides for a declaration in cases of original occupancy and for transfer *by deed*, duly acknowledged by some officer authorized to take acknowledgments of deeds, in cases of purchase, and for their registry in the office of the recorder of the proper county.

The next section declares that the owner of every such claim shall have a transferable interest which may be sold on execution. In the form of declaration prescribed by the 5th section, the occupant claims the lands described "together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining," and the record was to be received in evidence in all legal and equitable proceedings. It may be said generally that they passed all the laws usual in the older States, for the regulation of landed property held in fee, and brought title by occupancy within their meaning, either by express provision, or by a general law declaring that in the construction of statutes, the words "land or lands," and the words "real estate," shall be construed to include lands, tenements and hereditaments and *all right thereto and all interest therein*. 1 Sess. Laws. 107.

This brought title by occupancy within the meaning and provisions of the acts "concerning conveyances" of real estate, registration, partition, fraudulent conveyances, etc. The occupant could maintain trespass *quare clausum fregit*, ejectment, and forcible entry and detainer for injuries done to the possession. These are all actions applicable only to real estate, and we see, as we cannot but see,

a clear purpose upon the part of the legislature to raise title by occupancy to the dignity of real estate, and to surround its tenure with all the safeguards, its transfer with all the formalities, and its enjoyment with all the securities of a fee simple title.

Thus, upon the adjournment of the first legislature, except as against the United States, and subject to be defeated by abandonment, the *bona fide* occupant held his lands by a tenure as secure against attack, intrusion and disseizin, as the owner of the fee at common law; and with the exceptions named, had a title good against all the world. Such an occupancy is neither correctly nor justly characterized as a "mere naked possession."

A term which implies a purely physical possession, which supposes no law, which is independent of all law, and such as existed prior to all law; such a possession disappeared upon the death of the possessor, because it existed only in a physical sense. But we are not dealing with any such occupancy. By virtue of the legislation named, occupancy became an investive act, the law operated to give this effect to the fact. It was the commencement of legal landed rights. It invested the occupant with a tenure, assertable and defensible in mode and manner, as the highest estate known to the common law. It was not, therefore, a mere "naked possession," but as contradistinguished therefrom a legal possession, under the sanction, recognition and protection of the law.

Having thus shown the general course of legislation, and its manifest purpose, evidenced in so many ways to set its seal upon occupancy as real estate, we have smoothed our path to the end in controversy.

Real estate is a leading term in this inquiry, and it is necessary to keep in view its signification, to wit, "something that may be held by tenure, or will pass to the *heir* of the possessor at his death instead of his *executor*, including lands, tenements and hereditaments, whether the latter be corporeal or incorporeal." Bouv. Law Dict., title "Real Property."

Having placed title by occupancy upon the footing seen, it would have been strange, indeed, if the legislature had made no provision suitable to the legal character given it, for its disposition upon the demise of the occupant. We find in the Laws of 1861, p. 246, the following provision : "Whenever any person having title to any real estate, or property having the nature or character of real estate, * * * shall die intestate as to such real estate, it shall descend * * * in the following course and manner."

Whether we interpret the words "real estate," by the definition fixed by statute already alluded to, or with reference to its nature or the legal character with which title by occupancy had been invested, under either view or all, we can, we think, without subtlety or forced construction, hold such an estate inheritable.

We are unable to see any force in the argument that it descends as personalty. If it descends at all it is in and with the legal character which the law has given it.

There is nothing in the law which obliterates its legal character upon demise, nor is there any thing that invests it with another and different character upon transmission to the heir. Upon the death of Richardson, therefore, his heirs became co-tenants with Hawley H. Gillett of the premises in question. They were tenants in common, for a joint tenancy can only be created by purchase, or act of the parties, and not by descent or act of the law. 1 Wash. R. P. 643, 645.

Soon after Hawley H. Gillett made a sale and conveyance of an one-half interest in the premises to his brother George, and in August, 1865, the two received a deed from the probate judge therefor.

Hawley H. Gillett had no power or authority to sell the interest of Richardson's heirs; and had his power been full and complete, the deed which he executed conveyed only his individual interest. He describes himself as surviving partner of the late firm of Richardson & Gillett in the body of the deed, and as an addition to his signature

thereto. Farther than this, no mention is made of Richardson or his heirs, or of his or their estate. On the other hand, the deed, in words, conveys the right, title and interest of Hawley H. Gillett in and to the premises. One having a power to sell lands and also an interest in his own right in the same lands, his deed of the lands making no mention of the power, will convey only his own interest. If all the words of a deed or will can have an effect given to them, and are operative upon property or rights, without being taken as the execution of a power, they will not be the execution of such power. Perry on Trusts, § 511 c; 2 Wash. R. P. 665, § 33, and cases cited.

The bill was framed and the trial below proceeded upon the theory that the deed in question conveyed the interest of Richardson's heirs, while the decree implies that it conveyed the moiety of their interest. Both views are erroneous. The effect of the deed of Hawley H. Gillett to his brother George was to sever his relations as co-tenant with the heirs of Richardson and to substitute his grantee. Subsequently they acquired the fee by deed from the probate judge, who had entered the town site in trust, etc. This brings us to a consideration of the relations which George Gillett sustains to this case.

It is a well-settled rule governing the trust relation which co-tenants sustain, that if one tenant acquire an outstanding title, he will be considered as holding it in trust for his co-tenants, subject to the right of being reimbursed *pro rata* his moneys paid out in acquiring the title. 1 Wash. 686, § 14.

George Gillett was a co-tenant, and acquired an outstanding title, but should he be held to respond to the claim of his co-tenants, under the foregoing rule, under all the circumstances of the case? Here was a co-tenancy; the fee was in the United States; it had been entered in trust for the *bona fide* owners and occupants; the mode in which they should proceed to perfect their title was prescribed; it was necessary that the occupant should take

certain preliminary steps to that end ; he must file his application within ninety days stating, among other things, the specific interest or estate that he claimed, and make this proof of occupancy. The heirs of Richardson took no steps toward perfecting their title to this interest in this property under the law. George Gillett, on the other hand, complied with the statute and perfected his title to his one-half interest ; this much was his right to do under the law. Had he acquired the title to the half belonging to the heirs as well, equity undoubtedly would have held him as trustee as to that half for the heirs of Richardson. But he had no right or authority under the law to apply for the entire lot in his own right, and we cannot say that it was his duty to have voluntarily constituted himself their agent and applied in their name. Can it be said, under such circumstances, that he comes within the rule touching co-tenants as trustees in case of the acquisition of an outstanding title ? We think not. The heirs of Richardson having failed to take any steps toward perfecting their title, have no legal or equitable claim to participate in the title acquired by George Gillett. It would reduce his half interest to a quarter interest by reason of the neglect of the parties participating in the fruits of his greater diligence and care. It would be in all cases to reduce the half interest of the co-tenant to a quarter interest where one perfected his title, and the other neglected it. Neither can he be called upon to respond for rents and profits in the absence of any allegation in the bill that he has received more than his proportionate share. He sustains no relation to the complainants that entitle them to a decree against him, and the bill as to him must be dismissed, unless it be so amended as to make him a proper party. The relations which Hawley H. Gillett sustains to this case are altogether different. He was the surviving partner of Richardson, engaged in and by the law intrusted with the settlement of the partnership estate. The bill alleges that these premises were purchased with partnership funds. It is not denied by the answer,

which, on the other hand, admits the improvements thereon to have been made by partnership funds, and avers that the surviving partner dealt with the lots as part of the partnership assets. Belonging to the partnership, equity would, if necessary, have applied it to the payment of the partnership debts, or enforced against it the lien of the survivor, for any balance due him upon settlement of the partnership accounts. Parsons on Part. 371*, 372*, 374*, 441*, note *p*.

The death of a partner invests the surviving partner with the exclusive right of possession and management of the whole partnership property and business, for the purpose of settling and closing up the same. Parsons on Part. 440*. It is one of the most important trust relations. The survivors are from the death *trustees* for all concerned in the partnership for the representatives of the deceased, for the creditors of the firm, and for themselves. Their trust is to wind up the partnership matters in the best manner possible for all interests. Parsons on Part. 442. How far surviving partners would be entitled to the possession of partnership real estate we do not decide, but the trust relation exists as to it as well as to the personalty. They are held strictly and to the utmost good faith and fair dealing, and their conduct in discharging this trust is looked after with a jealous eye by courts of equity. *Id*. If there be negligence, delay, misconduct or mistake, equity will interfere and give proper relief. *Id*. No affirmative acts on the part of the heirs of Richardson were necessary to create this relation; the law established it for them and imposed the trust. Hawley H. Gillett was perfectly cognizant of the rights of Richardson's heirs in and to the undivided one-half of this property, and, in his double relation of surviving partner and co-tenant, had possession of, and control over it. Whether it was his duty, under the relation which he sustained, to have made application for title under the town site act for the heirs of Richardson, as their agent, it is not necessary to determine. Having sold and conveyed his own interest in the property, and after-

ward filed his application jointly with his grantee for the entire property, we must hold him to have acted as the agent of Richardson's heirs in making this application and to hold the property in trust for their use and benefit.

Equally under another view, we think he must be held to the same responsibility. From the death of Richardson until his deed to his brother George, he was the co-tenant of Richardson's heirs. He was in possession, and his possession was theirs as well as his own, and for their benefit so far as preserving their title thereto. 1 Wash. R. P. 656, § 7. During this period he applied to the probate judge for the title to the entire property as "surviving partner of the firm of Richardson & Gillett." For some reason, the written application was not completed. Subsequently on the 10th of July, he sold and conveyed his undivided interest in the premises to his brother George. On the same or the next day, he united in a joint application to the probate judge, under which the entire property was conveyed to them as legal owners thereof. The former uncompleted application was used, the words "surviving partner of Richardson & Gillett" being erased.

Had his first application been perfected and title acquired under it to the entire premises, clearly his relation as co-tenant would have devolved upon him the character of trustee as to one-half of the property. Can he be permitted to evade this responsibility by severing his relations as co-tenant, without notice, upon one day, and acquiring the outstanding title the next? We think not, under the circumstances of this particular case. He was at liberty to sever his relations as co-tenant by his deed to his brother George, and cannot be held, strictly speaking, to respond as in case of a co-tenant acquiring an outstanding title, but his acts constitute a fraud upon the heirs of Richardson in their results, if not in intention, of which a court of equity will not allow him to gather the fruits.

The heirs of Hawley H. Gillett took his interest in the premises charged with these equities, and must be held to hold it in trust for the complainants.

It is claimed, however, that the registry of the deed from the probate judge to Hawley H. and George Gillett was notice to the complainant, Mrs. Gaffney, of the facts which constituted the fraud, and that she is barred by the statute of limitations.

A deed duly recorded is constructive notice of its existence, and of its contents, to all persons claiming what is thereby conveyed under the same grantor by subsequent purchase or mortgage, but not to other persons. 3 Wash. R. P. 319, § 53. In the case of *Maul v. Rider*, 59 Penn. 167, SHARSWOOD, J., says: "That the record of a deed is constructive notice to all the world, is too broad an enunciation of the doctrine. Such record is constructive notice only to those who are bound to search for it as subsequent purchasers and mortgagees, and all others who deal with it on the credit of the title in the line of which the recorded deed belongs."

There is nothing in the registry laws in force at the time of the record of the probate judge's deed, that would authorize us to charge Mrs. Gaffney with notice of its existence or contents.

For the rents collected by Hawley H. Gillett after the death of Richardson, and prior to his own death, his estate must respond, and his administrator, Webster, is therefore a proper party.

The decree of the court below must be reversed, with leave to the complainants to amend their bill in accordance with the views expressed herein.

And, as it is possible, though we are not prepared to say this appears from the evidence, that Hawley H. Gillett may have acted through mistake, and may have paid over the proceeds of the sale to George Gillett, to the complainants in some authorized way, his representatives and heirs will have leave to file their cross bill, under which their equities, should any be made to appear, can be protected.

Each party to have leave to take further testimony, if so advised.

Decree reversed with costs.

Reversed.

WELLS, J. I concur in what is said above, but, to avoid any misunderstanding, I desire to say that I see nothing in the testimony which warrants making the moneys paid by Hawley H. Gillett to the widow and personal representative of his deceased copartner, a charge on the share of the infant complainant. I think that if any payments shall be shown to have been made under such circumstances as to warrant an allowance for them, in the account of rents and profits, they must be set off against the share of the widow only.

TITLE BY OCCUPANCY OF TOWN-SITE LOTS IS AN INTEREST IN REALTY, and subject to conveyance by deed (*Sears v. Taylor*, 4 Colo. 40; and such title is descendible: *Filmore v. Lettman*, 6 Colo. 124; *Blatchley v. Coker*, 6 Colo. 352.

SURVIVING PARTNERS ARE GOVERNED BY THE RULES applicable to ordinary trustees, and must use the same care, diligence, and good faith: *Salisbury v. Ellison*, 7 Colo. 169.

MOYNAHAN v. THE PEOPLE.

1. The statute of variances and amendments does not extend to indictments for crimes, and the misnomer of third persons necessarily mentioned in an indictment is fatal.
2. An indictment for the murder of Patrick Fitz Patrick, where the true name is Patrick Fitzpatrick, held fatally defective.

Error to District Court of Fremont County.

At the November term, 1876, of the district court, Moynahan, the plaintiff in error, was indicted for the murder of Patrick Fitz Patrick, tried and convicted. It appeared upon the trial that the name of the deceased was Patrick Fitzpatrick. The court instructed the jury upon the question of the name that "the jury must also believe from the evidence that the name of the deceased alleged in the indictment to have been killed, was Patrick Fitzpatrick, in order to find the defendant guilty."

The second and third instructions were as follows :

"2. If the jury believed from the evidence that the defendant killed the deceased, in the manner described in the indictment, animated and prompted so to do by the impulse of revenge and not irresistible passion, and that previous to the act of killing (and it is immaterial how short the time, even a minute being sufficient) if the defendant formed a

deliberate intention to take the life of the deceased, then the court instructs the jury that the killing under such circumstances would be in law deliberate, premeditated murder, and you should in such case indicate in your verdict, whether the killing was done with deliberation or premeditation."

"3. Manslaughter is the unlawful killing of a human being without malice either express or implied, and without any mixture of deliberation whatever, it must be voluntary, upon a sudden heat of passion, caused upon a provocation apparently sufficient to make the passion irresistible. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible, for if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and deemed murder."

Messrs. SMITH & MACON, for plaintiff in error.

A. J. SAMPSON, Attorney-General, for defendants in error.

WELLS, J. In the indictment upon which the plaintiff in error was arraigned, the deceased, where first mentioned, is designated as Patrick Fitz Patrick; the three words composing the name being written separately, and each with a capital initial. In the two succeeding allegations in which the injured person is mentioned he is described as "the said Patrick Fitzpatrick"; the syllables composing the name being divided into two words only. In all the allegations which follow, he is described as in the first instance.

Assuming for the present that the differences which have been noticed in the orthography of the name are to be regarded; that the indictment, therefore, is to be understood as designating the deceased person variously, the question first presented is, by which of these variant descriptions is the prosecutor concluded? Upon one or the other it is supposed he is bound to stand; for certainly it would be

an unprecedented departure from the precision which has been regarded as requisite in criminal accusations, to support a conviction of felonious homicide of one person charged, as ensuing the assaulting and wounding of another.

The case of *Commonwealth v. Hunt*, 4 Pick. 252, is somewhat analogous to the present. The indictment charged that the defendant, in and upon one Peddy Harvey, did make an assault, and her the said Peddy *Hunt*, did beat, wound and ill-treat, with intent, her, the said Peddy Harvey, to ravish and carnally know; and for this repugnancy objection was taken. But the court were of opinion that the whole clause containing the misnomer was surplusage, and might be rejected without impairing the residue.

In *Greeson v. The State*, 5 How. (Miss.) 42, indictment for robbery,—the assault and putting in fear was charged as done upon the person of Richard Gaines, and certain money obtained by the robbery was described as the property of the said Richard Gaines; in a subsequent recitation it was referred to as “of the property of the said *Robert Gaines*.”

On error, the latter recital was rejected as surplusage, and the conviction had below was affirmed.

In *Rex v. Morris*, 1 Leach (4th Ed.), 109; 1 Bish. Cr. Pro., § 481, the indictment contained an averment as follows: “that Francis Morris, the goods and chattels above mentioned so as aforesaid feloniously stolen, taken, etc., feloniously did receive and have, he the said Thomas Morris, well knowing the said goods and chattels to have been feloniously stolen, etc.” It was objected that the only person to whom the indictment imputed the guilty knowledge requisite to make the receiving criminal was another than the receiver; and therefore the indictment could not be supported. But, held that without the words “*the said Thomas Morris*,” the indictment would be sensible and sufficient; and that, therefore, the misnomer should not vitiate what was otherwise certain.

In the *State v. Hand*, 1 Eng. (Ark.) 165, the indictment described the defendant, where first mentioned, as “Haw-

kins ——— late of, etc.;" wherever mentioned subsequently he was described as "the said Hawkins Hand." Plea in abatement, that his name was "Hawkins Hand," and not Hawkins, and demurrer thereon. The court were of opinion that the relative 'said' accompanying the full name where first shown, must be understood to refer to the name Hawkins, previously given, and that the reference could neither add to, nor diminish the antecedent allegation. It was therefore concluded that if any one was presented, it was "Hawkins," and not Hawkins Hand; the demurrer was accordingly overruled.

These cases countenance the propriety of applying the maxims against surplusage, and false demonstration to criminal indictments; and establish the proposition, that when the name of the accused, or injured person, is given variantly, in different parts of the indictment, the first allegation shall control; and the variant allegation appearing subsequently, shall be rejected, if thereby repugnancy is avoided, and the indictment made sensible.

In the present case the deceased person having been once described by a full christian and surname, it would have sufficed to refer to him afterward by the christian name only. *State v. Pike*, 65 Me. 118. The surname, Fitzpatrick, therefore, which, according to the hypothesis, varies from the name previously given, may everywhere be rejected, and the indictment read as if in those places, it had mentioned the defendant as "the said Patrick," only. According to this interpretation, the indictment everywhere describes the deceased person as Patrick Fitz Patrick.

But the evidence sufficiently indicates that the surname of the deceased was Fitzpatrick; and the question next presented is, whether the name so proven is fatally variant from that ascribed to the deceased in the indictment.

To enlarge upon the propriety and humanity of requiring the officer charged with the pleas of the people to distinctly inform the accused of the name of the person whose private injury mingles with the public offense would be but a waste

of words. It is sufficient to say the law requires it. Those cases where the name is unknown, or the person injured is an unchristened infant, are, it is believed, the only exceptions to the rule; and in these cases, the fact which excuses the averment of the name must be both alleged and proven.

In all civilized communities, for many centuries past, at least, it has been found necessary to the convenient identification of individuals, that every person should bear both a family or surname, and a name of baptism. Even in ordinary discourse, no one would venture to designate a third person by the christian or surname alone, unless of the same family with the speaker or person addressed, or an intimate friend of one or the other.

The same reasons which seem to have dictated the common form of appellation apply with greater force in the case of a criminal accusation. The indictment ought, therefore, to set forth both the christian and surname; and while neither the grand jury nor the prosecuting officer are bound to observe the proper orthography, it seems very manifest that the christian and surname must be so inscribed in the indictment, that by inspection they may conveniently be distinguished. To dispense with this measure of precision is in effect to dispense altogether with alleging the name of the injured person, as may easily be illustrated.

In the *State v. Kean*, 10 N. H. 351, McKusic was held properly written with the abbreviation Mc. The conclusion probably would have been the same if the prefix had assumed the other abbreviated form, of the capital followed by the apostrophe. In either case the abbreviation indicates a prefix merely, and must be taken as part of the name which follows. But if, instead of the abbreviation, the word had been written at length, and in a form in which as a surname it is frequently found, and separated by a considerable space from the residue of the name, we think it must have been regarded as constituting a part of the christian name. So if the capital M alone had been used, followed by a period, and separated as before supposed, it must have been taken to be the abbreviation of some middle name, and

not as a prefix to the surname. There are many surnames in common use, in some instances also bestowed as a part of the christian name, in respect to which a departure from the canon requiring christian and surnames to be distinguished, will inevitably occasion confusion and variance.

Suppose the indictment to charge larceny of the goods of John King Mann, when in truth the name of the owner is John Kingman, or an assault upon William Green Field, or Henry Young Blood, where the surname of the injured person is, in fact, Greenfield or Youngblood; no one would for a moment suppose that a conviction upon such averment and such proof could be supplied.

The surname of the deceased, as proven at the trial, is of similar formation with some of those which I have instanced. The first syllable was originally, it is believed, a mere prefix, the paternal name retaining independent form, and conveying a distinct idea. At the present day, however, the two are invariably written, pronounced and accepted as one name. I am unable, at least, to find in the voluminous tables of cases which accompany the digests of the reports of this country, nor in any of the gazetteers, directories, or tables of names, which are accessible to me, any instance where they are written as the name of the deceased person is written in this indictment. Moreover, what here appears to be written as the middle name is occasionally found as a christian name. It has also attained to the dignity of a surname, and, with a various orthography, is borne by a family which appears to be widely disseminated, as, if necessary, may be established by reference to the judicial reports. *Commonwealth v. Fitz*, 11 Mass. 540; *Brown v. Fitz*, 13 N. H. 283; *Alden v. Fitts*, 12 Shep. 238; *Fitts v. Cook*, 5 Cush. 596; *Boston v. Fitz*, 4 id. 365; *Kendall v. Fittz*, 2 Foster; *Fitts v. Fitts*, 14 Texas, 443; *Harwell v. Fitts*, 20 Ga. 723; *Fitts v. Brown*, 20 N. H. 393; *Little v. Fitts*, 33 Ala. 343; *Fitts v. Whitney*, 32 Vt. 589; *Moore v. Fitz*, 15 Ind. 43; *Robbins v. Fitz*, 33 N. Y. 420; *Fitz v. Minnesota, etc., R. R. Co.*, 11 Minn. 414; *Fitz v. Reichard*, 20 La. Ann. 549; *Fitts*

v. *Davis*, 42 Ill. 391; *Fitts v. Morse*, 103 Mass. 164. The name which follows is also a well-known family name. The matter stands therefore in this wise: According to the orthographical usages of the language, the deceased person is in this indictment awarded three names, the surname being Patrick. The only other surname which the prisoner from inspection of the indictment could possibly conjecture to be intended, is that proven at the trial; and that surname is by the common and perhaps invariable usage written without any such division of syllables as here exhibited. What is here set down as the middle name, or part of the christian name, is in common use both in this character and as a surname. The fashion prevails in our generation to perpetuate the family name of the mother in that of the son.

All these considerations conspire to dissipate whatever effect might by suspicion be attributed to the repugnant designation before mentioned. To the mind of an indifferent person, familiar with the orthography of proper names in our language, and uninformed in the name of the person where death is alleged, this indictment would, therefore, it seems to me, have appeared to charge the felonious homicide of a person bearing the christian name of Patrick Fitz, and the surname of Patrick.

It follows, therefore, that the indictment failed of its office. It afforded the prisoner no information as to the person with whose death he is charged. If the result had been favorable to him he could not have availed himself of this record to bar another indictment, without producing evidence *aliunde* to identify the person named as the murdered man, in the new indictment, with the person who appears in that character in the present one; a burden, which neither the grand jury, nor the prosecutor, nor the courts have any power to impose.

It will not suffice to say that the prisoner has not been misled. In the resent state of the law we are not permitted to say this. It is presumed that every accused

person is both innocent and ignorant of the offense alleged in all its substance and detail ; and, therefore, it is that the law requires a specific charge of the whole matter, with all its particulars. It will be time to excuse the misnomer of third persons necessarily mentioned, when the legislature shall have extended the statute of amendments and variances to criminal indictments. The plaintiff in error has been convicted of the murder of one person upon evidence which relates altogether to another.

That portion of the charge to the jury which relates to this question was, therefore, erroneous.

In the residue, I am not able to discover error. The first and third instructions are based upon the statute, and conform to it. The second, in so far as it requires the jury to find premeditation, if the specific intent to kill existed at the time of giving the fatal wound, is entirely justified by the case of *Hill v. The People*, 1 Col. 436.

If by possibility the jury could have been misled by the generality of this part of the charge as to the essentials of manslaughter, the third instruction, following it immediately with a correct statement of the law, must have removed the false impression.

Judgment reversed and cause remanded.

Reversed.

RHOADES v. DRUMMOND.

1. In an action of trover, where there has been an illegal taking by the defendant, no demand is necessary before bringing suit.
2. An objection that the bill of exceptions was filed after the adjournment of court cannot prevail, when it appears that there is a stipulation between counsel that the same might be signed out of term, and be of the same force as though signed in term.

Error to District Court of Bent County.

Mr. CHAS. E. GAST and Mr. JOHN F. BOSTWICK, for plaintiff in error.

Mr. CHAS. S. THOMAS, for defendant in error.

ELBERT, J. The evidence in this case shows an illegal taking; this was a conversion on the part of the defendant and no demand was necessary. 1 Chitty's Plead. (16th Am. Ed.) 173.*

No special demand is alleged in the declaration, and if it had been, need not have been proven. 1 Chitty's Plead., § 342.*

The objection that the bill of exceptions was filed after the adjournment of court and that the record does not show that time was given in which to prepare the bill and file the same cannot prevail. There was a stipulation between counsel, that the bill of exceptions might be signed out of term, and be of the same force as though signed during the term. In the case of *Murphy v. Cunningham*, 1 Col. 470, it was held that the verbal agreement of parties or counsel might supply the absence of an order by the court giving time in which to prepare and file the bill.

The court erred in sustaining the defendant's motion for nonsuit, and the judgment must be reversed and remanded for further proceedings according to law. *Reversed.*

BILL OF EXCEPTIONS SIGNED IN VACATION is no part of the record, if there is no stipulation of the parties and no order of court allowing this to be done: *Jordan v. Finley*, 4 Colo. 190.

ROBINSON v. AUSTIN.

In an action of replevin under the statute (Laws 1876, p. 116), where the officer fails to give the defendant an opportunity to execute the statutory bond and retain possession of the property, the defendant may on motion and proper showing have the property restored to him, or he may have his action against the officer. The neglect of the officer is not a ground for dismissing the suit.

Error to County Court of Boulder County.

REPLEVIN brought by plaintiff in error in the county court of Boulder county, at the October term of said court, 1876, to recover possession of one sorrel stallion colt, four years old, and thirty tons of hay. The value of the colt being placed by the appraisement at \$160 and the hay at \$300.

The affidavit was made and filed with the clerk of the county court, on the 5th day of September, 1876, and writ issued the same day. The sheriff served the same by reading the writ and delivering a copy thereof to defendant, and taking into his possession the property named in the writ, and notifying the defendant of that fact, all on the same day. The sheriff on the 9th of September caused the property to be appraised, and on the 10th delivered the same to the plaintiff and took bonds of him ; the defendant not tendering any bond.

Plaintiff filed his declaration September 29th, 1876. On the 11th day of October, 1876, the defendant in error filed his motion to quash the writ of replevin and to dismiss the suit, and asked for a return of the property. The motion was sustained.

Mr. ALPHEUS WRIGHT, for plaintiff in error.

Messrs. BERKLEY & BLAKE, for defendant in error.

ELBERT, J. The facts in this case are similar to those presented in the case of *Parlin v. Austin* (*ante*, p. 337) decided at the present term.

It was there held, that the fact that the defendant in the replevin suit had been given no opportunity to execute the statutory bond, and retain the replevied property under the provisions of the act of 1876, by reason of the failure of the officer executing the writ to have the replevied property appraised within the three days fixed by law, was no ground for dismissing the writ.

In such case the defendant has his action against the delinquent official, or may on motion and proper showing have the property restored to him upon executing the requisite statutory bond.

The judgment of the court below is reversed, and the cause remanded for further proceedings according to law.

Reversed.

IN REPLEVIN, NEGLECT OF OFFICER to allow defendant opportunity to execute the statutory bond and retain the property is not ground for dismissal of the suit, but the defendant should move for restoration of the property on giving bonds: *Wyatt v. Freeman*, 4 Colo. 15.

FREAS et al. v. ENGELBRECHT et al.

1. After a general demurrer to a declaration is overruled, the defendant is precluded from moving in arrest of judgment for defects in the declaration.
2. After pleading over to the merits the defendant cannot assign error upon the overruling of his demurrer.
3. The dismissal of an appeal for want of prosecution in the supreme court, is not equivalent to an affirmance of the judgment appealed from.

Error to Probate Court of Gilpin County.

ACTION of debt on an appeal bond. The defendants in error obtained judgment in the probate court of Gilpin county against Freas, one of the plaintiffs in error, for the sum of \$301.75. Freas appealed to the supreme court and gave bond with Thomas and Wentworth as his sureties. The appeal was dismissed in the supreme court by defendants in error, for want of prosecution. The defendants in error thereupon instituted suit upon the appeal bond in the probate court of Gilpin county. The declaration sets up a joint and several bond, conditioned in the usual form, that Freas should prosecute his appeal with effect, and should pay the amount of the judgment together with interest and costs in case the judgment should be affirmed in the supreme court, etc.; the declaration further avers the dismissal of the appeal, and the breach assigned is that Freas had "not paid the amount of said judgment in said writing obligatory mentioned," whereby an action had accrued, etc. The defendants below filed a general demurrer to the declaration, the demurrer was overruled and thereupon Freas and Thomas (Wentworth not having been served) severally pleaded over to the merits; Freas interposing seven pleas and Thomas eight; demurrers were filed and sustained to some of these pleas and overruled as to others. These pleas are all commented on in the opinion of the court, and further reference to them in this place is unnecessary. A jury was waived and the cause tried by the court. It also appears that the parties agreed that the

amount due upon the original judgment was \$291.62. The court gave judgment in that amount as damages, together with costs against Freas and Thomas, to reverse which judgment, this writ of error was sued out.

Mr. L. C. ROCKWELL, for plaintiffs in error.

Mr. ALVIN MARSH, for defendants in error.

WELLS, J. 1. Having demurred generally below, the plaintiff in error was, it seems, precluded from moving in arrest of judgment for defects in the declaration. *Freeman v. Camden*, 7 Mo. 298; 2 Tidd, 740*, 918*; *Nouse v. The County of Peoria*, 2 Gilm. 106; *Graham's Prac* 641.

And having pleaded matter of fact after the overruling of his demurrer, he is precluded now from assigning error upon that decision. We have searched in vain for authority which will relieve from this absurd dilemma. The declaration, whatever it may contain, is, so far as any inquisition of error is concerned, a sealed book. The plaintiff in error, by the inconsiderate course pursued in pleading in the court below, has rendered it impossible for us to entertain the interesting questions which were principally discussed at the bar.

2. The second plea of the defendant Freas was probably not obnoxious to general demurrer. He was certainly at liberty to traverse the allegations of the narr., touching the proceedings in the supreme court; and this we suppose to be the effect of the plea in question; there was error, therefore, in sustaining the demurrer to this plea.

But the only effect of allowing the plea would have been to require the production of the record; and this was produced at the trial. It seems to us, therefore, that we ought not to reverse the judgment for the error in sustaining the demurrer.

The third plea set up matter of law only, and presents the same issue which had before been determined on demurrer to the declaration. The demurrer to this plea was, therefore, well sustained.

The fourth plea amounts to *nul tiel* record, to the judgment of the supreme court averred in the declaration. The effect of the judgment upon the demurrer to this plea is dependent upon the same considerations before adverted to in the case of the second plea.

The fifth plea is, of course, bad. The defendant Thomas pleaded separately the same pleas as his co-defendant, in the same order and form: except that his third plea sets forth his character of surety. The result as to the issues of law joined upon these pleas is the same as in the case of the pleas pleaded by the defendant Freas.

The additional plea of *nul tiel* record pleaded by this defendant was also bad. *Arnott v. Friel*, 50 Ill. 175. The result upon the whole record is that in determining these issues of law no material error which is open to examination was committed.

The issues of fact which were submitted were those arising upon the first plea, *non est factum*; the sixth, *performavit omnia*; the seventh, which is an immaterial issue, and the eighth plea of the defendant Thomas, which avers general performance by his co-defendant. The evidence produced by the plaintiffs was entirely sufficient to maintain the affirmative, which rested upon them. They produced the identical bond which they had averred in the declaration, and a transcript from the records of this court, which exhibited that Freas' appeal had been dismissed for default of prosecution, as the declaration alleged. The objections interposed to this evidence were properly overruled. The plaintiffs were entitled to maintain the issue which defendants had joined with them; the substantial insufficiency of the matters involved in these issues, to charge the defendants, was matter of objection at another stage of the cause. *Great-house v. Robinson*, 3 Scam. 9. Having established what they had alleged, however insufficient, the plaintiffs were entitled to have the issues of fact resolved in their favor. *Safford v. Stevens*, 2 Wend. 158; *Harley v. Wheeler*, 4 Jones, 162. The remaining question, which is presented by the assign-

ment of errors, regards the assessment of the plaintiffs' damages. These were estimated in the court below at the amount remaining unpaid of the judgment appealed from. It is argued that inasmuch as by the declaration it appears that the appeal of the defendant Freas was dismissed and the judgment from which the appeal was taken was never in terms affirmed in this court, the defendants are in no event liable for more than nominal damages.

The question presented, therefore, is whether the dismissal of an appeal from the district court to the supreme court is under the Territorial statute (R. S., ch. LXX, § 41) equivalent in its effect to the affirmance of the judgment. An affirmative response to this question was given in the case of *Haz v. Leis*, 1 Col. 187; but an examination of the report will make it apparent that the appeal in question in that case had been dismissed for the failure of appellant to give bond within the time limited by the order allowing the appeal; the effect of the dismissal for that cause was the question there presented, and in so far as that question differs from the one arising upon the present record, the remarks of the learned justice, who gave the opinion, were entirely extra-judicial, and neither conclude us nor excuse from an independent examination of the question.

The appellant, on executing the appeal bond and procuring his sureties to unite therein with him, must be presumed in every case to contemplate a compliance with the statute, and no more; except for the requirement of the statute, it may safely be assumed, he would not have given bond at all. The true question, therefore, is, what was the legislative intent in this requirement. The 41st section of the Practice Act (R. S. chap. LXX), after allowing the appeal, provides that within a day to be limited, etc., the appellant shall give bond conditioned "for the payment of the judgment, costs, interest and damages in case the judgment shall be affirmed, and also for the due prosecution of the appeal." The arrangement of the members of this sentence and the phraseology of the second clause are worthy of

remark. Two things are required of the appellant in order to save the bond : (1) To pay the judgment in case it shall be affirmed. (2) To make due prosecution of the appeal.

Looking to the letter of the statute alone, it seems impossible to say that affirmation of the judgment was in contemplation of the legislature, as incidental to a discontinuance of the appeal ; for, if so, why should the second condition have been added ; according to this interpretation, appellee was protected at every point by the first condition ; and the second is meaningless. An interpretation which, without any imperative necessity, reduces one of two harmonious clauses of the statute to empty verbiage, ought not to be adopted.

Looking beyond the statute, all the analogies of the law are opposed to the interpretation for which the defendants in error contend.

The appeal is merely cumulative to the common law process of writ of error. The statute which gives the former, does not take away the latter. The party may in the first instance, as will be confessed, adopt either, at his pleasure.

The appeal, if that method be pursued, performs the office of the writ of error, has the same effect, and is governed by the same rule in every respect, save in the single instance that an appeal, when perfected, stays by its own force the execution of the judgment, while upon writ of error, supersedeas is awarded only upon the order of some justice of this court. And so it was under the Territorial law.

Now if the dismissal of the appeal for want of prosecution operates to affirm the judgment, and so preclude the suing out of a writ of error, voluntary discontinuance of the appeal must be attended by the same consequences. And if the voluntary or negligent omission to prosecute an appeal has the effect attributed to it, it will follow that the abatement of the first writ of error, where the party adopts this instead of the statutory remedy, should bar any second writ of error. But this is not the law. Tidd's Prac. 1154;

Birch v. Triste, 8 East, 411; *Power v. Frick*, 2 Grant's Cases, 306.

Though the second writ of error will not, it seems, be made a supersedeas, where the first was discontinued for the default of the plaintiff in error.

Where the statute gives an appeal from the judgment of an inferior court, not as a process of review, but as the means of affording a new trial in the superior court, it must be conceded that the dismissal of the appeal has the effect to render the judgment unimpeachable, for there is no longer any process afforded by which the same questions and matters of controversy can be again agitated between the same parties, or the errors committed upon the first trial reviewed.

But in every other instance, it is believed, unless the present case be also an exception, the discontinuance of legal process, for default of the party instituting it, has no other effect than to charge him with costs, and perhaps a pecuniary penalty for the apparent injustice of making a false and groundless plaint. In other respects, it remits him to his original position.

He may renew his action in any court having jurisdiction and in the same form, or any other which is appropriate to the case. It was never heard that judgment of *non pros* at law, or the dismissal of a bill in equity, expressly for default of prosecution, would bar another suit at law, or a new bill in equity for the same cause. The judgment or decree it is said is but "the blowing out of a candle which a man may light again at his pleasure." *Freem. on Judg.*, § 261; 1 *Danl. Ch. Pr.* 659.

Now can any controlling reason be assigned for a distinction between process in error, and other legal process? Is not the injury inflicted by an unjust judgment as grievous in itself, as serious in its consequences, as worthy of redress, as another form of injury? Is the failure to prosecute an appeal so much more deserving of censure than the same default in respect to all other forms of litigation?

These questions must be answered in the negative. It

may be said that by the judgment below, the party prevailing is *prima facie* established in his title to that which is adjudged to him, and ought not to be delayed in having the lawful fruits of his recovery by an interminable series of appeals and writs of error, successively discontinued by default of his adversary. But the allowance of process of review in the first instance implies that the judgments even of superior courts are not above the suspicion of error, and if after the first appeal or writ of error, supersedeas be denied (as it seems is the rule), the inconvenience to the defendant in error is not more striking than in other cases. Moreover in the case of appeals, the appellee is in general indemnified for the delay which he has sustained by the damages which the law awards upon discontinuance.

Upon reason and analogy, therefore, the discontinuance of an appeal ought not to be treated as an affirmation of the judgment.

Considering the question in the light of authority, it may be admitted on the threshold, that where no other remedy for error in the judgment of an inferior court is provided, and the appeal be dismissed for any cause, the effect is to put the judgment beyond question, and so discontinuance of the appeal is equivalent to affirmance. This distinction disposes of *Karth v. Light*, 15 Cal. 326, and the other cases in the same court which follow that case, for by the rules of that court, in force long before the discontinuance which was then in question, no second appeal is entertained, and as appears by *Haight v. Gay*, 8 Cal. 300, no writ of error lies there in these cases where an appeal is given. The same distinction destroys the effect of *McConnell v. Swailes*, 2 Scam. 572; *Sampson v. Prather*, 5 Oreg. 86; *Bull v. Hammill*, 7 How. (Miss.) 111, and other cases in that court. As for the case of *Caldwell v. Hawkins*, 46 Mo. 263, and the other cases to which we are referred from the reports of the same court, and where, upon dismissal of appeals for want of prosecution, an order of affirmation has been made, they will be found to depend upon a statute expressly em-

powering and perhaps requiring the court, on dismissal of an appeal, to affirm the judgment, unless cause be shown to the contrary. This statute is referred to in the syllabus of the case above cited.

The case of *Canyon Road Co. v. Lawrence*, 3 Oreg. 519, has nothing to do with this question. *Hauer v. The Town of Polk*, 6 Wis. 350, decides nothing more than this: that after discontinuance of an appeal the court has no jurisdiction to annul the judgment below; by consequence, if the case has any application here, there is no jurisdiction to affirm.

Young v. Mason, 3 Gilm. 55, affords an argument against the effect sought to be attributed to the condition to prosecute with effect. The bond considered in that case contained a condition to "prosecute the appeal with effect and pay whatever judgment might be rendered by the circuit court upon dismissal of the appeal."

The circuit court, instead of dismissing the appeal, entertained it, and according to the report, affirmed the judgment of the justice and gave judgment for an additional sum as damages. In the action on the appeal bond, the issues were found for the plaintiff, and the court gave judgment for one cent damages. On error, this judgment was affirmed. "The obligors," said KOERNER, J., "had stipulated to pay a certain amount of money in the happening of a certain event, viz., the dismissal of the appeal. The record shows that event did not happen. * * * There being no evidence that the mere non-prosecution of the appeal by the defendants in error caused any damage, the court correctly gave but nominal damages."

The condition to prosecute the appeal with effect has precisely the same scope with the condition for the due prosecution of the appeal on the bond now before us. Yet the court, in that case, repudiate, in distinct terms, the idea that by failure to prosecute the appeal with effect, the appellant is to be charged with other damages than those which result from the delay incident to an unsuccessful appeal.

The remaining cases, so far as they have been brought to our notice, which countenance the petition of the defendant in error, are *Harrison v. Bank of Kentucky*, 3 J. J. Marsh. 143; *Sutherland v. Phelps*, 23 Ill. 91; *Karthous v. Owens*, 2 G. & J. 430; *Maryott v. Youny*, 33 N. J. Law, 327; *Sessions v. Pentard*, Hemp. 678; with some others in the same courts.

These cases do unquestionably decide that the condition to prosecute the appeal to effect, or to duly prosecute the appeal, is a substantive condition; and that for a failure therein, the appellant and his sureties are chargeable as for a breach of the other conditions.

Opposed to these are the cases of *Forsyth v. McCormick*, 2 Car. L. Rep. 472, followed in *Orr v. McBride*, 3 Murph. 359; *Star v. Benedict*, 19 Johns. 454; *Malone v. McLane*, 3 Ind. 532; *Ashley v. Brazil*, 1 Pike, 144; *Watson v. Husson*, 1 Duer, 242; *Drummond v. Husson*, 14 N. Y. 164. What is said by C. J. TANEY in the *United States v. Pacheco*, 20 How. 261, is to the same effect.

In this discord of the authorities, we feel at liberty to pursue the rule which appears to us the more in accord with reason.

If it should be suggested that, the question being in truth altogether dependent upon statute, we are concluded by the construction given to the same statute by the supreme court of Illinois, from whence we adopted it, it is sufficient to say that we ought not to presume a legislative adoption of an interpretation which is palpably wrong, harsh and oppressive. CAMPBELL, J., in *Drennan v. The People*, 10 Mich. 179; *Little v. Smith*, 4 Scam. 302. The case of *Sterling City Mining Co. v. Cock et al.*, 2 Col. 25, is very analogous to the present. In that case, the supreme court of the late Territory refused to be bound by the opinion of the supreme court of Illinois in *Churchill v. Abraham*, 22 Ill. 456, construing an attachment bond given in pursuance of a statute which we had adopted substantially, and I believe, in respect to the matter there in ques-

tion, literally from that State. This court has, at this term, in a cause arising upon the same bond, approved and followed the former decision.

To conclude, we hold that the dismissal of an appeal for want of prosecution is not equivalent to an affirmance of the judgment.

The plaintiffs' declaration must, therefore, be construed as assigning for breach the non-performance of the condition to prosecute the appeal with effect, but the breach of this condition cannot be said to charge the surety with the amount of the judgment below, for, as to this, he has stipulated to be answerable only in the single event that such judgment should be affirmed. So much of the declaration as alleges the non-payment of the judgment is, therefore, mere surplusage. And inasmuch as the plaintiffs below neither averred nor proved any damage occasioned by the breach of the first condition of the bond, they were entitled to nominal damages only. *Young v. Mason*, 3 Gilm. 56. Judgment reversed with costs and cause remanded.

Reversed.

PRIOR CONSTRUCTION OF BORROWED STATUTE: *Atchison, T. & S. F. R. R. Co. v. Farnes*, 6 Colo. 508.

DISMISSAL OF WRIT OF ERROR: *Monti v. Bishop*, 3 Colo. 607; *Stansbury v. Kerr*, 6 Colo. 29; *McMichael v. Groves*, 14 Colo. 542.

COOK v. HAGER.

1. A chattel mortgage to be valid must be executed, acknowledged and recorded in conformity to the statutes (R. S., p. 103; Laws 1874, p. 196). A non-resident, whether natural or artificial, is not within the terms of the statutes, and a chattel mortgage executed by such person can have no validity.
2. A foreign corporation does not become a domestic corporation by complying with the laws of this State, in pursuance of which a foreign corporation may do business here without liability attaching to the officers, agents and stockholders, upon the contracts of the company made before such compliance.

Appeal from District Court of Arapahoe County.

THIS was an action of replevin brought by Hager, the appellee, against Cook, sheriff, to recover certain chattels

claimed by Hager, under a chattel mortgage from the Cheyenne, Boulder and Denver Telegraph Company, a foreign corporation. Among the pleas interposed by the defendant below, was one justifying the taking of the property as sheriff, under the authority of a writ of attachment issued by the probate court of Arapahoe county, in the case of *H. C. Donnell v. The Cheyenne, Boulder and Denver Telegraph Company*. On the trial had by the court, on the 17th day of October, A. D. 1876, the court found the defendant guilty—and that the property mentioned in the declaration was the property of the plaintiff, and gave judgment accordingly. A motion for a new trial having been interposed and overruled, the defendant appealed.

Mr. JOHN W. BLACKBURN, for appellant.

Messrs. PATTERSON & CAMPBELL, for appellee.

THATCHER, C. J. Section two of chapter XIV, concerning chattel mortgages (R. S., p. 103), provides that “any mortgagor of personal property may acknowledge such mortgage before any justice of the peace, in the justice’s district in which he may *reside*.” By section eight of an act approved February 13th, 1874 (Sess. Laws 1874, p. 196), it is further provided that any mortgagor of personal property, *residing* in any township in which is located the county seat of any county, may acknowledge such mortgage before any justice of the peace, notary public, or county clerk of the county in which he may reside. The mortgage in question was acknowledged in the county of Arapahoe, before Charles W. Wright, a notary public. The parties stipulate in their agreed statement of facts, that the Cheyenne, Boulder and Denver Telegraph Company, the mortgagor, is a *foreign* corporation, but that it had complied with all the requirements of the laws of Colorado, which enable it to do business as a corporation here, and that one of its principal places of business is in Denver, Arapahoe county. By comity existing between nations

and States, independent of statute, a corporation of one jurisdiction may transact business in another, not requiring official corporate action, but the corporation nevertheless dwells in the State of its creation.

Can it be said that this foreign corporation resides in Arapahoe county? The law of the Territory creating it can have no direct extra-territorial force. A corporation can have no existence except by courtesy, beyond the limits of the sovereignty which brings it into life and endues it with its faculties. It is a subject of the government of the country creating it, where it must dwell, and it cannot migrate to another sovereignty. Angell & Ames on Corp., § 103 *et seq.*, and cases there cited; *Blackstone Mfg. Co. v. Inhabitants of Blackstone*, 13 Gray, 489. In the last case Chief Justice SHAW says: "It appears to us that the law of domicile affords a very good analogy, if not a test, in making the distinction between a domestic and a foreign corporation. Every man must have some domicile, and no man can have more than one domicile. It may often be difficult to determine, on a complicated state of facts, where one's domicile is; yet when fixed, it determines, to a great extent, his civil and social rights and responsibilities. If there were no distinction between a domestic and foreign corporation, it would be equivalent to saying that a body, when it is once invested with the power of a corporation in one State, has an equal standing in all others; or in other words, it has no domicile anywhere, either of which would lead to extraordinary, not to say absurd consequences." Again he says in the same opinion: "In any other State than that of its creation, though its existence may be recognized, and its rights protected to a limited extent, it is by the law of courtesy adopted and acted upon as the law of nations amongst civilized communities." Nor does this doctrine as we view it militate against the idea that a corporation may, under certain conceivable exceptional circumstances, as where the source of its life and power is distinctly traceable to two sovereignties instead of one, have a legal existence in both sovereignties. In such case its existence may be

co-extensive with the sovereignties which spoke it into being. It may be conceded, in obedience to the general doctrine here enunciated, that if a consolidated company derives its corporate powers from the legislatures of two States, as where several railroad companies, each owning a line in contiguous territorial jurisdictions, and each having been duly chartered by the legislature of its appropriate jurisdiction, such company may be for certain purposes treated as a domestic corporation of each State from which it derived its being. This is the extent to which the *State v. Northern Central R. W. Co.*, 18 Md. 193, upon which the appellee largely relies, goes.

In such case the corporation exists in both States, not by the law of courtesy, but by virtue of a charter granted by each State. The legal status of the mortgagor in Colorado, in the case before us, is widely variant from the case supposed. The mortgagor, it is agreed, is not a domestic corporation, unless a foreign corporation becomes a domestic one by complying with the laws of this State in pursuance of which a foreign corporation may do business here without individual liability attaching to the officers, agents and stockholders upon the contracts of the company made before such compliance. R. S. 150, Art. III, §§ 1, 2 and 3. It has been decided in England that a foreign railway corporation may be required to give security for costs as a non-resident plaintiff. *Kilkenny R. W. Co. v. Fielden*, 2 Eng. Law & Eq. R. 388; *Limerick & Waterford R. R. Co. v. Fraser*, 4 Bing. 394. By comity a foreign corporation, without conforming to the statute just referred to, may carry on business here, but a penalty in such case may be inflicted upon the officers, agents and stockholders. This statute has nothing to do with the *situs* of the company.

Its residence, so far as residence may be predicated of a corporation, still remained within the territorial jurisdiction of the law-making power to which it owed its existence.

The statute authorizing chattel mortgages is in derogation of the common law and must, therefore, be strictly construed. *Porter v. Dement*, 35 Ill. 480.

A mortgage to be valid must be executed, acknowledged and recorded in conformity to the statute. As a non-resident person, whether natural or artificial, is not within its terms, a mortgage executed by such person can have no validity.

The judgment must be reversed and cause remanded for further proceedings according to law.

Reversed.

THOMAS et al. v. MACKEY.

1. In a bill to set aside a conveyance of land upon the ground of fraud upon creditors, the facts upon which the fraud is based must be distinctly and specifically averred.
2. A voluntary conveyance from husband to wife is not *per se* fraudulent. The statute (R. S., § 20, p. 340) makes the question of fraud wholly one of fact and not of law.
3. A defendant cannot be required to meet and overcome evidence not responsive to the pleadings.

Error from District Court of Boulder County.

ANDREW J. MACKEY, the defendant in error, filed his bill of complaint against Jerome Thomas and his wife Sarah, the plaintiffs in error, to set aside a conveyance of lands given to Sarah by James Decker, on the ground that there was no consideration moving from Sarah to Decker, and that the conveyance was in fraud of Mackey, who was a judgment creditor of Jerome Thomas, the husband of Decker's grantee. The bill alleges that Decker was indebted to complainant in the sum of \$838, on two promissory notes. That on the 27th day of February, 1869, Thomas took up these notes and gave his own note for the amount, together with Alpheus Wright as surety, payable twelve months after date. That in the month of April, 1872, the complainant sued and obtained judgment against Thomas and Wright, and issued execution thereon, which was re-

turned *nulla bona*. That on the 27th of February, 1869, at the date of the making of the note, Decker gave a bond to Sarah P. Thomas to convey to her the lands in controversy, and did, on the 11th day of December, 1871, make the conveyance. The bill charges "that the consideration money paid therefor was the money of the said Jerome Thomas, and that the same, nor any part thereof, was the money of the said Sarah P. Thomas; and that part of the consideration thereof was the two notes above described made by the said James H. Decker, to complainant, and that the same were delivered up to the said James H. Decker upon the execution of the aforesaid deed by him and his wife to said Sarah P. Thomas." Also, "that the equitable title to said land is in the said Jerome Thomas, and that the said deed so made by the said James H. Decker and wife, to the said Sarah P. Thomas, was entirely without any consideration from her to said Decker, and was in fraud of the rights of your orator, and was so designed and intended to be by said Thomas and wife at the time of the execution thereof."

The prayer was that the legal title be decreed to be in Jerome Thomas, and that the land be applied to the satisfaction of the judgment, etc. A demurrer to the bill was overruled. The cause was heard on the bill, answer, replication and master's report of the proofs, and a decree rendered in favor of the complainant in accordance with the prayer of the bill. To reverse this decree the plaintiffs in error sue out this writ.

Mr. J. M. NORTH, for plaintiff in error.

Messrs. BROWNE & PUTNAM, for defendant in error.

THATCHER, C. J. The charge in the bill that the conveyance made to Sarah P. Thomas was without consideration, and was in fraud of the rights of Andrew J. Mackey, and was so designed and intended to be, and other charges of a like general character, are not sufficient to sustain the de-

cree. The facts upon which the charge of fraud is predicated cannot be left to inference, but must be distinctly and specifically averred. *Bryan v. Spruill*, 4 Jones' Eq. (N. C.) 27; *Bump on Fraudulent Conveyances*, 524; *Small v. Boudinot*, 1 Stockt. (N. J.) 391; *Fraser v. Heat*, 2 Strobb. Eq. R. 255; *Newell et al. v. Bureau Co.*, 37 Ill. 253; *Kline v. Horine*, 47 id. 430.

The demurrer to the bill should have been allowed.

A voluntary conveyance from husband to wife is not *per se* fraudulent. In obedience to the dictates of humanity and the voice of reason, the husband may, and ought, in prosperous times, if it can be done without imperiling his creditors, to put his wife beyond the reach of want, when old age shall overtake her, and when he, perchance, through some misfortune in business, may have lost all his property. But as this right, which the law recognizes under the circumstances mentioned, has so frequently been used as a mere cover for fraud, courts scrutinize such transactions very closely. It is urged that as it is clearly averred in the bill that the conveyance made at the instance of Thomas, to his wife, was made without any consideration moving from her, and "that the consideration money paid therefor was the money of the said Jerome Thomas," the law raises a presumption of fraud as to existing creditors, which cast the burden of proving solvency upon the defendant. But for our statute, which makes the question of fraud wholly one of fact, and not of presumption, there might be some force in the position. Section 20, R. S., page 340, enacts "the question of fraudulent intent, in all cases arising under the provisions of this title, shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration."

Construing a section of a statute whose provisions in this respect are the same as ours, the court of appeals of New York say: "Although the conveyance from the husband

was voluntary it was not for that reason necessarily or *presumptively* fraudulent as against his creditors. This I understand to be the necessary inference from the statute which declares that 'no conveyance or charge shall be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration.' It is a circumstance bearing upon the question of fraud, and in connection with other circumstances may establish it."

In the case before us much of the evidence is not responsive to the issues. Although the bill fails to aver directly that Thomas was insolvent, or to state facts from which either his insolvency, or that he was in an embarrassed condition financially at the time the bond for a deed was executed to his wife, is necessarily made to appear (*Montz v. Hoffman et al.*, 35 Ill. 558; *Harris v. Taylor*, 15 Cal 348), the evidence proves his insolvency, not only at that time but continuously thereafter, until judgment was obtained against him and Wright. The averment that neither Thomas nor Wright had any property out of which said judgment could be collected, and that neither of them had such property since the date of such judgment, is not inconsistent with the solvency of Thomas, at the time the bond for a deed was made to his wife. The decree of the court was pronounced *secundum probata*, but not *secundum allegata*. In this there was error. The defendant cannot be required to meet and overcome evidence not responsive to the pleadings. Had the necessary averments been made in the bill, we would not, with the evidence taken, interfere with the decree.

The decree is reversed and the cause remanded with directions to the court below to allow complainant to file an amended bill without prejudice to the testimony already taken.

Reversed.

Mr. Justice WELLS did not concur.

EVIDENCE NOT RESPONSIVE TO PLEADINGS need not be met and overcome by the defendant (*Emery v. Pount*, 7 Colo. 100); but if he sits by and allows the defendant to prove a case he has not pleaded, without objection, plaintiff may take a judgment upon amendment of the pleadings: *Gibbs v. Wall*, 16 Colo. 159.

FRAUD SHOULD BE SPECIALLY AVERRED in a bill to set aside a conveyance for fraud against creditors: *Burdall v. Waggoner*, 4 Colo. 259, 280.

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CHRIST v. THE PEOPLE.

1. A petition for change of venue, and the affidavits in support thereof, must set forth the facts upon which the petitioner's fears that he will not receive a fair trial are founded.
2. Where a matter of law merely (as the argument of a motion for change of venue or for a new trial) is being agitated before the court it is not necessary that the prisoner be present.
3. In case of larceny of cattle the inspection of the hides by the jury, the brand not being in question, is immaterial.
4. Where secondary evidence is admitted at the trial without objection and exceptions duly reserved it cannot be considered in this court.
5. Where, by the record, the verdict appears formal, but by the bill of exceptions, informal, this court will presume that the verdict was put in proper form before the discharge of the jury.
6. Where newly-discovered evidence goes only to impeach the credit or character of a witness it is not sufficient ground for a new trial.

Error to District Court of El Paso County.

GEORGE H. CHRIST was indicted at the February term, 1877, of the El Paso district court, for the larceny of certain cattle of the property of Bell & Thornton; was tried at the same term and convicted. A motion for a new trial was overruled, and judgment was entered on the verdict. The errors assigned are discussed in the opinion, which renders further statement unnecessary.

Messrs. BROWNE & PUTNAM, for plaintiff in error.

A. J. SAMPSON, Attorney-General, for the defendants in error.

ELBERT, J. We will consider the assignment of errors in the order in which they are presented.

1. Waiving any consideration of the question that the petition for a change of venue and the affidavits in support of it are not properly before us, not having been preserved in the bill of exceptions they were clearly insufficient under the statute. The defendant in his petition

failed to set forth the fact or facts upon which his fears that he would not receive a fair trial were founded. This is necessary under the statute. The naked statement, that the inhabitants of the county wherein the trial was had were prejudiced against him, was not sufficient. He should have set forth the grounds upon which his belief of prejudice was based. The three affidavits in support of the petition were insufficient under the law for the same reason.

2. The fact that the defendant was not present in court, except by attorney, upon the argument and overruling of the motion for a change of venue is not ground for reversal. Mr. Bishop states the rule to be, that where a mere matter of law is to be agitated before the court, there is no reason why it should not be done by counsel in the absence of the prisoner. Bishop's Crim. Pro., § 277. To this rule we can see no valid objection, either in reason or practice. The objection taken in the twelfth assignment, that the prisoner was not present in court in person when the motion for a new trial was determined, comes within the same rule, and cannot be sustained.

3. We can see no object in allowing the hides sworn to by the witnesses Charles and Sarah Smith to be inspected by the jury. The brand on them was not in dispute. The question whether the hides were those of the cattle stolen was the real point in controversy.

Upon this question the inspection could have thrown no light, and the defendant would have gained nothing thereby.

4. The evidence respecting the brand of Bell & Thornton, the alleged owners of the stolen cattle, was admitted without objection or exception by the defense, and cannot be considered here. If objection had been made at the trial, the prosecution might have supplied evidence that the brand had been duly recorded according to law.

5. We find no error in the instruction given by the court and set forth in the fifth assignment. It correctly pronounced the law. The instruction asked for by the de-

fendant and refused by the court, set forth in the sixth assignment, had already been substantially given in a previous instruction, and it was not error to refuse to repeat it.

6. There was sufficient evidence respecting the venue to warrant the jury in finding it proven as charged in the indictment. Clark testified that he followed the trail of the cattle from El Paso county to the house of the prisoner, and also that the prisoner admitted having taken the cattle from that county.

7. By the record proper, the verdict of the jury appears formal and sufficient. By the bill of exceptions it appears to have been informal, as rendered by the jury. The court had full power to put the verdict in form, and the presumption is that it did so prior to the discharge of the jury. There is nothing in the record to show the contrary.

The mere recitals in the defendant's motion to correct the record made after judgment rendered, cannot be accepted as showing that such was the fact.

8. The only question presented by the motion for a new trial, necessary to consider, is the matter of newly-discovered evidence. This evidence could have no other tendency than to discredit the witness Clark, and it is a well-settled rule that newly-discovered evidence going only to impeach the credit or character of a witness is not sufficient ground for a new trial. Hilliard on New Trials, 505, and cases cited.

The exceptions to this rule are rare, and we have been unable to find any authority or reason for taking this case without the rule. Respecting the term of court, counsel appeared to have been misled. The trial was had at a term of court fixed by a law of the late State legislature, and as yet unpublished.

These are the only assignments that it is thought necessary to consider.

Finding no error in the record, the judgment of the court below must be affirmed.

Affirmed.

PETITION FOR CHANGE OF VENUE, and affidavits in support of it, must set forth the facts upon which petitioner relies: *Hughes v. People*, 5 Colo. 431; *Thomas v. People*, 14 Colo. 235.

GREATHOUSE et al. v. JAMESON.

1. The authority of the supreme court, under the Constitution, to issue writs of mandamus, carries with it the power to adjudicate such questions as may be brought before it in any proceeding for a mandamus, without further legislation.
2. The determination by a probate court of the issue involved in the matter of the probate of a codicil to a will is within the meaning of section 2 of the Laws of 1872 (p. 105), and an appeal will lie therefrom to the district court.

Petition for mandamus to County Court of Jefferson County.

THE petitioners, Greathouse *et al.*, were legatees in the last will and testament of Warren N. Hoyt; the testator executed a codicil revoking the will. The petitioners were cited by JAMESON, judge of the county court of Jefferson county, to appear and show cause why the codicil should not be admitted to probate. Upon their appearance, and a hearing being had, the court admitted the codicil to probate. From this determination of the court the petitioners prayed an appeal to the district court of Jefferson county, the appeal was denied, and thereupon the petitioners apply to this court for a writ of mandamus to compel the county court to grant an appeal, to fix the amount of the bond, etc. The respondent demurred.

Messrs. PATTERSON & CAMPBELL, for petitioners.

Per Curiam. As authority is conferred upon this court by the Constitution of the State to issue writs of mandamus, and to hear and determine the same, it necessarily carries with it the power to adjudicate such questions as may be brought before it in any proceeding for a mandamus, without additional legislation.

In our opinion, section 2 of an act "concerning probate courts," Session Laws, 1872, p. 105, gives the right of appeal from the probate (now county) court to the district court of Jefferson county. The special act applicable to Jefferson

county alone (Session Laws, 1872, p. 107), does not assume to regulate the manner of taking appeals, or to determine the courts to which appeals shall lie from that court. It is only where a special and a general act are in conflict, that the special act governs. In the silence of the special act upon the subject of appeals, the general act authorizing appeals from the final judgment or decision of any probate court must be held to control.

The determination by the probate court of the issue involved in the matter of the probate of the codicil is within the meaning of section 2 of the general act; a judgment or decision from which an appeal will lie. The demurrer to the relator's petition must be overruled.

Demurrer overruled.

WASSON v. DYER.

When all the errors assigned are based upon matter in the bill of exceptions and exceptions have not been duly reserved, there can be no ground for disturbing the judgment.

Appeal from District Court of Rio Grande County.

Messrs. WAKELY & WINSPEAR, and Messrs. PATTERSON & CAMPBELL, for appellant.

Mr. C. S. THOMAS, and Mr. JOHN G. TAYLOR, for appellee.

THATCHER, C. J. No exception was reserved to the admission or rejection of testimony or to the instruction of the court. Nor was any exception taken to the decision of the court in overruling the motion for a new trial. Even had such exception been taken, this court would not examine the evidence for the purpose of determining whether it sustains the verdict, as the record does not purport to contain all the evidence. As not one of the specifications of

error rests upon an exception duly reserved, and as every error assigned is based upon matters in the bill of exceptions, it is obvious that there is no ground for disturbing the judgment. The judgment must be affirmed.

Affirmed.

EXCEPTIONS MUST BE RESERVED to admission or rejection of testimony, or the action of the court in that respect cannot be reviewed on appeal: *Pipe v. Smith*, 4 Colo. 588; *Pietz v. People*, 6 Colo. 244.

TAYLOR v. RANDALL.

1. Unless exception to the charge of the court be seasonably taken error cannot be based upon it. After the delivery of a sealed verdict, or the announcement of an oral verdict, it is too late to except to the charge.
2. The proper practice requires that the exception be taken at the time the instruction is given and before the retirement of the jury to consider of their verdict.
3. This court is not at liberty to reverse a judgment upon the overruling of a motion for a new trial, where exceptions have not been properly reserved during the trial, unless the verdict is unsupported by evidence.

Error to District Court of Park County.

THE case is stated in the opinion.

Mr. ORRIS BLAKE, for plaintiff in error.

Messrs. FRANCE & ROGERS, for defendant in error.

THATCHER, C. J. This suit was commenced by the defendant in error against the plaintiff in error, before a justice of the peace, on an account for goods sold and delivered. The trial resulted in a judgment for the plaintiff from which an appeal was taken by the defendant to the district court, where a trial *de novo* was had with the same result as before the justice of the peace.

The first, second and third assignments of error upon the record relate to the instructions of the court, and may be properly considered together. Unless an exception to the charge of the court be seasonably taken, error cannot be

predicated upon it. The record shows that the defendant in the court below, "at the announcement by the jury of their verdict, and upon the discharge of the jury," excepted to the instructions of the court, and each and every of them. This language is somewhat ambiguous. The announcement of the verdict and the discharge of the jury could not have been simultaneous acts. One must have preceded the other. As a bill of exceptions must be construed most strongly against the party who prepared it, we must interpret this language to import that the exception was only taken "upon the discharge of the jury." Can the defendant avail himself of the benefit of this exception? Is it properly any part of the record? These are pertinent inquiries. To entitle a party to an exception to an erroneous charge, it should be taken at the time the error complained of is committed. The court, before it is too late to rectify the supposed error, must be apprised of its alleged existence. If the party aggrieved silently acquiesces in the instructions given, until the time has passed within which it is possible for the court to recede from its position, if it chooses to do so, he is precluded thereafter from taking an exception. If the exception be allowed, it becomes a needless incumbrance of the record.

The authorities are agreed that after the delivery of a sealed verdict or the announcement of an oral verdict in open court, it is too late to except to the charge. *Jones et al. v. Insurance Co. of North America*, 1 Binn. (Penn.) 38; *Bratton v. Mitchell*, 3 Penn. St. 44; *Morris v. Buckley*, 8 S. & R. 211; *Jones v. Van Patten*, 3 Ind. 107; *Madenbousch v. Sharer*, 2 W. Va. 285; *Lanuse v. Barker*, 10 Johns. 321; *Doyle v. Stevens*, 4 Mich. 87; *State v. Clark*, 37 Vt. 471; *Leigh v. Hodges*, 3 Scam. 17; *Hill v. Ward*, 2 Gill, 293; *Life and Fire Insurance Co. v. The Mechanics' Fire Ins. Co.*, 7 Wend. 35.

The doctrine of the last four cases just cited, which we conceive is the better practice, requires the exception to be taken at the time the instructions are given, and before the retirement of the jury to consider of their verdict. But the

exception under consideration was not taken even in pursuance of the more liberal practice. It came too late.

Had the exception been taken in time, it would afford no ground for a reversal of the judgment. The instructions could not have misled the jury in any event to the prejudice of the defendant.

The only other question raised by the remaining assignment goes to the ruling of the court in denying the motion for a new trial. As no exception was duly reserved during the progress of the trial, we are not at liberty to reverse the judgment unless the verdict is unsupported by evidence. The *bona fides* of the sale by Janes to Randall was sought to be impeached. The actual delivery and continued possession of the property sold were also drawn in question. As no written pleadings were required, the court below allowed the same latitude to the defendant in the introduction of testimony as if every plea that might have been pleaded had been interposed. The evidence is set out *in extenso* in the record. It was the province of the jury that tried the cause, as the evidence was so contradictory as to be impossible of reconciliation, to determine to whom credit should be given. They are the proper judges of the weight of evidence and the credibility of witnesses. Sitting as an appellate court we must assume the truth to be with the evidence that upholds, and not with that which assails the verdict, unless the weight of evidence very strongly preponderates against it. It is not enough that had the verdict been different upon the same evidence, this court would not have disturbed it. This case has twice been submitted to a jury with the same result at each trial. As in our view there is sufficient evidence to sustain the verdict, and as we discover no material error in the record, the judgment of the court below will be affirmed.

Affirmed.

CREDIBILITY OF WITNESSES IS FOR JURY, and an appellate court will not interfere except when the verdict is not supported by the evidence: *Kansas Pac. Ry. Co. v. Ward*, 4 Colo. 31; *Barker v. Hawley*, 4 Colo. 327, 329.

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HUSTON v. PLATO.

1. Where a plaintiff adopts the ancient form of declaring upon a *warrantizando vendidit*, alleging a *scienter*, he may recover upon the express contract, or for the deceit if the *scienter* be proved. Such a declaration has a two-fold aspect.
2. The admission of oral evidence of a warranty not so comprehensive as the written warranty could not prejudice the warrantor in an action against him, and is not a ground of reversal.
3. If an animal has at the time of sale patent defects apparent upon casual inspection, or any defect known to the buyer, such defect would not usually be covered by a general warranty.
4. A mare afflicted with navicular disease is unsound, and although the vendee at the time of the sale knew of her lameness, yet the true cause not being apparent, *held*, a breach of general warranty.
5. The measure of damages for a breach of warranty in the sale of a chattel is the same whether the action sound in *tort*, or in contract, and should be governed by the ordinary rule.
6. When the vendee of an animal, after discovering its unsoundness, tenders it back to the vendor, who declines to accept it, the vendee may recover the expense of keeping over such reasonable time as will be necessary to make a fair sale.
7. On a trial to the court, it must be presumed that the court, in the determination of the facts, rightly applied the law governing the case.
8. When the plaintiff holds the affirmative of any one of several issues, he is entitled to begin and reply.
9. The refusal of the court to permit the defendant to interfere with the usual course of a trial, by breaking in upon the plaintiff's case, and interposing a defense before the plaintiff has rested, is not assignable for error.
10. The question as to whether an alteration of an instrument, offered in evidence, had been made, as well as the time when, and for what purpose, is ordinarily a question for the jury. When the trial is by the court, without a jury, the alteration and its materiality is for the court.

Error to Probate Court of Arapahoe County.

ON the 9th day of August, 1873, the defendant in error, John B. Plato, bought of Eli Huston, plaintiff in error, and his son, who were doing business as E. Huston & Co., a certain mare, with the following warranty :

"DENVER, Aug. 9, 1873.

"*John B. Plato, Esq.:*

"Bought of E. Huston & Co., one dark bay mare, black mane, tail and legs, five years old, for the sum of one hundred and fifty dollars, (\$150) which said mare I warrant to be kind, true and sound in every particular.

"E. HUSTON & Co."

The mare proved to be worthless, being afflicted with an incurable disease; and Plato ceased to use her entirely after November 22d; less than four months after he had purchased her. He also tendered the mare to Huston, after having become satisfied of her condition, but the latter refused to receive her. Plato thereupon brought his action, and recovered judgment.

Messrs. BLAKE & JACOBSON, for plaintiff in error.

Messrs. FRANCE & ROGERS, for defendant in error.

THATCHER, C. J. This is an action on the case sounding *in tort*. It is, however, founded upon an express warranty that the mare sold was kind, true, and sound in every particular. The warranty was incorporated into the bill of sale. The plaintiff, following the old precedents, declares upon a *warrantizando vendidit*. The *scienter* of the vendor that the mare was not as warranted is averred. The warranty is alleged to have been made *false et fraudulenter*. Upon proof of the express warranty and the breach thereof, in the absence of fraud or deceit, is the plaintiff entitled to recover in this form of action? Had there been no warranty and had deceit in the sale been relied on, deceit would have been the gist of the action, and necessarily must have been established to entitle the plaintiff to recover. *Bayard v. Malcolm*, 1 Johns. 480.

But here the action rests upon a warranty in writing expressed. The warranty is the material averment. The

gravamen is not laid on the deceit, but on the breach of the warranty. It is a general rule that whatever averments may be stricken out without defeating the plaintiff's cause of action, are not deemed material. If the words in this declaration, imputing fraud or deceit, had been omitted, the plaintiff's right of action would in our view still be complete. *Williamson v. Allison*, 2 East, 451; *Gresham v. Postan*, 2 Carr. & P. 721; *Vail v. Strong*, 10 Ver. 462.

In the case last cited, Mr. Justice PHILIPS, speaking for the court, says: "The plaintiff may adopt the ancient form of declaring upon a *warrantizando vendidit*, alleging a *scienter* of the falsity of the warranty, and in this case he may recover, either upon the express contract, or if the *scienter* be proved, for a deceit. Such a declaration has a two-fold aspect. If a warranty be proved, it binds the defendant *proprio vigore*, and the defendant is liable if the warranty is broken. And as every such warranty includes a representation, if it be willfully and knowingly false, the deceit is made out. * * * * Such is the declaration in this case. The representation relied on in this case consists in the false warranty, which is a part of the contract. The action is therefore founded on the contract, which must be proved as laid."

In recognition of this doctrine the supreme court of Massachusetts (*Salem India Rubber Co. v. Adams*, 23 Pick. 266) holds that a failure in an action in the present form, would be a bar to an action of *assumpsit*, on the ground that "the same evidence would support both actions, and the damages recovered in one would be a satisfaction of those claimed in the other." See, also, *Norton v. Doherty*, 3 Gray, 372.

For the purpose of proving the warranty, as it was reduced to writing, recourse could properly be had only to the written instrument itself, as the best evidence of the final agreement of the vendor and vendee. If this salutary rule of evidence has been violated in this case, it was in so slight a degree and in such a manner as to be entirely

harmless to the defendant. The admission of oral evidence of a warranty not so comprehensive as the written warranty could not prejudice the warrantor, and is, therefore, no ground of reversal. The court did not err in admitting evidence as to the condition of the mare at the time of sale. This was, in fact, an important inquiry. If, at that time, the mare had any patent defects, apparent upon casual inspection, or any defects known to the buyer, such defects would not usually be covered by a general warranty Benjamin on Sales, § 616.

That, within the knowledge of the vendee, the mare was, at the time of the sale, affected with slight lameness in one leg, is fully proved and not disputed; but as to the cause of the lameness, and whether, having reference to its cause, it would be temporary or permanent, there is great conflict of evidence. The plaintiff introduced evidence to the effect that the mare was afflicted with the navicular disease at the time of sale; that although he knew of her slight lameness, the true cause thereof was not apparent until after the sale; that an examination by a veterinarian surgeon several months after the sale disclosed the fact that although not so readily observable, the mare was actually, at the date of the warranty, afflicted with the navicular disease, which, growing worse with the lapse of time, had rendered her unfit for use; that in consequence of her unserviceable condition he ceased to use her altogether, and sent her out upon a ranch. If the mare had the navicular disease when Plato purchased her, she was at that time unsound, and the warranty was broken. Benjamin on Sales, § 620; *Bywater v. Richardson*, 1 Adol. & El. 508.

Now if credence be given to the testimony in behalf of the plaintiff, there was no unsoundness plainly apparent to the vendee. Mere lameness, which may be casual and temporary, would not necessarily constitute unsoundness. If the lameness, however, resulted from a latent disease, which could not be cured by speedy remedies, the warranty covered it. That such was the character of the lameness the court may well have found from the evidence in behalf of

the plaintiff. As the trial was to the court, it was for the court to determine the credibility of witnesses, and the weight of evidence. In this respect the functions of the court trying the facts are not different from the functions of a jury, when the trial is to the jury. We cannot say either that the finding of the court is unsupported by evidence, or that it is so manifestly against the weight of evidence as to make it the duty of the court to order a new trial.

The measure of damages for the broken warranty is the same whether the action *sounds* in *tort*, or in contract. The ordinary rule is that the damages shall be measured by the difference between the actual value of the article at the time of the sale, if it had been as warranted, and its value with the defect. In addition to this measure of relief the plaintiff in this case might also recover the expenses of keeping the mare, if the court was satisfied from the evidence that the plaintiff had tendered the mare back to the vendor after discovering her unsoundness, and the vendor had declined to accept her. These expenses would extend from the date of the offer to redeliver to the vendor, over such a reasonable period as might, in view of all the circumstances, be necessary to make a fair sale of the mare.

In the case of *Ellis v. Chinnock*, 7 Carr. & P. 169, Mr. Justice COLERIDGE says: "With respect to the keep of the horse, I am of opinion, that if a person has bought a horse with a warranty which has been broken, and he tenders the horse to the seller, and the seller refuses to receive it back, the buyer is entitled to keep it a reasonable time till he can sell it, and for that time he may recover the expenses of keeping it, but he must not keep it as long as he chooses. All that he is allowed to do, is to keep for a reasonable time till he can fairly sell it, and for that time he ought to be allowed for keeping it." This doctrine seems to rest on a sound foundation. *Caswell v. Coare*, 2 Camp. 82; *Caswell v. Coare*, 1 Taunt. 566; *McKenzie v. Hancock*, 21 E. C. L. 790; (Ryan & Moody, 486); *Seibles v. Black-*

well, 1 McMul. (S. C.) *55 *McGarock v. Wood*, 1 Sneed, 181 ; *Woodward v. Thatcher*, 21 Vt. 583.

To what evidence the court gave credence, and what evidence it rejected, where there was a conflict that could not be reconciled, we need not inquire. It is enough to know that in view of all the evidence, considered with reference to correct principles of law, the finding of the court might properly have been made. It must be presumed that the court, in the determination of the facts, rightly applied the law governing the case. In other words, the finding of the court, so far as its impregnability is concerned, sustains the same relation to the evidence sustained by a verdict of a jury, to whom had been given by the court the most unquestionable charge as to the law applicable to the case.

It is unnecessary to inquire into the legal sufficiency of the special plea to which a demurrer was allowed, as the same defense was not only admissible under the general issue, but as the record evinces, was in fact interposed. The defense sought to be set up by the remaining special plea, which was allowed to stand, was available under the general issue.

If the plaintiff, as in this case, holds the affirmative of any one of several issues, he is entitled to begin and reply. 1st Greenleaf's Evidence, § 74, 13th ed. The court, therefore, did not err in precluding the defendant from opening and closing the case.

The plaintiff's counsel, after Plato had identified and testified to the due execution of the bill of sale of the mare, incorporated in which was a warranty of its soundness, offered it in evidence. Counsel for defendant here proposed to call, in his own behalf, a witness (the plaintiff still being on the witness stand, and not yet having rested) to prove that the words "in every particular," were added to the warranty after the same had been signed. It does not appear that there was any erasure or interlineation. It is not pretended that the instrument was not fair on its face. Plato had testified that after its execution it had not been altered. The

refusal of the court to permit the defendant to interfere with the usual course of the trial, by breaking in upon the plaintiff's case, and interposing a defense before the plaintiff had rested, is not assignable for error. The order of the trial is largely controlled by the discretion of the court, and in this case we cannot say that it was improperly exercised. It was competent for the defendant to have shown, after the plaintiff had rested, if such was the fact, that certain words were added to the warranty after it was executed. But this was not attempted. The question as to whether an alteration had been made, as well as the time when, and for what purpose, is ordinarily a question of fact for the jury (*McCormick v. Fitzmorris*, 39 Mo. 34), but the question as to the materiality of the alteration is for the court. *Stephens v. Graham*, 7 S. & R. 505. Here the question of alteration as well as the question of its materiality, a jury being dispensed with, were both for the court. But as the defendant failed, after the plaintiff rested, to introduce any evidence tending to show an alteration, no circumstances of suspicion appearing upon the face of the warranty, the court was not called upon to pass upon either the question of fact or the question of law.

As we fail to discover any error in the record that could prejudice the plaintiff in error, the judgment of the court below will be affirmed.

Affirmed.

GOODRICH, Adm'r, v. TREAT, Adm'r.

1. A policy of insurance is to be interpreted by the same rules that apply to other contracts, and to be enforced according to the intention of the parties.
2. At common law a husband could effect an insurance upon his life for the benefit of his wife and her heirs.
3. The common law right of the husband surviving the wife to exclusively administer upon and enjoy the personal estate of the wife does not obtain in this State.

Error to Probate Court of Arapahoe County.

THE facts in this case as well as the character of the action are sufficiently stated in the opinion of the court.

It was insisted by the plaintiff that a policy could not be effected by the husband for the benefit of the wife and her heirs in the absence of an enabling statute. Also that the insured, being insolvent, could not invest money in an insurance policy for the benefit of his wife and her heirs to the exclusion of his creditors without statutory aid. That, aside from such investment being a fraud upon creditors, the statute invested the administrator with all the personal property of the decedent, first for the payment of debts and next to be distributed under the direction of the probate court. That the proceeds of the policy both by the common law and the statute should go into the hands of the administrator of the insured decedent to be distributed.

Messrs. FRANCE & ROGERS, for plaintiff in error.

Messrs. BENEDICT & PHELPS, for defendant in error.

ELBERT, J. Leander M. Sprague insured his life for the benefit of his wife, Mary E. Sprague, her heirs, executors or assigns. The wife died Dec. 10, 1872, and the husband about two years thereafter, leaving three minor children, issue of the marriage. The premiums were all paid by the husband, some before and some after the death of his wife.

Goodrich, administrator of the husband, brings this suit to recover the proceeds of the policy paid by the company to Treat, administrator of the wife. Declaration for money had and received and general issue.

The evidence offered by the plaintiff to show the insolvency of Sprague at the date of the policy, and that it continued until his death, was properly rejected.

Whatever their rights under the facts of this case the creditors were not before the court, and an administrator cannot avoid the contracts of his intestate, on the ground

that they are in fraud of his creditors. The administrator is a mere representative of his intestate, and where his intestate would have been bound, the administrator will also be bound. Bump on Fraud. Con. 443 and cases there cited.

It is insisted, however, that independent of the question that the contract was in fraud of creditors, the administrator of the husband is entitled to the proceeds of the policy. Policies of insurance are but written contracts to be interpreted by the same rules applicable to other contracts, and to be enforced according to the intention of the parties.

At common law the husband could effect a valid contract of insurance on his own life for the benefit of his wife and her heirs. In such case the interest which he had in his own life supported the policy. *Campbell v. New Eng. Ins. Co.*, 98 Mass. 381; *Baker v. Union Mutual L. Ins. Co.*, 43 N. Y. 283; *McKee v. Phoenix Ins. Co.*, 28 Mo. 383.

Such a provision by the husband for his wife and heirs is of the most meritorious character, and as between their respective representatives we see no reason why the contract should not have effect and be enforced in accordance with the intentions of the husband therein expressed.

In determining who is entitled to personalty the law of the intestate's actual domicile at the time of his or her death must govern. Story on Laws, § 481.

The record shows the domicile of the husband in this State at the date of his death, and the law presumes the wife's domicile to be that of her husband.

The beneficial interest in this policy was in the wife, and belonged for what it was worth to her separate estate. The claim that it was in the power of the husband to change the beneficiary, or allow the policy to lapse by non-payment of the premiums, can make no difference so long as the right remained unexercised.

These contingencies might affect the value of the wife's interest, but would neither exclude nor destroy the wife's title so long as they remained in possibility only.

In this State, administration and distribution are governed by statute. The common law right of the husband surviving the wife to exclusively administer upon and enjoy her personal estate does not here exist.

The decision in the case of *Mutual Benefit Ins. Co. v. Atwood*, 24 Gratt. 497, is based on this right of survivorship at common law, and the dicta of the cases of *Eadis v. Slimmon*, 26 N. Y. 9, and *Barry v. Equitable, etc., Co.*, 59 id. 587, cited and relied upon by the plaintiff, it is supposed rest upon the same common law rule.

The policy was payable to Mary E. Sprague, her heirs, executors or assigns, and upon her death the beneficial interest passed to her representatives, who, upon the death of the husband, became entitled to the proceeds of the policy to be administered and distributed under the law.

Whether, under the terms of the policy and our statutes, upon an order of distribution, the representatives of the husband would be entitled to a distributive share as representing a distributee of the wife's estate, need not be determined.

The judgment of the court below is affirmed with costs.

Affirmed.

BOARD OF COUNTY COMMISSIONERS OF LAS ANAMAS
COUNTY v. BOND et al.

Generally, and upon considerations of public policy, a municipal corporation is not subject to garnishment. The exemption may, however, be waived by appearance and submission to liability.

Error to Probate Court of Las Anamas County.

BOND and Rice, the defendants in error, procured an attachment to be issued out of the probate court of Las Anamas county, against Haring and another, the writ commanding the sheriff to serve the county commissioners of

Las Anamas county as garnishees. The interrogatories filed were answered by the county clerk, but no appearance was entered by the board. Judgment was entered up by the court against the board of county commissioners in favor of Harring for the use of the defendants in error. The court refused to vacate the judgment upon motion subsequently entered by the board, and they prosecute this writ of error to have the judgment reversed.

MR. CALDWELL YEAMAN, and MR. J. O. PACKER, for plaintiffs in error.

MR. A. W. ARCHIBALD, and MESSRS. SMITH & MACON, for defendants in error.

ELBERT, J. Upon considerations of public policy, it has generally been held that municipal corporations are not subject to garnishment. Drake on Attachments, § 516; 1 Dillon on Mun. Corp., § 65.

Although the decisions are not uniform, we regard this as the better doctrine. Inconvenience and detriment to the public service lie at the basis of the rule, and demand that the interests of the individual be subordinated to that of the public. In the case of *Merwin v. Chicago*, 45 Ill. 133, Mr. Justice LAWRENCE forcibly says: "Municipal corporations are in the exercise of governmental powers to a large extent. They control pecuniary interests of great magnitude, and vast numbers of human beings, who are more dependent on municipal, for the security of life and property, than they are on either the State or Federal governments. * * * A municipal corporation cannot properly be turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers, or the money of its treasury in defending suits, in order that one private individual may the better collect a demand due from another. A private corporation must assume the same duties and liabilities as private individual."

als, since it is created for private purposes. But a municipal corporation is part of the government. Its powers are held as a trust for the common good. It should be permitted to act only with reference to that object, and should not be subjected to duties, liabilities and expenditures merely to promote private interest or private convenience."

Such was the law at the date of the rendition of the judgment. The statute subsequently passed by the legislature does not affect the determination of this case. Code, § 101.

This exemption, however, may be waived by appearance and submission to liability. Drake on Attachments, § 516a.

Here the judgment expressly recites that no one appeared on behalf of the board of county commissioners. Whether process was served on the board or not, is unimportant. If it did not appear and waive the exemption, no valid judgment could be given.

The county clerk, and *ex-officio* clerk of the board, stands to the case in the relation of a witness certifying to an indebtedness, and not in the relation of an attorney or agent claiming to represent a principal. If in any case, therefore, his answer as clerk of the board would have the effect of an appearance and waiver, binding upon the board, it certainly did not so operate in this case.

The judgment of the court below is reversed with costs, and the cause remanded, with directions to dismiss the proceedings in garnishment as to the plaintiff in error.

Reversed.

MUNICIPAL CORPORATIONS ARE NOT SUBJECT TO GARNISHMENT by the general law, and such was the law in this state until changed by statute: *Denver v. Brown*, 11 Colo. 340, 342.

CLAFLIN et al. v. DOGGETT et al.

1. Where two attaching creditors are, under the statute, entitled to share *pro rata*, the fact that the property attached is sold under execution issued in one case only, does not affect the right of the creditor not ordering execution. The effect of the sale is merely to transfer the attachment lien from the property to the fund.
2. An order of distribution made by the court is final as between attaching creditors until set aside or reversed, and its legal effect is to give each creditor the exclusive right to the amount adjudged to him.

8. When a sheriff collects money on execution in attachments and the several creditors are entitled to share the proceeds *pro rata* under an order of distribution, and the sheriff, without authority, pays the money to the clerk of the court, and is afterward sued by one of the creditors for the amount, and judgment obtained, which is collected by the sheriff's successor: *Held*, that the creditors, under the order of distribution, were entitled to share this fund, and that a bill in equity would lie to compel the distribution; and also *held*, that the ex-sheriff and the clerk were not necessary parties to the bill, and that in such case a court of equity is not ousted of jurisdiction because an action would lie for money had and received.

Error to District Court of Gilpin County.

THE case is stated in the opinion.

MESSRS. H. M. & W. TELLER, for plaintiffs in error.

MR. ALVIN MARSH, for defendants in error.

ELBERT, J. At the May term, A. D. 1871, of the district court for the county of Gilpin, Claflin, Allen & Co. recovered in attachment a judgment against Deitman Schneider. At the same term Doggett, Bassett & Hills also recovered a judgment in attachment against the same defendant. The writ of attachment in each case was levied on the same property. By an agreement of counsel, and for the purpose of saving costs, execution issued only in the case of Doggett, Bassett & Hills, and the property attached was sold thereunder. The proceeds of the sale amounted to \$1,035.79. The court ordered this fund distributed *pro rata* between the two attaching creditors. The clerk made the estimates and certified them to the sheriff. Under this order of distribution, Claflin, Allen & Co. were entitled to the sum of \$548.91, and Doggett, Bassett & Hills, to \$400.38. Upon presentation of the certificate of distribution, the sheriff refused to pay, claiming that he had before paid the money to the clerk of the court. Subsequently Doggett, Bassett & Hills brought suit against the sheriff and his bondsmen for the full amount of the moneys collected by the sheriff, by sale of the goods attached in the two suits. In this suit they recovered the full amount of the sum col-

lected by the sheriff, with interest, amounting to \$1,160, and costs of suit. Upon this judgment an execution issued April 11th, 1876, and the above amount, with costs of suit, were collected by the then sheriff, the defendant, Buffington.

This was a bill filed by Claflin, Allen & Co., claiming the right to participate in the proceeds of this last judgment, under the order of distribution made in the attachment suits, and seeking to enjoin the sheriff Buffington from paying the proceeds to defendants, Doggett, Bassett & Hills.

To this bill, defendants interposed a demurrer, which was sustained by the court below and the bill dismissed. The demurrer raises three objections:

1. Want of equity in the bill.
2. Want of proper parties.
3. Adequate remedy at law.

The two attaching creditors were entitled, under the statute, to share in the funds *pro rata*. That the property was sold on an execution issued upon the judgment of Doggett, Bassett & Hills alone did not affect the right of Claflin, Allen & Co. to participate in the proceeds of the sale. The effect of the sale was to transfer the lien of the attachments from the property to the fund. *Maloney v. Grimes*, 1 Col. 112.

The order of distribution made by the court respecting the fund was final as between the attaching creditors before the court, until set aside or reversed. Rorer on Jud. Sales, 1143-4, and cases there cited.

The legal effect of the order was to give to each attaching firm the right to demand and receive from the sheriff the sum adjudged to it. This right was exclusive. Had either demanded and received from the sheriff a greater amount than the sum so adjudged, the other could have recovered.

Warren v. Iscarian Community, 16 Ill. 114.

The proceeds of the judgment obtained by Doggett, Bassett & Hills, against the sheriff and his sureties, represent this original fund ordered distributed. The default of the

sheriff in not paying over this fund was the basis of the recovery. In that proceeding Doggett, Bassett & Hills recovered not only for what of the fund had been adjudged them, but that which had been adjudged to Claflin, Allen & Co., and which Claflin, Allen & Co., alone, were entitled to demand. Had the sheriff and his sureties plead and proven the order of distribution, there can be no doubt but it would have been a good defense *pro tanto*. That the defense was not interposed cannot affect the right of Claflin, Allen & Co., as against the defendants. The defendants do not properly invoke the maxim that "the law favors the diligent." Upon the order of distribution the rights of the attaching firms, as between themselves, touching this fund, became settled, and no rule of diligence was necessary for their protection. Each was at liberty to press the sheriff for payment or not, as it should see fit. Their failure to pursue their claim would in nowise entitle the other creditor to appropriate it. In such a case, if the proceeds collected amounted to less than the original fund, then the rule of diligence might control the distribution, and the defendants be called upon to account only for what they had recovered in excess of their distributive claim and interest.

In this case the complainants are entitled to recover the amount due them under the order of distribution, with interest, subject to the right of the defendants to be reimbursed an equitable proportion of their expenses in prosecuting their suit against the sheriff and his bondsmen.

The ex-sheriff and the clerk Salisbury were not necessary parties to the suit.

That an action for money had and received would lie, does not oust a court of equity of its jurisdiction. Story's Eq. Jur., § 1256.

The court erred in sustaining the demurrer and dismissing the bill.

The decree of the court below is reversed with costs, and the cause remanded for further proceedings according to law.

Reversed.

COLORADO CENTRAL R. R. CO. v. BLAKE.

Though a demurrer to a special plea is erroneously sustained, yet if under another plea in the record the same defense is available, such error is no ground for reversal; and this court will presume that such defense was interposed when nothing appears in the record to the contrary.

Appeal from Probate Court of Arapahoe County.

THIS was an action of trespass on the case, brought by appellee, to recover for damages sustained by the building of the appellants' railroad through Montgomery street, in the city of Denver. Appellee claims to be owner in fee of certain lots abutting on said street, in Hoyt & Robinson's addition to the city of Denver. The defendant filed a plea of not guilty and two special pleas. The second plea sets up the fee of the street in the city of Denver; permission of the city, by an ordinance duly passed, to the defendant to build and maintain its railroad through Montgomery street.

The third plea sets up fee in the city, permission of the city of Denver to the defendant to build its railroad through the street, and sets out the ordinance in full, under which the defendant claims the right to build its railroad, and alleges that the railroad was constructed in accordance with the provisions of the ordinance, and only such embankment built as was necessary to enjoy the privilege given by the ordinance.

To the second and third pleas, the plaintiff filed a general demurrer, which was sustained by the court. There was a trial by the court on the general issue, and judgment for the appellee. No bill of exceptions was preserved.

Mr. V. D. MARKHAM, for appellee.

Messrs. H. M. & W. TELLER, for appellant.

ELBERT, J. It is not necessary to go into the question of the sufficiency of the special pleas. The defense sought to be interposed by them was equally available under the gen-

eral issue. 1 Chitty's Pleadings, 491 (14th Am. ed.); Gould's Plead. 307-8 (4th ed.); 1 Tidd's Practice, 651*.

The action of the court below in sustaining the demurrer could not, therefore, have prejudiced the defendant, and is no ground of reversal. Though a court erroneously sustains a demurrer to a special plea, yet if under another plea the same defense is available, the error in sustaining the demurrer is no ground of reversal. This is the doctrine of the cases of *Marr v. Wetzel*, and *Brown v. The People*, decided at the February term, 1876, and is supported by the current of authority. *Ill. Cent. R. R. Co. v. Johnson*, 34 Ill. 393; *Varden v. Ellis*, 18 Ark. 355; *Chambers Co. v. Clews*, 21 Wall. 317.

The ruling of the court did not deprive the defendant of its defense, nor is there any thing in the record to show but what it was given in evidence under the general issue. Nothing appearing to the contrary, it has been held that such is the presumption. *Warren v. Crane*, 20 Ill. 151; *Ill. Cent. R. R. Co. v. Johnson*, 34 id. 317.

The judgment is affirmed with costs.

Affirmed.

IF DEMURRER TO SPECIAL PLEA IS ERRONEOUSLY SUSTAINED, such error is not ground for reversal if under another plea in the record the same defense is available, and in such case, in the absence of anything to the contrary in the record, it will be presumed that such defense was interposed: *Colorado Cent. R. R. Co. v. Stoutland*, 4 Colo. 156.

WIDNER v. WALSH.

The statute contemplates the personal seal of the judge to a bill of exceptions, and not the seal of the court. The mistake or default of the judge will not be allowed to prejudice the rights of litigants.

Error to Probate Court of Boulder County.

MR. ALPHEUS WRIGHT, for plaintiff in error.

MESSRS. BERKLEY & BLAKE, for defendant in error.

ELBERT, J. An objection is taken that the bill of exceptions is not properly sealed by the judge, and cannot be considered as part of the record. It is claimed by the defendant, and not contested by the plaintiff in error, that

the seal affixed to the original bill of exceptions was the seal of the probate court, and not the personal seal of the judge. This we think otherwise sufficiently evident. The *locus sigilli* is to the left of and apart from the signature, and within the scrawl are written the words "seal" and "probate court."

The statute contemplates the personal seal of the judge, and not the seal of the court. This bill of exceptions is, therefore, not sealed as required by law, and cannot be regarded as part of the record. *City of Denver v. Capelli*, decided at last term (*ante*, p. 236).

The bill of exceptions was prepared, presented and settled within the time limited by the order of the court. No laches are properly chargeable to the plaintiff. The mistake or default was that of the judge, and must not be allowed to prejudice the right of the parties litigant.

Thirty days time is therefore given the plaintiff in error to perfect his bill of exceptions, and apply for leave to file the same, if he should so desire.

STATUTE CONTEMPLATES PERSONAL SEAL OF JUDGE to bill of exceptions, and not the seal of the court: *Morgensen v. Middeltesen M. & M. Co.* 11 Colo. 173.

CHARLES v. PEOPLE'S INS. CO.

It is not commendable practice for a court to stop the trial of a cause and continue the same on the ground that the plaintiff was intoxicated. And where, in such case, the cause was dismissed at a subsequent term because the plaintiff neglected to pay costs adjudged at the time of such continuance: *Held*, that such dismissal was equivalent to a nonsuit merely, and was no bar to a subsequent action.

Error to District Court of Arapahoe County.

THE case is stated in the opinion.

MESSRS. BELDEN & POWERS, for plaintiff in error.

MESSRS. BROWNE & PUTNAM, for defendant in error.

THATCHER, C. J. This was an action in *assumpsit* on a policy of insurance brought by Charles against the company. The defendant filed the general issue and six special pleas.

The last special plea, *res judicata*, sets up a judgment recovered against the plaintiff by the defendant in the probate court of Arapahoe county for the same cause of action. The plea avers that at December term of said probate court, on its own motion, the court, while evidence was being heard, continued the cause to the next term on the ground that the plaintiff was too drunk to proceed further with said suit, and ordered "that no further proceedings of any kind soever be had in this cause until all the costs and charges in this behalf accrued are paid by the said plaintiff;" that at the subsequent January term "on motion of said defendant's attorneys, it was ordered by the court that the case be dismissed at the costs of said plaintiff for failure to comply with the order heretofore, and on the 13th ultimo entered herein."

To this plea the plaintiff demurred.

The action of the court in continuing the cause on the ground that the plaintiff was intoxicated, was, to say the least, exceptional and by no means commendable practice. It was competent for the court to have proceeded with the trial, which might have resulted in a verdict and a final judgment which would have been a bar to another action. This course, however, was not pursued. The status of the case, at a subsequent term, was precisely the same as when the order of continuance was entered, as to the issues to be tried and determined. There had been no adjudication upon the merits. Upon the payment of costs in pursuance of the order, the plaintiff was at liberty to proceed with the trial upon the issues joined.

It is insisted that the dismissal of a cause for failure to comply with the order of the court is a *final* determination of the rights of the parties litigant. Passing by the question as to whether the very informal *order* of dismissal is to be treated in any technical sense, according to the rules of the common law, as a *judgment*, lacking as it does many of its essential features in form, if not in substance, and treating it for the purpose of this opinion as a judgment, the question recurs: Is it a bar to a future action?

It may be asserted as a general rule, that the plaintiff is not concluded by a judgment not rendered *upon the merits*, and for the same cause of action. 2 Smith's L. Cas. 784, and cases there cited.

The face of the judgment pleaded in bar discloses that by reason of the action of the court in the premises, the merits were not, and could not have been, considered by either court or jury. This order of dismissal cannot be given any broader effect than a judgment of nonsuit. It was final only as to the then pending action, but not conclusive as to the rights of parties. Freeman on Judgments, §§ 13, 258, 261.

In the case of *Howes v. Austin*, 35 Ill. 396, in which the court, upon failure of the plaintiff to comply with a rule requiring him to reply to a plea, interposed to the first and second counts of the *narr.*, within a prescribed time entered a judgment that plaintiff "take nothing by his said first and second counts of his declaration aforesaid, and that the said defendant go thereof without day," etc., it was held that the only effect of the judgment "was to turn the plaintiff out of court on the cause of action *non prossed*, leaving him at liberty to proceed for its recovery precisely as though the declaration or counts *non prossed* had never been filed."

A judgment of nonsuit or dismissal entered in a cause, even where there was no impediment to a trial on the merits, will not ordinarily operate as an estoppel. Freeman on Judgments, § 261, says: "Judgments of nonsuit, of *non pros*, of *nolle prosequi*, of dismissal and of discontinuance are *exceptions* to the general rule, that when the pleadings, the court and the parties are such as to permit of a trial on the merits, the judgment will be considered as final and conclusive of all matters which could have been so tried."

We are satisfied on principle and authority that the court erred in overruling the demurrer to the plea of *res judicata*. The judgment of the court below must be reversed with costs, and the cause remanded for other proceedings not inconsistent with the views here expressed.

Reversed.

HARTFORD FIRE INS. CO. v. SMITH et al.

1. Under the terms of an insurance policy where the insured were required to give immediate notice to the company in case of loss: *Held*, that notice to the company's local agents on the day after the loss was sufficient.
2. Where appropriate words are employed descriptive of the present use of the insured premises, courts will not construe them into a promissory stipulation that the use of the premises shall remain unchanged, unless the intention of the parties to that effect is clearly manifest.
3. Where, under the terms of a policy of insurance, it was provided that "if the premises hereby insured shall become vacant or unoccupied, this policy shall be void," and one of the rooms continued to be occupied nightly as a sleeping apartment by a person engaged in the repair of the building: *Held*, that the building did not become vacant or unoccupied under the meaning of the policy.
4. There must be a substantial compliance with the terms of the policy in furnishing preliminary proofs of loss, unless waived by the insurer. Failure to furnish a copy of all policies covering the insured premises, when the same is required in the preliminary proof, by the terms of the policy, is not a substantial compliance in this particular.
5. If the company put the refusal to pay upon other grounds than of defective proofs, it will be held a complete waiver of the preliminary proofs.
6. An agent having special authority to adjust a particular loss cannot, by virtue thereof, adjust a different loss, and whatever he may do with reference to the different loss cannot affect the principal. To bind the principal, it must be shown by competent evidence that the agent acted within the scope of his authority.
7. When incompetent evidence is permitted to go to the jury, and that may have influenced their verdict, the verdict will be set aside. Whenever it appears that there is written evidence of a particular fact, oral evidence must be excluded, or the non-production of the written evidence legally excused.

Error to Probate Court of Arapahoe County.

THIS was an action of assumpsit brought by Smith and another, the defendants in error, against the plaintiff in error, upon a policy of insurance against loss by fire. The jury rendered a verdict in favor of the plaintiffs below, and judgment was entered on the verdict. The facts are sufficiently stated in the opinion.

Messrs. SAYRE, WRIGHT & BUTLER, for plaintiff in error.

Mr. C. S. THOMAS, and Mr. T. M. PATTERSON, for defendants in error

THATCHER, C. J. By the terms of the policy the assured were required, in case of loss, to give immediate notice thereof to the company. On the day after the fire, Kassler & Patterson, local agents of the company; whose duty it was, in the event of loss, to notify their principal, wrote a letter to G. F. Bissell, general agent of the company at Chicago, apprising him of the loss. On the same day, and after the letter was written, the assured notified Kassler & Patterson of the loss, and were informed by them that it was already known to them, and that they had signified the same by letter to the company. Was this notice of loss given to the local agents sufficient? It has been held that where the policy requires the notice to be given to a particular officer or agent of the company, that notice to any other officer or agent than the one designated would not be a substantial compliance with the provisions of the policy, and that it would, therefore, be insufficient. But the policy under consideration contains no such restrictions. The assured are, therefore, free to give the company notice in any manner they choose. The only requirement is that the company be apprised of the loss immediately after it occurred. The notice given to the agents must, under a proper construction of the assured's contract, be held to be a notice to the company. *Killips v. The Putnam Fire Insurance Co.*, 28 Wis. 480.

The fact that the occupancy of the building insured was changed after the issuance of the policy is not deemed to be material. The statement in the policy that the insured building was "occupied by the tenant for a boarding-house," was but an affirmation of its then existing condition, not promissory in its character.

It is not to be regarded as a warranty that the building

would continue to be occupied in the same way. If a continuing warranty had been intended, it is to be supposed it would have been expressed in more apt language. Where appropriate words are employed, descriptive of the present use of insured premises, courts will not construe them into a promissory stipulation that the use of the premises shall remain unchanged, unless the intention of the parties to that effect is clearly manifest. *Blood v. Howard Fire Ins. Co.*, 12 Cush. 472; *Smith v. Mechanics & Traders' Ins. Co.*, 32 N. Y. 399; *Hough v. City Fire Ins. Co.*, 29 Conn. 10.

It is provided in the policy that "if the premises hereby insured shall become vacant or unoccupied * * * this policy shall be void." Were the premises vacant or unoccupied within the meaning of the policy at the time of the fire? The building was no longer used as a boarding-house, but as we have seen, the insured were under no obligation to continue its use for that purpose. When the boarding-house tenant vacated the building, Mr. Feely at once occupied it, and continued its occupation until it was burned down. He was engaged in repairing the building, and slept therein every night. One of the rooms was furnished, and used by him as a sleeping apartment. The fact that he took his meals elsewhere does not, in our opinion, operate to defeat the policy. We do not think that the company, by requiring that the building should be occupied, stipulated for a higher degree of care and watchfulness than the occupancy by Mr. Feely implies. While we shall endeavor to guard the rights of insurance companies by a fair and reasonable construction of their contracts, we cannot consent to see frittered away the rights of the insured by an illiberal and unjust interpretation of a policy designed for their (the insured's) protection. We are of opinion that the building did not become vacant or unoccupied within the meaning of the policy. In this view one of the objections of the general manager to the preliminary proof, viz: that the insured failed to set forth the occupancy of the building,

is not valid. The statement "that the building insured and destroyed was occupied by Patrick Feely as a lodging-house" is sufficient.

As a precedent condition to the right of the assured to recover from the company, a particular account of the loss in the nature of preliminary proofs is required. The character of this particular account is determined by the policy. Among other things the assured are required in their preliminary proofs to furnish a copy of all policies covering the insured premises, in which respect they failed. That there must be a substantial compliance with the terms of the policy in furnishing the preliminary proofs before the assured are entitled to any indemnity in case of loss, the authorities are agreed, unless the company waive the defects in the proofs, or waive the proofs altogether, by putting the refusal to pay on other grounds. *Blake v. Exchange Mutual Ins. Co.*, 12 Gray, 270; *Franklin Fire Ins. Co. v. Coats & Glenn*, 14 Md. 293; *Charleston Ins. & Trust Co. v. Nene*, 2 McMullen (S. C.), 237; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Tayloe v. Merchants' Ins. Co.*, 9 How. (U. S.) 390; *Hartford Pro. Ins. Co. v. Harmer*, 2 Ohio St. 452; *Noyes v. Washington County Ins. Co.*, 30 Vt. 659; *Peoria Marine & Fire Ins. Co. v. Whitehill*, 25 Ill. 470; *Vos v. Robinson*, 9 Johns. 192; *Commonwealth Ins. Co. v. Sennett et al.*, 41 Penn. 162.

These authorities abundantly attest that by the acts of the underwriters there may be a complete waiver of the preliminary proofs. Was there a waiver in this case? The general manager of the company at Chicago, after receipt of proof of loss from Smith & Doll, wrote them a letter informing them that the "alleged proof of loss was incomplete and unsatisfactory, and not in accordance with the conditions of the policy in the particular that a copy of the policy was not furnished with and made a part of the alleged proof of loss, and also that the occupancy of the building at the time of the destruction by fire is not set forth in the alleged proof of loss." Subsequently McLane visited Denver for the purpose of adjusting the losses of the

company on the Rough and Ready mill, which had been destroyed by fire some time before Mr. Doll testified that McLane offered \$250 in satisfaction of the policy, and declared to him that "the only reason why he would not pay the full amount of the loss was, that the house was not rented at the time of the fire." No mention was made of any defects in the preliminary proofs. The refusal to pay was put distinctly upon other grounds than the failure to furnish the "particular account" in accordance with the provisions of the policy. McLane having thus denied liability of the company solely for other reasons than incomplete or defective proof, it must be held that the company waived the condition requiring proof before payment of loss, if McLane acted within the scope of his authority.

"Surely," says Mr. Justice STRONG, speaking for the court in the case of *The Inland Insurance and Deposit Company v. Staffer*, 33 Penn. 403, "it cannot be contended that it was not competent for the insurers to waive performance of a formal condition, introduced solely for their own benefit. At most it was a condition precedent not to the undertaking of the insurers, but to the right of action of the insured. It is no new doctrine that insurers may waive objection to defective compliance with such a stipulation, or to entire non-compliance, and that such waiver in effect strikes the condition out of the contract; nor need the waiver be express. It may be inferred from the acts of the insurers evidencing a recognition of liability, or even from their denial of obligation for other reasons."

Under the authorities there was a complete waiver of preliminary proofs, if McLane had power to bind the company.

But the scope of McLane's authority does not sufficiently appear. If it were established either that he was a general adjusting agent of the company, or that he was specially authorized to examine into and adjust the loss of Smith & Doll, we should hold that by his acts the company was

estopped from demanding further preliminary proofs. The witness, Kassler's, primary knowledge of the agency of McLane was based upon a letter he had received from the general manager at Chicago, from which he learned that McLane was "a representative and adjuster" of the company, and that he would be sent out to adjust the Rough and Ready mill loss. This evidence the company moved to exclude on the ground that it was secondary. This motion was not met with an offer to excuse the absence of the letter. The letter was, without question, the best evidence of its own contents, and the court erred in permitting secondary evidence to be substituted for it. As written evidence is higher than oral, whenever it appears, whether in the direct or cross-examination, that there is written evidence of the facts sought to be proved, the inferior evidence must be excluded altogether, or the non-production of the written evidence be legally excused. 1 Phillips' Ev. 470 (5th Am. Ed.)

The motion to exclude the secondary evidence should have been allowed.

It appears that McLane did, in fact, adjust the loss on the Rough and Ready mill, and that upon his adjustment it was paid. This shows a ratification of his acts in this particular matter. As the evidence tending to prove his original authority in the form in which it was introduced, was incompetent, and as the only act of McLane, which was subsequently ratified by the company, was his adjustment of the Rough and Ready mill loss, it would be going very far to say that the jury was warranted in finding as it must have done if the verdict is to stand, that the company had waived a strict compliance with the condition of the policy requiring preliminary proof, by reason of any thing that had been said by McLane, to Smith & Doll. An agent having special authority to adjust a particular loss, cannot, by virtue thereof, adjust a different loss, and whatever he may have asserted with reference to that different loss cannot affect the company. As in our opinion, the secondary

evidence not being considered, the cause must be remanded for a new trial, we forbear to comment further upon the testimony.

The inquiry as to the scope and extent of McLane's authority being one of fact was, as it should have been, submitted to the jury. *Hough v. City Fire Ins. Co.*, 29 Conn. 10; *Keenan v. Missouri State Mut. Ins. Co.*, 12 Iowa, 126.

But as there was incompetent evidence before it, that may have largely influenced its verdict, it cannot be permitted to stand.

The judgment of the court below is reversed with costs, and the cause remanded for further proceedings according to law. *Reversed.*

INSURANCE—AVERMENT OF PERFORMANCE OF CONDITIONS PRECEDENT is supported by proof of the total waiver of them: *Bishop v. Griffith*, 4 Colo. 71.

VERDICT WILL BE SET ASIDE FOR ADMISSION OF INCOMPETENT EVIDENCE which may have influenced the verdict of the jury: *Orans v. Andrews*, 8 Colo. 355.

THE PEOPLE ex rel. CRAWFORD, State Auditor, v. LOTHROP, County Clerk, etc.

1. Under section 307 of the Code, if the relator goes to trial without demurring to the answer to a petition for *mandamus*, he cannot afterward raise any question as to formal defects.
2. Under section 60 of the Code, a defendant may interpose inconsistent defenses, if each defense is in itself complete, and not inconsistent with itself.
3. Under section 61 of the Code, a demurrer may be interposed to the whole answer, and a separate demurrer may also be interposed to one or more of the defenses.
4. A mere averment of a conclusion of law is bad upon *demurrer*, and may be *stricken out*.
5. When a demurrer for irrelevancy, etc., goes to the whole answer, and it appears that any portion of the answer is material to the defense, the demurrer must be overruled.
6. The State board of equalization created by the Constitution is not, in any strict sense, a corporation, yet an act of the majority of the whole number at a stated meeting, every member having had due notice to attend, may be valid.

7. Where duties of a public, deliberative, and judicial nature are by law cast upon a board, *eo nomina*, an aggregate organ of the government, they may be performed by a majority of its members at a duly convened meeting, unless the law creating such board otherwise provides. Although every member must be notified, a majority only need attend and act.
8. The statute (§ 2281, Gen. Laws), requiring the board of equalization to meet at a stated time and place was *notice* to every member of the board.
9. At an adjourned meeting of the board any business may be transacted that might have been transacted at the stated meeting. It is in fact but a continuation of the stated meeting.
10. The duty of the State board is to *adjust* and *equalize* the valuation of the real and personal property among the several counties, with the view of apportioning equitably the burthen of the State government.
11. The power to determine the valuation of taxable property is lodged in the assessors and the boards of county commissioners. The State board of equalization may, for the purpose of adjusting and equalizing, increase the aggregate valuation of one county and decrease that of another, but it has no power to increase the aggregate valuation of property above the valuations as returned by the clerks of the several counties.
12. A levy of a State tax by the boards of county commissioners for the year 1877 was not necessary; the effect of section 2283 (General Laws) is to levy, by legislative declaration, a State tax for that year in specified cases.

DEMURRER to the answer to a petition for mandamus :

The sections of the Code passed upon but not set out in full in the opinion are as follows :

“SECTION 307. On the trial the applicant shall not be precluded by the answer of any valid objection to its insufficiency, and may controvert it by proof either in direct denial or by way of avoidance.”

“SECTION 60. The defendant may set forth, by answer or cross complaint, as many defenses and counter-claims or set-offs, as he may have, whether the subject-matter of such defenses be such as were heretofore denominated legal or equitable, or both—they shall each be separately stated; and the several defenses shall refer to the cause of action which they are intended to answer in a manner by which they may be intelligibly distinguished.”

“SECTION 61. When the answer contains new matter constituting a defense or a counter-claim or cross complaint or set-off, the plaintiff shall, within ten days (said days to be

computed from the time of the filing of said answer) reply or demur to the same for insufficiency, stating in his demurrer the grounds thereof ; and he may also, within the same time, demur to one or more defenses set up in the answer ; sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant, immaterial or insufficient, may be stricken out on demurrer, and upon such terms as the court in its discretion may impose."

The petition, answer and demurrer were as follows :

To the Honorable, the Supreme Court of the State of Colorado :

Your petitioners, David C. Crawford, as State auditor, on behalf of the people of the State of Colorado, respectfully represents and shows that on the 2d Monday of August, A. D. 1877, being the 13th day of August, the State board of equalization in and for the State of Colorado did convene and sit at the office of secretary of State, at the capital, pursuant to and by authority of the Constitution of the State of Colorado, and of an act "to provide for the assessment and collection of revenue and to repeal certain acts in relation thereto," approved on the 20th day of March, A. D. 1877, for the purpose of examining the various assessments of the several counties of the State, as far as regards the State tax, and to equalize the rate of assessment in the various counties of the State, and to adjust and equalize the valuation of real and personal property among the several counties of said State, as by the Constitution and said act contemplated, whenever, upon such examination, they should be satisfied that the scale of valuation in said counties had not been adjusted with reasonable uniformity, by the different assessors thereof, and to discharge such other duties as were imposed upon them by law ; that said board was duly adjourned from time to time, and met pursuant to adjournment, at the said office of secretary of State until the — day of August, A. D. 1877, at which time abstracts of the assessment rolls of all the counties in said State had been

received by the State auditor, from the county clerks of each of the respective counties in said State, and said board did then and there publicly sit and proceed to act and discharge the duties imposed upon the said State board of equalization ; and that at said last-named meeting, the said abstracts of the assessment rolls were severally before the said board and duly considered ; that said board did then and there proceed to examine the various abstracts of the assessment rolls of property in the various counties in the State, for the year A. D. 1877, as far as the State tax was concerned, for the purpose of equalizing the rate of assessment in the various counties of the State, and to increase or diminish the aggregate valuation of real estate in any county, so as in their judgment to adjust and equalize the rate of assessment in the various counties of said State ; that upon such examination the said board of equalization became and were satisfied that the scale of valuations in the various counties of the State had not been adjusted with reasonable uniformity by the different assessors thereof, and that thereupon the said board being so satisfied, in the discharge of their said duty, then and there proceeded to equalize the rate of valuation of real and personal property among the several counties of the State, as regards the State tax ; that to that end, and in the discharge of their duty, the said board of equalization adjourned from day to day, and met pursuant to adjournment, at the office of secretary of State, until they had completed their work, as said board, to equalize the rate of assessment in the said various counties ; that said board did proceed, after said abstracts of the assessment rolls had been received, as in their judgment authorized, after careful examination and deliberation had, to adjust and equalize the rate of assessment of the various counties as far as regards State tax, and adjust and equalize the valuation of real and personal property among the several counties of the State, according to their best knowledge and judgment, and said board did ascertain that the valuation of the real estate in several counties of the State did not

bear a fair relation or proportion to the valuation in all other counties of the State, and thereupon they increased the aggregate valuation of the real estate of some of said counties, and diminished the aggregate valuation of the real estate of other of the said counties as much, and no more, than in their judgment was necessary to produce a just relation between all the valuations of real estate in the State ; that said board, in the discharge of duty, to adjust and equalize the valuation of real and personal property among the several counties of the State, made certain changes in the valuation and assessment of the real and personal property of the county of Arapahoe from the valuation as shown by the abstract of assessment roll returned as aforesaid by Wilbur C. Lothrop, then and now being county clerk of Arapahoe county, to the State auditor, as follows : Increased the valuation of land 100 per centum, increased the valuation of horses 15 per centum, increased the valuation of mules 25 per centum, increased the valuation of cattle 71 per centum, and increased the valuation of sheep 30 per centum ; that the said action of the said State board of equalization in respect to the equalization of the rate of assessment, and the increase and diminution of the valuation of real estate aforesaid, and in respect to the said changes made in the assessment of Arapahoe county was agreed to by a majority of all the members of said board, as in their judgment just and right, and as authorized by law ; that thereafter, on the 1st day of September, A. D. 1877, the said State auditor, David C. Crawford, duly transmitted to each of the county clerks of the various counties of the State a statement of the changes so made in the assessment of his county by said board, and to Wilbur C. Lothrop, then and now being county clerk of the county of Arapahoe, the said State auditor duly transmitted a statement of the changes so made in the assessment of said county of Arapahoe, and the rate of State tax to be levied and collected in said county of Arapahoe, at the rate of 5 mills on the dollar ; that said statement, so sent, was duly received by the said Wilbur C. Lothrop, county clerk, as

aforesaid, on or about the 1st day of September, A. D. 1877.

Your petitioner further complaining shows that the said changes in the assessment and valuation of the real and personal property of Arapahoe county were made by said board as aforesaid, as in their judgment was just and right, to adjust and equalize the valuation of real and personal property in said Arapahoe county with the valuation of the real and personal property of the several counties of the State, and said statement of changes so made and transmitted to, and received by the said county clerk of said Arapahoe county, have been by him disregarded, and he hath and still doth neglect and refuse to perform his duty in the premises, and he hath and doth wrongfully refuse, in making up the tax list in and for said county of Arapahoe, to compute and carry out in the proper column a State tax according to said change so made as aforesaid by the said board of equalization, and so transmitted to said clerk, contrary to the provisions of said act, and he, the said Wilbur C. Lothrop, county clerk of said Arapahoe county as aforesaid, hath wholly failed and refused, and doth continue to fail and refuse to discharge his duty herein, contrary to the provisions of said act.

Wherefore, inasmuch as said Wilbur C. Lothrop, county clerk as aforesaid, hath failed and refused, and doth fail and refuse to compute and carry out in the proper column a State tax at the rate as returned to him, as aforesaid, by said State board of equalization ; and, whereas, your petitioner further shows, that there is not a plain, speedy and adequate remedy in the ordinary course of law, whereby the said Wilbur C. Lothrop, county clerk as aforesaid, can be compelled, in making up his tax list, to compute and carry out in the proper column, a State tax according to the changes so made in the assessment of property in said Arapahoe county by said State board of equalization ; and your petitioner further shows that the only remedy whereby the people of the State of Colorado can or may realize from the

said county of Arapahoe its just quota of taxes for State purposes in accordance with, and pursuant to said act, is by the writ of *mandamus*.

Wherefore, your petitioner prays a writ of *mandamus* directed to the said Wilbur C. Lothrop, county clerk of said Arapahoe county, commanding him to proceed without delay in making up the tax list as required by said act, to compute and carry out in the proper column, a State tax according to the statement of the changes so made by the said State board of equalization, in the assessment of said Arapahoe county, and transmitted to him by the State auditor, at the rate of 5 mills on the dollar, to be collected within the said county of Arapahoe, and that such other and further order may be made in the premises as justice may require, etc.

DAVID C. CRAWFORD.

STATE OF COLORADO, }
COUNTY OF ARAPAHOE, } ss:

David C. Crawford, being duly sworn according to law, deposes and says that he is the petitioner named in, and who signed the foregoing petition; that he is the auditor of the State of Colorado, and a member of the State board of equalization for the State of Colorado, and attended personally all the sittings of the said board mentioned and referred to in said petition, and participated in all the proceedings, deliberation and action of said board in said petition mentioned; that the several matters and things in said petition set forth are true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

DAVID C. CRAWFORD.

Sworn to and subscribed before me, }
this 22d day October, A. D. 1877. }

ORSON BROOKS,

Notary Public.

{ Notarial }
{ Seal. }

IN THE SUPREME COURT OF THE STATE OF COLORADO.

The People ex rel. David G. Crawford,	}
as Auditor of State,	
agst.	
Wilbur C. Lothrop, County Clerk of	
the County of Arapahoe.	

First. The defendant, Wilbur C. Lothrop, answers the petition of the relator herein, and denies that the State board of equalization of the State of Colorado met at the office of the secretary of State, at the capitol of the State, on the second Monday of August, A. D. 1877, or at any other time after that date, pursuant to law, for the purpose of examining the various assessments of the several counties of the State, so far as regards the State tax, or to equalize the rate of assessment in the various counties of the State; or to adjust and equalize the valuation of real and personal property among the several counties of said State.

And he denies that the State board of equalization of the State of Colorado on or after the said second Monday of August, A. D. 1877, adjourned from time to time, or met pursuant to any adjournment at the office of the secretary of State or elsewhere, until the — day of August, A. D. 1877.

And this defendant denies that the State board of equalization of the State of Colorado on the — day of August, A. D. 1877, sat publicly at the office of the secretary of State, or proceeded to act and discharge the duties imposed upon the State board of equalization; and he denies that at that time, the abstracts of the assessment rolls of the several counties of the State were before the State board of equalization, or were duly considered by said State board; and he denies that the State board of equalization ever, at any time, examined the various abstracts of the assessment rolls of property in the various counties in the State for the year 1877, as far as the State tax was concerned, for the purposes in said petition stated, or for any other purpose;

and he denies that the State board of equalization of the State of Colorado ever became or was satisfied, that the scale of valuations in the various counties of the State had not been adjusted with reasonable uniformity by the different assessors thereof; and he denies that the State board of equalization of the State of Colorado ever proceeded to equalize, or ever did equalize, the rate of valuation of real and personal property among the several counties of the State as regards the State tax; and that in the discharge of its duty the said State board of equalization of the State of Colorado adjourned from day to day and met pursuant to such adjournment at the office of the secretary of State, until it had completed its work, as alleged in the said relator's petition herein; and he denies that after the abstracts of the assessment rolls had been received, the State board of equalization of the State of Colorado proceeded to adjust and equalize, or ever did adjust or equalize, the valuation of real and personal property among the several counties of the State, according to its best knowledge and judgment; and he denies that the State board of equalization of the State of Colorado ascertained that the valuation of real estate in several counties of the State did not bear a fair relation and proportion to the valuation in all other counties of the State; and he denies that the State board of equalization of the State of Colorado thereupon increased the aggregate valuation of the real estate of some of the said counties and diminished the aggregate valuation of the real estate of other of said counties, as much, and no more, as in its judgment was necessary to produce a just relation between all the valuations of real estate in the State; and he denies that the said State board of equalization in the discharge of its duty, to adjust and equalize the valuation of real and personal property among the several counties of the State, made certain changes in the valuation and assessment of the real and personal property in the county of Arapahoe from the valuations as shown by the abstract of assessment roll returned by the county clerk of said

county to the auditor of State; and he denies that the State board of equalization of the State of Colorado increased the valuation of land in Arapahoe county one hundred per centum; the valuation of horses fifteen per centum; the valuation of mules twenty-five per centum; the valuation of cattle seventy-one per centum, and the valuation of sheep thirty per centum; and as to the allegation in the relator's petition, that on the 1st day of September, A. D. 1877, the auditor of State duly transmitted to each of the county clerks of the various counties of the State a statement of the changes alleged to have been made in the assessment of his county by the said State board of equalization, this defendant states that he has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Second. And for a second and further answer to the petition, this defendant admits:

That he is now, and on the first day of September last past was, the county clerk of said county of Arapahoe;

That, as such county clerk, on or about the 1st day of September, A. D. 1877, he received from the auditor of State a statement in writing containing certain changes in the valuation of real and personal property in the county of Arapahoe, purporting to have been made by the State board of equalization of the State of Colorado, which said statement is the same referred to by the relator in his petition herein, as this defendant is informed and verily believes, and none other or different, but this defendant denies that any such changes in the valuation of the real and personal property in said county of Arapahoe, as were contained in said statement, were ever made, or authorized to be made, by the State board of equalization of the State of Colorado, or by a majority of the members of the said State board of equalization at any meeting of the said board; and he denies that the changes in the valuation of the real and personal property of said county of Arapahoe, which appeared in said statement so as aforesaid received from the said auditor of State, were ever made by the said State board of equalization, as

in its judgment was just and right to adjust and equalize the valuation of real and personal property in said county of Arapahoe with the valuation of real and personal property of the several counties of the State ; and this defendant denies that any such changes as appeared upon the said statement were necessary to be made in the valuation of the real and personal property of said county of Arapahoe for the year 1877 in order to equalize and adjust the valuation of the real and personal property of said county of Arapahoe with the valuation of real and personal property of the several counties of the State ; and this defendant further admits that he, as such county clerk, has disregarded the changes in the valuation of real and personal property in said county of Arapahoe as appeared in the said statement so as aforesaid received by him, and that he has refused, in making up the tax list for said county of Arapahoe, for the year 1877, to compute and carry out in the proper column a State tax according to said changes in said statement contained, for the reason that, as he is advised and believes, no such changes were ever made by the State board of equalization of the State of Colorado ; and that such changes were contrary to the spirit and intent of the constitution and laws of this State ; and that it was his duty to disregard all such changes in carrying out the State tax for the year 1877, upon the assessment roll of said county of Arapahoe ; and he denies that, as he is advised and verily believes, such refusal was, or is, contrary to the Constitution and laws of this State.

Third. And for a third and further answer this defendant, upon information and belief, avers :

That on the 13th day of August, A. D. 1877, being the 2d Monday of August, A. D. 1877, the governor, auditor of State, State treasurer, and attorney-general, members of the State board of equalization, met at the office of the secretary of State, at the capitol of the State ;

That on that occasion the secretary of State was absent and took no part in the deliberations or proceedings of the other members of said State board ;

That the other members of said State board, to wit : the governor, the auditor of State, the State treasurer, and the attorney-general, assuming to act as the State board of equalization of the State of Colorado, transacted no business, and adjourned to the 20th day of August, 1877 ;

That on the 20th day of August, 1877, the said auditor of State, State treasurer, and attorney-general, members of said State board, again met at the office of the secretary of State in Denver ; that the governor and secretary of State did not, nor did either of them, meet with or take any part in the deliberations of the other members of said State board ;

That the said auditor of State, State treasurer, and attorney-general did no business at that meeting except to direct the auditor and the clerk of said members of said board to prepare tables of the assessment returns for the year 1876 and of the year 1877, so far as the same had been received, and to adjourn, which they did to the 27th day of August, 1877 ;

That afterward, and on the 31st day of August, A. D. 1877, the said auditor of State, State treasurer, and attorney-general, members of said State board of equalization, again met at the office of the secretary of State in the city of Denver ; that the governor and secretary of State did not, nor did either of them, have any notice of a meeting of the State board of equalization on that day ; and the said governor and secretary of State did not, nor did either of them, on that day meet with, or take any part in the deliberations of the other members of said State board ;

That on the said 31st day of August, A. D. 1877, the said auditor of State, State treasurer and attorney-general assuming to be, and to act as the State board of equalization of the State of Colorado, and in the absence of the other members of said board, and without authority of law, proceeded to examine the various assessments as far as regards the State tax, and to make certain changes in the rate of assessment in the various counties of the State ; and then and there, contrary to the true intent and spirit of the constitution and laws of this State, called before them and

took the advice and opinion of sundry farmers, ranchmen, stock breeders and money lenders as to the proper value of real and personal property in the different counties of the State, and compared the abstracts of the assessments from the various counties of the State returned in previous years with the abstracts for the year 1877, for the purpose of equalizing the valuation of property in the various counties of the State, and then and there, instead of equalizing the rate of assessment in the various counties in the State, whenever the scale of valuation had not been adjusted with reasonable uniformity by the different assessors and by increasing the aggregate valuation of the real estate of such counties in the State, as was relatively too low in proportion to the valuation of real estate in the other counties in the State, and diminishing the aggregate valuations of real estate of such counties of the State as was relatively too high in proportion to the valuation of the real estate of the estate of the other counties of the State, so as to produce a just relation between all the valuations of real estate in the State, increased the aggregate valuation of the real and personal property over and above the valuations as returned by the clerks of the following counties as follows :

The county of Arapahoe.....	\$960,255 90
The county of Bent.....	224,038 45
The county of Boulder.....	630,654 70
The county of Douglas.....	305,389 60
The county of Elbert.....	409,008 95
The county of El Paso.....	383,818 90
The county of Gilpin.....	55,025 00
The county of Huerfano.....	12,538 14
The county of Jefferson.....	547,979 05
The county of Lake.....	272 85
The county of La Plata.....	5,962 50
The county of Larimer.....	305,330 85
The county of Las Animas.....	24,648 98
The county of Park.....	11,303 00

The county of Pueblo.....	\$644,332 70
The county of Rio Grande.....	2,694 50
The county of Routt.....	49,206 50
The county of Saguache.....	28,568 73
The county of Summit.....	408 72
The county of Weld.....	889,545 20
	\$5,490,993 32

That said auditor of State, State treasurer and attorney-general assuming to be the State board of equalization of the State of Colorado, at the same time and place diminished the aggregate valuations of the following named counties as follows:

The county of Conejos.....	\$1,852 80
The county of Costilla.....	5,297 00
The county of Custer.....	26,834 05
The county of Fremont.....	15,617 00
	\$49,590 85

And made no changes whatever in the valuations of the property in the other counties of the State, thereby making a net increase in the aggregate valuation of all the counties in the State, above the aggregate valuations as returned by the clerks of the several counties, of \$5,441,402.47 as will more fully and at large appear by reference to the tabular statement hereto attached, and made a part of this answer, and to which the defendant begs leave to refer if it becomes necessary for him to do so.

That in making such net increase in the aggregate valuations of all the counties as aforesaid, above the aggregate valuations as returned by the clerks of the several counties, the said auditor of State, State treasurer and attorney-general increased the aggregate valuation of the property in the said county of Arapahoe as follows:

They increased the value of lands one hundred per centum, thereby fixing the valuation of lands in said county at the average value of \$13.06 per acre, while the equalized valuation of all the lands in the State as returned by the clerks of the several counties is only \$5.63 per acre.

They increased the valuation of horses in said county fifteen per centum, thereby fixing the valuation of horses per head in said county at \$45.89, while the equalized valuation of all the horses in the State as returned by the clerks of the several counties is \$43.41 per head.

They increased the valuation of mules in said county twenty-five per centum, thereby fixing the valuation of mules in said county at \$64.24 per head, while the equalized valuation of all the mules in the State as returned by the clerks of the several counties is \$66.33 per head.

They increased the valuation of cattle in said county seventy one per centum, thereby fixing the valuation of cattle in the said county at \$12.02 per head, while the equalized valuation of all the cattle in the State as returned by the clerks of the several counties is \$10.02 per head.

They increased the valuation of sheep in said county thirty per centum, thereby fixing the valuation of sheep in said county at \$1.70 per head, while the equalized valuation of all the sheep in the State as returned by the clerks of the several counties is \$1.63 per head.

All which will more fully and at large appear by reference to the said tabular statement hereto attached, and to which this defendant begs leave to refer.

That the changes so as aforesaid made by the said auditor of State, State treasurer, and attorney-general, in the valuation of the real and personal property of said Arapahoe county, for the year 1877, are the same changes therein alleged by the relator herein to have been made by the State board of equalization of the State of Colorado, and none other or different.

Fourth. And this defendant further answering avers, that as he is advised and believes, and he so charges the truth to be, the said David C. Crawford, auditor of State,

George C. Corning, State treasurer, and Archibald J. Sampson, attorney-general, do not, and never did, constitute the State board of equalization of the State of Colorado, and that they, the said Crawford, Corning and Sampson, had no right, power, or authority whatever, in the absence of the governor and secretary of State, to sit as a State board of equalization or to make any changes in the valuation of the real and personal property in the several counties of the State as returned by the several county clerks; that the State board of equalization never met, nor considered, nor examined the various assessments, nor equalized the rate of assessment in the various counties in the year 1877, and never made any changes whatever in the valuation of real or personal estate in the county of Arapahoe for the year 1877; and he is advised, and so charges the truth to be, that all the changes made in the valuation of real and personal property in said county of Arapahoe, so far as regards the State tax, were made by the said David C. Crawford, auditor of State, George C. Corning, State treasurer, and Archibald J. Sampson, attorney-general, and that such changes were made without authority of law, and were irregular, improper, null and void.

Fifth. This defendant, further answering, denies each and every allegation in said petition contained not hereinbefore specifically denied, admitted, or controverted.

Wherefore this defendant prays that the peremptory writ of mandamus prayed against him may be denied.

WILBUR C. LOTHROP.

WM. B. MILLS, *Attorney for the defendant.*

STATE OF COLORADO, }
COUNTY OF ARAPAHOE. } ss :

Wilbur C. Lothrop, being duly sworn, deposes and says : that he is the defendant in the above-entitled proceeding ; that he has heard read the foregoing answer by him subscribed, and knows the contents thereof ; and that the same is true of his own knowledge, except as to the matters

444 PEOPLE ex rel. CRAWFORD v. LOTHROP, etc. [Dec. T.,
therein stated upon information and belief, and as to those
matters he believes it to be true.

WILBUR C. LOTHROP.

Subscribed and sworn to this 24th day of }
October, A. D. 1877, before me. }

[Notarial
Seal.]

LORIN A. STALEY.
Notary Public.

IN THE SUPREME COURT OF THE STATE OF COLORADO.

The People ex rel. David C. Crawford

agst.

Wilbur C. Lothrop, County Clerk of
Arapahoe County.

The relator demurs to the answers of the defendant, taken
together, for insufficiency.

First. Because taken as a whole the facts alleged, ad-
mitted, and denied therein, do not constitute a defense or
cause for denying the writ prayed for in the petition.

Second. Because it appears upon the face of said answers
taken together, and is manifest, that the whole thereof are
framed and founded not upon fact, but upon a supposed
fiction of law, that a meeting of the majority of the mem-
bers of the board of equalization on the day appointed by
law for the session of the board, and at subsequent ad-
joined meetings, were not meetings of said board in point
of law, and the action had at such meetings was not, in
point of law, the action of said board, and such action was
not binding in law upon the defendant.

Third. Because the several answers of said defendant are
inconsistent and repugnant in this, that in one, the meet-
ing of said board on the day appointed by law, to wit: the
second Monday of August, is denied, and in another, it is
admitted that on that day a majority of the members of

said board assembled. In this also, that while in one answer it is denied that said board adjourned from day to day, in another, it shows that a majority of said board met on said 13th of August, and adjourned said meeting, and it is not averred that said majority did not adjourn from that day, from day to day, until and including the meeting of the 31st of August, when the action in controversy was taken. In this also, in one answer, it is denied that said board acted at any of said meetings in the various particulars set out in the petition respectively, but it is not denied that the majority, which another answer avers did attend the meetings, acted as averred in the petition, but avers that such action was had at such meetings of the majority. In this also, in one answer, it is denied that the two members, whom it is averred did not attend the meeting of the 31st of August, had notice of that meeting, but it is not averred that said first meeting was not adjourned from time to time from the second Monday of August, to and including the meeting of the thirty-first by the majority shown to have attended and acted at the several meetings, and it is not shown that such adjournments were not notice of the several meetings held in pursuance thereof, to all the members of said board. In this also, it is denied in one answer, that any changes in assessments were made by said board at any meeting thereof, and in another, it is averred, that the changes in question were made at said meeting attended by a majority on the 31st of August, and that the defendant received the same. In this also, that in respect to all other material matters of action averred in the petition, which in one answer are denied, are respectively averred or admitted in other answers, to have been done or performed by the majority.

The relator demurs to the second answer of the defendant.

First. For insufficiency. Because it does not state facts sufficient to constitute a defense, or cause for denying the writ prayed for in the petition.

Second. Because it states the following irrelevant, redundant, and immaterial matters, respectively and exclusively within the jurisdiction of said board to determine, and which cannot properly be inquired of here, viz: "and this defendant denies that any such changes as appeared upon said statement were necessary to be made in the valuation of the real and personal property of said county of Arapahoe, for the year 1877, in order to equalize and adjust the valuation of the real and personal property of said county of Arapahoe with the valuation of the real and personal property of the several counties of the State."

Third. Because it states the following irrelevant, immaterial and redundant matter, the same being the defendant's conclusions of law, and not a statement of fact, viz: "and that such changes were made contrary to the spirit of the Constitution and laws of this State."

The relator demurs to the third answer of the defendant.

First. For insufficiency. Because it does not state facts sufficient to constitute a defense, or cause for denying the writ prayed for in the petition.

Second. For that all the matters after the phrase "various counties of the State," where the same first occurs in said third answer, to and including the end thereof, is irrelevant, immaterial, and redundant. Because portions thereof state the defendant's conclusions of law, and not facts. Because it seeks to impeach the action of said board, for alleged errors in respect to matters within its exclusive jurisdiction and cognizance which cannot properly be inquired of here. Because it seeks to impeach the decision of said board for acting upon alleged improper evidence or information. Because portions thereof are argumentative. Because it is multifarious, and tenders a multitude of material issues. Because it seeks to measure the judgment of said board respecting matters within its exclusive jurisdiction and cognizance, by the judgment of the defendant.

The relator demurs to the fourth answer of the defendant.

First. For insufficiency. Because it does not state facts

sufficient to constitute a defense, or cause for denying the writ prayed for in the petition.

Second. Because it states the following immaterial, irrelevant, and redundant matter, and defendant's conclusions of law, viz: "the said David C. Crawford, auditor of State, George C. Corning, State treasurer, and Archibald J. Sampson, attorney-general, do not, and never did, constitute a State board of equalization of the State of Colorado, and they, the said Crawford, Corning and Sampson, had no right, power, or authority, whatever, in the absence of the governor and secretary of State, to sit as a State board of equalization, in the valuation of the real and personal property in the several counties of the State, as returned by the several county clerks."

Third. Because it states the following conclusion of the defendant, upon matters of law, viz: "and that such changes were made without authority of law, and were irregular, improper, null and void."

A. J. SAMPSON,

Attorney-General.

A. W. BRAZEE and J. Q. CHARLES, of counsel.

Mr. W. B. MILLS, county attorney, and Messrs. WELLS, SMITH & MACON, for respondent.

By the Court. At the threshold of this case we are confronted by questions of procedure arising under the Code, upon a correct solution of which will depend, in a large measure, the disposition of the demurrer interposed to the return to the alternative writ of *mandamus*. We are without adjudications of our own. By the Code of Civil Procedure hitherto untried in Colorado, adopted by the first *State* legislature, and by the recognized principles of sound pleadings and of the law not inconsistent with the provisions of the the Code, the fate of this demurrer must be determined. Sec-

tion 307 of the Code (Ch. XXXII, concerning "the writ of mandamus") provides that "on the trial the applicant shall not be precluded by the answer of any valid objection to its sufficiency, and may controvert it by proof either in direct denial or by way of avoidance." It is contended that as the relator in a mandamus proceeding is by this section given the right to demur *ore tenus* at the trial, he is not at liberty to demur in advance of the trial. We cannot yield our assent to this position. If he goes to trial without demurring, he cannot afterward raise any question as to formal defects.

This section sanctions the doctrine that where the defense interposed is substantially defective the complainant is not "precluded at the trial from raising any valid objection to its sufficiency." A proper interpretation of this provision will not permit questions as to mere matters of form to be raised at the trial. It does not militate against the right of the complainant to demur at an earlier stage—a right elsewhere secured by the Code whose provisions are as applicable to the pleadings in a proceeding for a *mandamus* as to those in any action. *People v. The Board of Supervisors of San Francisco*, 27 Cal. 655.

A ground of demurrer going to the whole answer is that the several defenses therein set up are inconsistent with each other. Section sixty of the Code provides "the defendant may set forth by answer, or cross complaint, as many defenses and counter-claims or set-offs as he may have, whether the subject-matter of such defenses be such as were heretofore denominated legal or equitable, or both, they shall each be separately stated; and the several defenses shall refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished."

May the defendant, under this section, interpose inconsistent defenses? It unquestionably gives him the right by his answer to set up as many defenses as he may have without any *express* qualification as to whether they shall be consonant with each other. It is not doubted that each de-

fense separately pleaded must be sufficient in itself. In determining the legal sufficiency of each defense, as a general rule reference must not be had to any matter *dehors* the defense itself, although it may be contained in the same answer. Each defense separately considered must be complete. The several pleas or defenses must be examined independently of each other. If there be contained in a defense matters which are repugnant to each other, the defense is ill. But when one of several defenses in an answer is consistent with itself, yet, taken as a whole, is inconsistent with any one or all of the other defenses, is the answer bad? Can courts, without a forced construction of the language of the section under consideration, deprive the defendant of the right which, by its natural import, it seems to confer? This section, or a section whose provisions are quite similar, has been enacted in many of the States where the Code system prevails. Section forty-nine of the Practice Act of California, which was substantially re-enacted as section four hundred and forty-one, in the Code of Civil Procedure (1872) of that State, is almost identical with section sixty of our Code. The earlier decisions of the supreme court of that State, as to the proper construction of this provision and the true mode of reaching inconsistent defenses, if their interposition is inhibited by the section, whether by demurrer or motion to strike out, or to compel the defendant to elect by which defense he would stand, are in conflict. *Young v. Bell et al.*, 46 Cal. 201; *Klink and wife v. Cohen et al.*, 13 id. 623; *Undias v. Morrell*, 25 id. 31; *Bell v. Brown*, 22 id. 681; *Wilson v. Cleaveland*, 30 id. 200.

In the later case of *Buhue v. Corbett*, 43 Cal. 269, in which the question of inconsistent defenses was directly presented, Chief Justice WALLACE, speaking for the court, all the judges concurring, says: "If the plaintiff desired to present that question, he should have moved to strike out the one or the other, or applied for an order compelling the defendants to elect as to which particular one of them

they would rely upon. But had he, even by motion, presented the question of the supposed inconsistency of the several defenses in the answer, we think that it would not have availed him. A party defendant in pleading may plead as many defenses as he may have. If a plea or defense separately pleaded in an answer contain several matters, these should not be repugnant or inconsistent in themselves. But the plea or defense regarded as an entirety, it it be otherwise sufficient in point of form or substance, is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded. And there is no distinction in this respect between pleadings verified and unverified."

These views appear to be in harmony with the letter and spirit of the section under examination.

Pomeroy's Remedies and Remedial Rights, § 722. Under section 1, ch. LXX, concerning practice (R. S. 1868, p. 504), which is substantially the same in this respect as section sixty of the Code, any number of pleas, however inconsistent, could be interposed. Such was the uniform practice. Even if we were to follow the modified rule adopted in New York (*Hopper v. Hopper*, 11 Paige's Ch. 46; *Hollenbeck v. Clow*, 9 How. Pr. 282), that the Code will not tolerate several defenses that are so inconsistent with each other that the proof of one would *necessarily* disprove the other, the defenses here interposed would not be obnoxious to that rule of construction. This ground of demurrer to the entire answer is not well taken. A question is made respecting the demurrer, that it must be taken as a demurrer to the entire answer, and cannot be treated as a separate demurrer, so that, if any one of the several defenses set up therein is sufficient, it must be overruled.

The demurrer in its commencement is stated in terms to be "to the answer of the defendant taken together" for insufficiency, and sets forth *in extenso* grounds of objection to each and all of the defenses interposed by the answer. Following this the relator in terms "demurs to the second

answer of the defendant" for insufficiency, and sets forth grounds of demurrer to this separate defense.

In like manner he demurs separately to the third and fourth defenses.

This demurrer must be treated, not only as a demurrer to the whole answer, but as a separate demurrer to each separate defense demurred to therein.

The intention of the relator is evident to refer separately to the decision of the court, the legal sufficiency of each separate defense, as well as the legal sufficiency of the answer taken as a whole. Such is its plain language, and there is no room for any other construction. That a demurrer may be interposed to the whole answer, and to one or more of the defenses set up therein, seems to be contemplated by section sixty-one of the Code. The same section of the Code provides that so much of any pleading as may be irrelevant, redundant or immaterial may be stricken out on demurrer, and we will first consider the objections of this character made by the relator.

To the second defense it is objected (1) that the following is irrelevant, redundant and immaterial, to wit: "And this defendant denies that any such changes as appeared upon said statement were necessary to be made in the valuation of the real and personal property of said county of Arapahoe, for the year 1877, in order to equalize and adjust the valuation of the real and personal property of said county of Arapahoe, with the valuation of the real and personal property of the several counties of the State," and (2) that the following is irrelevant, redundant and immaterial, to wit: "And that such changes were made contrary to the spirit of the Constitution and the laws of this State."

The objections are well taken. The first denial is not in response to any allegation of the petition, nor does it tender an issue that can be considered by this court. The board was the sole judge as to what was necessary to the proper adjustment and equalization of the tax so long as it acted within its constitutional and statutory jurisdiction. This

court can only inquire whether it did so act within the limits of its authority.

The second denial is the denial of a conclusion of law, which cannot form an issue capable of trial, and is not admissible under any system of pleading. Van Santvoord's Plead. p. 416*.

The matter objected to in this defense will accordingly be stricken out.

To the third answer it is objected upon the same grounds that all after the phrase "various counties of the State" where it occurs in the answer, should be stricken out.

This claim is too broad and must be denied. While this portion of the answer contains much that may be deemed irrelevant matter it also contains allegations which tender an issue upon the power of the State board to increase the aggregate amount of the valuation as returned by the clerks of the several counties. In objecting to the specific matter as irrelevant, redundant or immaterial, the pleader should be careful to include in his specifications only such portions of the answer as are clearly obnoxious to the objection, for the reason that, if any portion of it should appear material to the defense or a proper disposition of the cause, the objection being entire, must be overruled. Van Santvoord's Plead. p. 523*.

To the fourth defense it is objected (1) that the following is irrelevant, redundant and immaterial, to wit: "The said David C. Crawford, auditor of State, George C. Corning, State treasurer, Archibald J. Sampson, attorney-general, do not and never did constitute a State board of equalization of the State of Colorado, and they, the said Crawford, Corning and Sampson, had no right, power or authority whatever, in the absence of the governor and secretary of State, to sit as a State board of equalization in the valuation of the real and personal property in the several counties of the State as returned by the several county clerks," and (2) that the following is irrelevant, redundant and immaterial, to wit: "and that such changes were made with-

out authority of law and were irregular, improper, null and void."

Each of these allegations assert nothing but a conclusion of law and will be stricken out.

The third defense, set up in the answer, proceeds partly on the assumption that the State board of equalization can only act legally when all its members attend its meetings. This defense presents the question whether, when a board is created charged by law with the duty of exercising a public function, and when all the members thereof are duly notified of the time and place of its meeting, the presence of every member of such board is necessary to the validity of its action. When an authority is granted to several persons to transact business of a private nature, the general rule doubtless is that unless they act jointly in the execution of the authority, their acts are void.

In the case of a corporation, if a corporate act is to be done, by a definite body, as by a board of directors or trustees, where the charter and by-laws are silent, a majority, at least, must be present to constitute a quorum, but a majority of that quorum may do the act. Angell and Ames on Corporations, § 502; Green's Brice's *Ultra Vires*, 458; 2 Kent's Com. *293 (12th ed.)

The State board of equalization is not in any strict sense a corporation, yet it has in some respects the similitude of a corporation. It is termed by the Constitution which creates it a *board*, and by that instrument it is endued with perpetuity. The board consists of the present incumbents of the offices of governor, State auditor, State treasurer, secretary of State and attorney-general and their *successors* in office. Like corporations, it must, by implication at least, keep a record of its proceedings. But here the analogy ends. The members of the board are only such *ex-officio*. The question recurs, can an act of the board be valid, done at its stated meeting, if every member be not present?

The respondent contends for the broad rule laid down in the opinion of Chief Justice EYRE in the case of *Grindley*

v. *Barker*, 1 Bos. & Pul. 236, that "where a number of persons are intrusted with powers not of mere private confidence, but in some respects of a general nature, and *all* of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole." This, as a general proposition, cannot be questioned, but so far as the opinion inferentially announces that the act of a majority, where all are duly notified, is not the act of the whole unless all are present, it was not responsive to the question before the court.

In that case the point involved was whether a condemnation of leather made by four out of six triers who had been duly appointed pursuant to statute, the entire number having assembled and having taken part in the trying of the leather, must be regarded as a condemnation by all six—not whether, if one of the triers had *refused*, or neglected to meet with the others, the remaining five would not have been competent to act. The rule as broadly laid down in that case, without any qualification whatever, is not, we conceive, the universally accepted doctrine in England. *Rex v. Beeston*, 3 Term, 592; *Witherell v. Gartham*, 6 id. 383; *Doe dem. Read v. Godwin*, 16 E. C. L. 37.

In this country, the dictum of Chief Justice EYRE, from which the broad, unqualified rule is sought to be deduced, has been frequently cited with approval, but seldom in a case where its application was necessary to determine the controverted question.

In *Greene v. Miller*, 6 Johns. 39, the point decided is that, where a controversy between private parties is, by agreement, submitted to five arbitrators, it is necessary that all should concur in the award, unless the agreement otherwise provided. This is distinctly put upon the ground that a submission to arbitrators in such case is a delegation of authority *for a mere private purpose*. The citation of the suggestion in *Grindly v. Barker*, with approval, was *obiter*.

In the case of *Brown v. Cook*, 9 Johns. 360, the question presented was not whether the act of a meeting of the com-

missioners of highways duly convened would be valid, if a majority only attended, but whether without any meeting the commissioners could individually act and order the removal from the highways of an encroachment thereon.

In *Ex parte Rogers*, 7 Cowen, 526, the point determined was that where three persons, who, by law, were constituted a board of appraisers convened and conferred, but only two joined in the award, the third, although actually present, declaring himself absent and refusing to unite in the award, the act of the majority was the act of the board. The question whether if the dissentient member, being notified, had failed to attend, the act of the majority would not have been valid, was not properly before the court. Following the dictum in the case of *Grindly v. Barker*, the legislature of New York, December 10th, A. D. 1828 (2 R. S., Ch. VIII, tit. XVII, § 27), enacted as follows: "Whenever any power, authority or duty is confided by law to three or more persons, and whenever three or more persons or officers are authorized by law to perform any act, such act may be done and such power, authority or duty may be exercised and performed by a majority of such persons or officers upon a meeting of *all* the persons so intrusted or empowered, unless special provision is otherwise made."

The decisions in the cases of *McCoy v. Curtice*, 9 Wend. 18; *Downing v. Rugar*, 21 id. 178; *The People v. White-side*, 23 id. 9; *Keeler v. Frost*, 22 Barb. 400; *People v. Supervisors Chenango County*, 11 N. Y. 571; *Doughty v. Hope*, 3 Denio, 253; *Lee v. Parry*, 4 id. 125, cited and relied on by counsel for respondent, were rendered subsequent to the enactment, and we must believe were controlled by the provisions of this section. They, therefore, have very little authoritative force in this case. But even under this section, as mandatory as it seems to be, it is conceded that if the absent member of the board had been notified, the act of the majority would be deemed to be the act of the board.

In the case of *McCoy v. Curtice*, cited *supra*, the court says: "There can be no doubt that a contract made by all

of the trustees and signed by two would be binding, or that two could contract against the will of the third, if he was duly *notified* or consulted and refused to act."

The opinion of the court in the case of the *People v. Coghill*, 47 Cal. 361, to the effect that in order to the validity of the assessment made by the board of commissioners it was necessary that they should *all* act, both in viewing and assessing the swamp land, was founded upon a statute which in terms declared that "the three commissioners shall *jointly* view and assess upon each and every acre to be reclaimed or benefited thereby, a tax proportionate to the whole expense, and to the benefits which shall result from such works," etc. (Stat. of Cal. 1867-8, 516.) It was held that the statute which, by express language and not by implication, merely required *joint* action, must be pursued.

The case of *Charles v. The City of Hoboken*, 3 Dutcher (27 N. J.), 203, but affirms the doctrine that where an authority judicial in its character is conferred upon a body consisting of two *integral* parts—in that instance of a mayor and council—it cannot be exercised by either in the absence of the other.

In the *State v. Pratt*, 5 Halstead (10 N. J.), 161, it was held that an order of filiation must be executed by the *two* justices jointly, and not separately. The majority rule could not have been invoked in this case.

The general rule to which the authorities advert is to be applied with certain important exceptions and modifications which we will hereafter indicate. That eminent jurist, Chief Justice SHAW, in *Williams v. The School District in Lunenburg*, 21 Pick. 75, lays down the doctrine which we conceive applicable to the State board of equalization, with clearness and precision, a doctrine in harmony with the spirit and genius of our republican government.

The question before the court was, whether an assessment made by two out of a board of three assessors, the third having been notified, was valid, a question in principle somewhat analogous to the one under consideration.

Speaking for the court, the learned chief justice says: "Where a body or board of officers is constituted by law to perform a trust for the public or to execute a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body, and where all have had due notice of the time and place of meeting, in the manner prescribed by law, or by the rules and regulations of the body itself, if there be any, otherwise, if reasonable notice be given, and no practice or unfair means are used to prevent all from attending and participating in the proceedings, it is no objection that all the members do not attend, if there be a quorum. In the present case all three having had an *opportunity* to act, the act of two is sufficient." In the *Commonwealth ex rel. Hall v. The Canal Commissioners*, 9 Watts, 466, in which the question referred to the decision of the court was, whether the act of a board of appraisers (one of whose members had resigned) in making an appraisement of the damages done to the relator's land by reason of the construction of a canal was valid, the court, Chief Justice GIBSON delivering the opinion, affirmed its validity. The court substantially says: These appraisers were constituted a board for the performance of duties of a *public, deliberative and judicial* nature, and it may be safely said that any duty of an aggregate organ of the government may be performed by a majority of its members where the constituting power has not expressly required a concurrence of the whole, and further, "that it is not to be supposed that the functions of the board would be suspended, to the detriment of the public, by the loss of one of its members." And herein lies the important distinction between a mere private agency, and a public aggregate agency charged with the duty of exercising a governmental function. If one of several persons to whom is confided the execution of a private trust refuses to join with the others, or if, after his appointment and before the execution of the trust, he dies, the business may be put off till another time. Not so with public business of a deliberative or judicial character. It

cannot be deferred to a more convenient season. By necessity, prompt action is required. The law exacts it. The public weal demands it. The framers of the Constitution and the people who adopted it, we think, did not intend, by the manner in which the board was formed, to place it in the power of one member to prevent its sitting.

The equalization officers by the organic law are constituted a board *eo nomine*. They act as a 'board', as an aggregate body, and not as individuals. If the legitimate operations of the fiscal department of the State can be defeated by one member of the State board, either through obstinacy, sickness or for mere partisan or other purposes, then indeed does our revenue system, so far as relates to the equalization and adjustment of State taxes, rest upon a precarious foundation. Nothing less than the clear, express intention of the law-making powers, in the silence of the Constitution, that *all* the members of the board must meet and confer, would, in our opinion, warrant us in holding that the action of the majority of the whole number is not the action of the board where every member had an opportunity by *due notice* to attend its meeting. Authorities, in addition to those above cited, are not wanting to show that where a public duty is cast by law upon a board a majority may act. *Caldwell v. Harrison*, 11 Ala. (N. S.) 755; *Sprague v. Bailey*, 19 Pick. 436; *Commissioners v. Lecky*, 6 Serg. & Rawle, 165; *Jewett v. Alton*, 7 N. H. 253; *Cooley v. O'Connor*, 12 Wall. 398.

Were all the members of the board duly notified? The statute requiring the board to sit at the office of the secretary of State at the capital, on the second Monday of August of each year, was *notice* to all the members of the board. Section 2281, General Laws.

The respondent failing to deny, except inferentially, in the third defense admits that the subsequent meetings were held pursuant to adjournment. At an adjourned meeting any business may be transacted that might have been transacted at the stated meeting. It is, in fact, but a con-

tinuation of the stated meeting. Dill. on Mun. Corp. 223, 224, 225.

As all the members of the board were notified and a majority attended, the action of that majority was not invalid on account of the failure of other members to attend.

We come now to the consideration of a question which vitally affects the public welfare. The answer alleges in substance that the auditor of State, State treasurer and attorney-general, assuming to be and to act as the State board of equalization, increased the aggregate valuation of the real and personal property over and above the valuations as returned by the clerks of the following counties as follows :

The county of Arapahoe	\$960,255 90
The county of Bent	224,038 45
The county of Boulder	630,654 70
The county of Douglas	305,389 60
The county of Elbert	409,008 95
The county of El Paso	383,818 90
The county of Gilpin	55,025 00
The county of Huerfano	12,538 14
The county of Jefferson	547,979 05
The county of Lake	272 85
The county of La Plata	5,962 50
The county of Larimer	305,330 85
The county of Las Animas	24,648 93
The county of Park	11,303 00
The county of Pueblo	644,332 70
The county of Rio Grande	2,694 50
The county of Routt	49,206 50
The county of Saguache	28,568 73
The county of Summit	408 72
The county of Weld	889,545 20
	\$5,490,993 32

That at the same time the board diminished the aggregate valuations of the following counties, as follows :

The county of Conejos	\$1,852 20
The county of Costilla.....	5,287 00
The county of Custer.....	28,834 05
The county of Fremont.....	15,617 00
	\$49,590 85

That they made no changes of the valuation of the property of the other counties of the State.

That the net increase of the aggregate valuation of all the counties of the State above the aggregate valuation as returned by the clerks of the several counties was five millions four hundred and forty-one thousand four hundred and two and 47-100 dollars (\$5,441,402.47).

Was it in the power of the board of equalization to thus increase the aggregate valuation of the real and personal property of the State above the aggregate valuation as returned by the clerks of the several counties ?

Taxes are defined as being the enforced proportional contribution of persons and property levied by authority of State for the support of the government and for all public needs.

They are the property of the citizens demanded and received by the government, that it may be enabled to perform its essential functions. The demand is founded on the reciprocal duties of protection and support existing between the State and its citizens. Protection of life, liberty and property is the citizen's return. The sovereignty of the State within its limits secures their enforcement. Their levy and collection is one of the highest acts of supreme power, in that it takes the property of the citizen by processes of necessity more or less summary and but *quasi-judicial*.

History is full of its abuses, and American constitutions, statutes and decisions show with what jealous solicitude and care the power has been viewed and guarded. Limited by

the people in their Constitution to specified purposes and within fixed rates, the mode and manner of its exercise prescribed and settled by statutory enactment, the power wherever found, whether in constitution or statute, must still be strictly construed by the judiciary. Thus at this point of danger to the citizen, the genius of our laws has stationed the triple guard of constitutional limitation, statutory regulation and judicial interpretation.

Any injury, then, involving the legality of a tax proceeding must be conducted in reference to these general principles, keeping in view that revenue is essential to the existence of the State, and that its collection in accordance with the mode prescribed by law, and in that mode only, is essential to the preservation of the rights of the citizen.

The question here presented is one touching the powers of the State board of equalization. Section 15, article 10 of the Constitution provides as follows: "There shall be a State board of equalization, consisting of the governor, State auditor, State treasurer, secretary of State, and attorney-general. * * * The duties of the State board of equalization shall be to *adjust* and *equalize* the valuation of real and personal property among the several counties of the State."

The purpose of the creation of this board is imported in its title; its duties, as stated in terms in the Constitution, are to "*adjust* and *equalize* the valuation of real and personal property among the several counties of the State." Perfect equality in the assessment of taxes is unattainable, approximation to it is all that can be had.

The object of the provision is to apportion as equitably as may be the burthen of the State government among the several counties, to prevent a disproportionate share of the State tax from being thrown upon any county or counties by reason of the action of the local assessors. The grossest inequality might prevail in the valuations in the different counties, and possibly with reference to escaping a fair proportion of the State tax, and without a power lodged somewhere to adjust and equalize the several county valuations,

the greatest injustice might be done, and there would be a practical annulment of the constitutional provision that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." It was to meet this difficulty and accomplish this end that the State board of equalization was created with powers to *adjust* and *equalize*. For this purpose the board is required by statute (General Laws, § 42, p. 756) to "examine the various assessments as far as regards the State tax, and equalize the rate of assessments in the various counties whenever they are satisfied that the scale of valuation has not been adjusted with reasonable uniformity by the different assessors." By section 43, the board is required to ascertain whether the "valuation of real estate in each county bears a fair relation or proportion to the valuation of all other counties of the State, and on such examination they may increase or diminish the aggregate valuation of real estate in any county as much as in their judgment may be necessary to produce a just relation between all the valuations of real estate in the State, but in no instance shall they reduce the aggregate valuation of all the counties below the aggregate valuation as returned by the clerks of the several counties." Under these sections it is claimed that the board has the power to increase the aggregate valuation of the real and personal property of the State over and above the aggregate valuation as returned by the clerks of the different counties.

This claim if well founded makes them practically a board of assessors, with power to fix and determine values as well as to adjust and equalize valuations.

In all cases of taxes by valuation an assessment is indispensable and primary. It lies at the foundation of the proceeding. The term as commonly employed embraces both the listing of taxable property and the determination of its value. This assessment is not only indispensable, but in making it the provisions of the statute under which it is made must be observed with particularity. If this were not compulsory; if the officers were at liberty to disregard im-

portant provisions of the statute in this initiatory step, the chief protection which the law has intended for individuals in tax cases would be removed. Cooley on Taxation, p. 259-60.

Our statutes provide (General Laws, p. 742, § 4) that "all property, both real and personal, within the State, not expressly exempt by law, shall be subject to taxation." They further provide (General Laws, p. 747, § 14) that "all taxable property shall be listed and valued each year, and shall be assessed at its full cash value." Let us then inquire where, under our Constitution and laws, this important power of determining the valuation of taxable property as a basis of taxation is lodged.

The Constitution provides (§ 8, art. 14) for the election in each county, each alternate year, of a county assessor. He is thus a constitutional officer, and though his duties are left unprescribed, the essential duties of an assessor must be presumed to have been contemplated. Is there not here a plain intention on the part of the people to preserve local control over the valuation of property for purposes of taxation? This local control existed under the territorial form of government under which they had been living, and is this not an effort to secure it beyond contingency? In view of this provision and of other constitutional limitations it may be gravely doubted whether it is competent for the legislative authority to take from county assessors the substantial control of valuations of property for State taxation, and vest it in a central authority. The question here presented is not what the legislative authority could do in this respect, but what it has done.

Following the provisions of the Constitution our statutes (General Laws, § 121, p. 247) provide for the election of a county assessor in each county of the State who shall give bond to the people of Colorado and subscribe an oath for the faithful performance of his duties as assessor.

Section 25 (General Laws, p. 750) requires the county commissioners of each county to furnish the assessors suit-

able blank forms for assessment, and such instructions as shall be necessary to secure full and uniform assessments and returns.

Section 21 (General Laws, p. 749) requires the assessor to leave with each resident of his county, etc., a notice requiring him to make out and return to the assessor a list of his property subject to taxation, and to leave him a blank form upon which the list may be made. This return by another section is to be under oath.

Section 23 (General Laws, p. 750) provides for the valuation of certain property by the owners.

Section 32 (General Laws, p. 753) provides that all property shall be valued by the assessor, except such as may be required to be valued by the owner, in section 23 of the act.

Section 11 (General Laws, p. 744) provides that the assessor shall assess all personal property situate or being in his county.

Section 27 (General Laws, p. 751) provides for the assessor to assess in case of failure of owner to give in his list according to law.

Section 33 (General Laws, p. 753) provides for the delivery of the assessment roll by the assessor to the county clerk.

Section 37 (General Laws, p. 754) provides an oath to be taken by the assessor and attached to the assessment rolls, to the effect that he has made diligent inquiry and examination to ascertain all property within his county subject to taxation; that he has assessed it equally and uniformly according to his best judgment and information and belief at its full cash value; that he has faithfully complied with all duties imposed on the assessor by the revenue laws; that he has not imposed any unfair assessment through malice nor allowed any one to escape a just and equal assessment through favor.

Section 38 (General Laws, p. 754) provides that the county commissioners of each county shall constitute a board of equalization for the correction and completion of the assessment rolls, with power to supply omissions in the

assessment rolls, and for the purpose of equalizing the same, to increase, diminish or otherwise alter and correct any assessment or valuation. It provides in case of change of the assessment of any tax payer, that he shall be notified and have a hearing before the board. It constitutes them a *quasi* court to hear any and all complaints of the tax payer touching the valuation or listing of his property, with full power to adjust and correct the assessment roll as in their judgment they may deem proper and right, thus adding statutory duties to their constitutional duty "to adjust and equalize." Other sections of the law might be cited, but those mentioned suffice for our purpose. We find here a complete system with well-defined and minutely prescribed rules and regulations guarding the property right of the citizen; guarding equally the revenue necessities of the State, acting through the instrumentalities of owners and the assessors chosen by the electors of the several counties, listing, valuing, and returning taxable property under the sanction of an oath, with the board of county commissioners acting as a board of appeal and review, all for the one purpose of ascertaining, determining and fixing the value of taxable property in each county of the State as a basis of taxation. The statute provides for the transmission of these assessment rolls of the county to the board of equalization and contemplates that one assessment shall be made for both State and local taxes.

The only exception to this that we find is the express provision for the assessment of railroad property by the State board of equalization. For this, in the opinion of the legislature, there was, doubtless, an obvious necessity and authority, found in the last clause of section 15, article 10 of the Constitution, which provides that the board shall perform such other duties as shall be prescribed by law. The assessor is thus made an integral part of the revenue system which not only thus specifies and defines his duties, but assigns to other officers and boards equally well-defined and separate duties. The assessor shall list and value. The board of commissioners shall equalize, adjust, increase

and diminish, supply omissions and correct errors and hear complaints. The county clerk shall prepare assessment rolls and compute and extend the tax therein. The State board of equalization shall adjust and equalize valuations, and lastly, the county treasurer shall collect the tax. In seeking for legislative intent, reference must be had not only to the form and phraseology of the particular section under consideration, but any part must be viewed in connection with the whole, so if possible to harmonize and give effect to the whole.

Looking then to the provisions of the Constitution and the statute, we are clearly of the opinion that the power to fix and determine the valuation of taxable property is lodged by them in the assessor and the board of county commissioners of the several counties of the State, and that when they have under the law performed this duty and exercised this power, that the sum of the valuations of the several counties so by them found must be taken as the aggregate valuation of all the property in the State, and is conclusive and final as against the State board of equalization. The State board may, for the purpose of adjusting and equalizing, increase the aggregate valuation of one county, and decrease the aggregate valuation of another, but they have no power to increase the sum of all the valuations of the several counties of the State. That aggregate valuation has been found for them, and fixed by the authority and in the mode prescribed by the law. This view is not only sanctioned by the force of the general provisions of the statute considered as a whole, but also by the phraseology of the sections under consideration. The board is to adjust and equalize the valuation. This term *valuation* here imports values already estimated and fixed and must be referred for the measure of its force and meaning to the mode prescribed by law for estimating and fixing valuations. The aggregate material with which the board can deal is thus limited; they may adjust and equalize it among the several counties, but they cannot add to its volume.

It is claimed that in that the statute prohibits the board from decreasing "the aggregate valuation of all the counties below the aggregate valuation as returned by the clerks of the several counties" (General Laws, p. 756, § 43), the power to *increase* must be implied.

A power so vast and important, involving the integrity of constitutional limitation, cannot be founded on an implication of law. A statute in derogation of the rights of property, or which takes away the estate of the citizen, must be strictly construed. *Sharp v. Spier*, 4 Hill, 76; *Bloom v. Burdick*, 1 id. 130.

Section 11 of the Constitution is as follows: "The rate of taxation on property for State purposes shall never exceed six mills on each dollar of valuation, and whenever the taxable property within the State shall amount to one hundred million dollars, the rate shall not exceed four mills on each dollar of valuation, and whenever the taxable property within the State shall amount to three hundred million dollars, the rate shall never thereafter exceed two mills on each dollar of valuation, unless a proposition to increase such rate, specifying the rate proposed, and the time during which the same shall be levied, be first submitted to a vote of such of the qualified electors of the State as in the year next preceding such election shall have paid a property tax assessed to them within the State, and a majority of those voting thereon shall vote in favor thereof in such manner as prescribed by law."

If this claim of power on behalf of the State board to increase the valuation be admitted, why limit in the Constitution the per cent that it may levy? It matters little whether the limitation be one mill or ten, if increase of valuation be unrestrained. Limited upon the one hand, it is unlimited upon the other. We may neither calculate its extent nor challenge its pretensions. Over five million dollars increase this year — it may be over fifty million dollars increase the next.

Under this construction of the statute the efforts of the

people to establish and maintain legitimate restraints on the power to tax will have been unavailing, and the checks and guards which they have embodied in their Constitution to that end, cease to be of practical force or value. The spirit of the law and not "the letter which destroys" must prevail. We cannot believe that any such grant of power to the State board of equalization was within the intent of the legislative authority.

We are, therefore, of the opinion that the board of equalization in making the increased valuation acted without authority of law, and that their action in this respect is void.

Every county, the aggregate amount of whose valuation was increased, must be presumed to have been assigned some portion of this added burthen of taxation. The county of Arapahoe comes within this class, and the defense of the respondent must be held good.

Upon the question of the levy of the State tax by the board of county commissioners before the county clerk could be called upon to compute and carry out the tax on his rolls, upon which counsel were heard at chambers after the argument in chief, we are of the opinion that no levy was necessary on the part of the board of commissioners. Section 2283 (General Laws, p. 756) provides that "on or before the first day of September, in each year, the auditor shall transmit to the clerk of each county a statement of the changes, if any, which have been made in the assessment, and the rate of State tax which is to be levied and collected within his county, which, however, shall not exceed three mills on a dollar of the valuation, and when the board fixes no different rate, or if, for any reason, the board fail to sit, or the county clerk should fail to receive the statement of the rate of tax ordered by them, that rate shall be deemed to be levied, and the clerk of each county, in making up the tax list required by this act, shall compute and carry out, in the proper column, a State tax at the rate aforesaid; provided, however, that for the year 1877, the

rate of taxation shall be for State purposes five mills on the dollar, unless the State board of equalization shall fix a different rate."

In this section the intention of the legislature is evident, to provide against contingencies that might defeat and leave unprovided the State revenues. The force of the section is to levy, by legislative declaration, a State tax for the year 1877, of five mills on each dollar of valuation in any one or more of the following cases: (1) Where the board fixes no different rate; (2) where, for any reason, the board fail to sit, or what, in our opinion, is the same thing, where for any reason its sitting shall prove ineffectual; (3) when the county clerk shall fail to receive the statement of the rate of tax ordered by the board.

Upon the happening of any one or all of these contingencies the law intervenes and makes the levy, and it becomes the duty of the clerks of the several counties in making out the tax list, in the language of the statute, to "compute and carry out in the proper column a State tax" at the rate fixed by law. As the record discloses that no different rate was fixed by the board, and as in our mind no valid changes were made by it in the valuations of the different counties, this levy must be computed upon the valuations as returned by the clerks of the several counties as the basis of the tax.

Whether if a different rate had been fixed by the board, it would have been necessary, in view of the provisions of section 2284, for the board of county commissioners to make a levy, it is not necessary for us to determine.

The demurrer, except as to the irrelevant, redundant and immaterial matter of the answer, which we have ordered stricken out, is overruled.

Demurrer overruled.

INCONSISTENT DEFENSES.—Defendant may plead as many matters of fact in several pleas as he may deem necessary for his defense (*Tucker v. Etinara*, 7 Colo. 21); and may interpose inconsistent defenses, if each defense is in itself complete and not inconsistent with itself: *Prie v. Kramer*, 4 Colo. 554.

INJUNCTION TO RESTRAIN COLLECTION OF TAXES IS NOT MAINTAINABLE by an individual claiming the tax to be excessive. He is furnished by statute with a plain and adequate remedy: *Breeze v. Haley*, 10 Colo. 12.

BREED v. FIRST NATIONAL BANK OF CENTRAL.

1. When an appeal is *made* thirty days prior to the first day of the next ensuing term of the supreme court, and the plaintiff fails to file an authenticated transcript of the record of the judgment appealed from by or before the third day of the term of this court, the appeal will be dismissed.
2. Without a bond there can be no perfected appeal, and until the day fixed on or before which the bond is to be filed, the appellant cannot be said to be in default.
3. Where the appellant was allowed seventy-five days within which to *make* his appeal, this court will not entertain a motion by the appellee to docket and dismiss the appeal before the expiration of that time, although more than thirty days may have elapsed from the time of praying the appeal and the first day of the next ensuing term of this court.

Appeal from District Court of Gilpin County.

Mr. JAMES B. BELFORD now moved to docket this cause and dismiss the appeal.

Messrs. H. M. & W. TELLER, *contra*.

THATCHER, C. J. The motion to docket this cause and dismiss the appeal presents the question as to what is meant by "making an appeal," within the intent of section 42, chapter 70, of the Revised Statutes. On the 27th day of September, A. D. 1877, judgment was entered in this cause in the court below, an appeal was prayed and allowed, and seventy-five days limited within which to file a bill of exceptions and appeal bond. It is contended by the appellee that as the appeal was prayed and allowed more than thirty days before the first day of this term, that the appeal was returnable to this term; and that it was not competent for the court below to fix a time beyond the first day of this term within which the appellant might file his appeal bond and bill of exceptions. Section 21 of the same chapter empowers the judge to sign and seal the bill of exceptions at any time after the term at which the judgment was rendered, that might be fixed by the court. Section 41 of the same chapter provides that the party praying the appeal shall, by

himself or agent, or attorney, give and file a bond in the office of the clerk of the district court, within the time *limited* by the court. If the appeal was *made* thirty days prior to the first day of this term, the appellant having failed to file an authenticated copy of the record of the judgment appealed from, by or before the third day of this term, as required by said section 42, it must be dismissed.

In our opinion the praying of an appeal is but a preliminary step — the first in a series of acts that are necessary to complete an appeal.

The praying of an appeal, the allowance thereof, and the filing of the appeal bond are separate and distinct acts, each of which under the statute is as essential as the others to the perfection of the appeal. Whether if the time limited by the court within which to file an appeal bond below should expire more than thirty days before the first day of the next term of this court, and the time fixed within which to file the bill of exceptions should not expire until a day less than thirty days before the first day of such term, the appeal would be returnable to such term, or the term succeeding, we need not now determine. An appeal may be made without a bill of exceptions. The case may be brought up on the record proper. But without a bond there can be no perfected appeal, and until the day fixed on or before which the bond is required to be filed, the appellant cannot be said to be in default in the performance of any act necessary to the making of the appeal.

In the case before us the time fixed for the filing of the bond and the bill of exceptions is the same, until the time, seventy-five days, limited by the court within which to file the appeal bond, has passed; it cannot be determined whether the appeal will ever be perfected, *made* in the sense of the statute.

The motion to docket the cause and dismiss the appeal must be denied. As the cause was put on the docket for the purpose of this motion, it is ordered stricken therefrom.

Motion denied.

APPEAL, FILING TRANSCRIPT. — Where an appeal is made thirty days prior to the first day of the next ensuing term of court, and the plaintiff fails to file the transcript by or before the third day of such term, the appeal will be dismissed: *Eicholls v. Wilbur*, 4 Colo. 433.

CITY OF DENVER v. CLEMENTS.

1. A dedication of land to public use may be made either according to the common law, or in pursuance of statute.
2. A statutory dedication operates by way of grant; a common law dedication by way of *estoppel in pais*, rather than by way of grant.
3. When a vendee purchases a lot marked on a plat, duly recorded, of city property, the plat being referred to for a description of the premises conveyed, by a reasonable construction of the vendor's intention, the vendee is entitled to all the appurtenant advantages which the plat proclaims to exist, so far as the land embraced is owned by the grantor; the plat is a material part of the deed.
4. Where no express reservation is made in an absolute deed, the most valuable estate which the vendor can sell necessarily passes. Where platted streets are appurtenant to the land sold, it will be held that the proprietor intended the streets as *public*, and not as private ways.
5. Where a proprietor of urban property recognizes a plat in making a sale of lots, he will be estopped to deny a dedication of the streets designated upon the plat, embraced within his property, to public use. And the fact that the city acquiesces in the use, by the dedicator, of the streets for a limited period, and receives taxes thereon, will not estop the city from asserting the dedication.

A dedication may be made *in presenti* to be accepted by the public *in futuro*.

6. Where a statutory plat has been filed the fee of the streets vests in the city. Where the dedication is not statutory, the fee remains in the owner, and there is nothing for which the owner is to be compensated upon the mere opening of the street to public use.

Appeal from District Court of Arapahoe County.

Trespass quare clausum. It was among other things stipulated by the parties in the court below as follows:

"And it is further agreed that the parties waive a trial by jury, and submit all the matters and issues of law and facts to the court, and this agreement is made a part of the record in this case. And the pleadings in the case subsequent to the declaration are hereby withdrawn. In the year 1859 one E. D. Boyd surveyed and made and filed a map of the city of Denver, and according to said map of Boyd, the land, to wit: the south half of the north-east quarter of section thirty-four, township three, range sixty-

eight, in Arapahoe county, Colorado Territory, upon which the trespass is alleged to have been committed, formed a part of said city so laid out by said Boyd. The title to the land included in the city of Denver, according to said map, was at that time in the United States. A copy of the aforesaid map of Boyd is exhibited in these proceedings to show the location of block 'A' and of the streets and alleys on said land, as well as in the city of Denver generally, according to said map.

Alfred H. Clements pre-empted the said land—that is, the south half of the N. E. quarter of section 34, T. 3, R. 68, and eighty acres adjoining it, one hundred and sixty acres in all—on the 11th day of May, A. D. 1864, and the certificate of pre-emption issued to him on that day. Block 'A,' on which the trespass is alleged to have been committed, is a part and parcel of the said south half of the N. E. quarter of section 34, T. 3, R. 68, said block being 500 feet long and 400 feet wide. After the pre-emption of said land, Alfred H. Clements sold and conveyed to individuals lots on said land, according to the aforesaid map of E. D. Boyd, and in the conveyances of said lots, referred to said map of said Boyd for description of said lots so conveyed, but did not sell or convey any part of Block 'A.' On the 1st day of December, A. D. 1865, a patent issued for, and was received by, Alfred H. Clements for the 160 acres of land aforesaid, under the pre-emption certificate of May 11, A. D. 1864, and after the said patent was issued, Alfred H. Clements sold and conveyed divers lots and parcels of said land to individuals according to Boyd's said survey, and in conveyances thereof referred to said map and survey for description; but sold no part of Block 'A.' On the 23d day of January, A. D. 1869, Alfred H. Clements sold and conveyed all of his interest in said land to Caleb B. Clements. Caleb B. Clements sold to individuals some of the lots on said land according to the aforesaid map of E. D. Boyd, and in the conveyances thereof referred to said map of E. D. Boyd for description; but did not sell or con-

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vey any part of said Block 'A.' On the 13th day of January, A. D. 1870, Caleb B. Clements filed in the recorder's office in Arapahoe county, Colorado Territory, his map of Clements' addition, embracing, among other lands, the said south half of the N. E. quarter of section 34, T. 3, R. 68; of which said Block 'A' was a part, and marked Block 'A' on said map, and according to said map so filed by C. B. Clements as aforesaid, no street nor alley ran through or on said Block 'A,' and the said block was not divided into lots, but said block was marked on said map 'Block A.' That Welton street in said map of Clements' addition is laid as it was laid out in the Boyd survey, except that portion of the same included in Block 'A.'

That in the year 1863, and during the months of January, February, March and April, A. D. 1864, Alfred H. Clements built and put large and valuable buildings and improvements on said Block 'A,' and at the same time inclosed the whole of said Block 'A' under one substantial fence inclosure. That, with the exception of said fence, none of said improvements on said Block 'A' occupied that portion of the said inclosure occupied by Welton street in the Boyd survey. That said improvements cost \$15,000. That said A. H. Clements planted said block in trees and shrubbery, and made said block his home and residence; and said Block 'A' has so remained improved, inclosed and occupied by the said A. H. Clements and the subsequent purchasers from January, A. D. 1864, to the time of the trespass alleged in this suit. That, with the exception of said Block 'A,' the city of Denver has been in possession of Welton street through said Clements' addition since 1864, but has not improved, graded, or performed any work on said street through said addition.

The congressional grant for the relief of the citizens of Denver, passed congress May 24th, 1864. This grant covered section 33 and the west half of section 34, T. 3, R. 68. The congressional grant adjoined, but did not include, any of the lands in Clements' addition aforesaid. The entry of the probate judge of the lands embraced in the congress-

ional grant for the purpose specified in said act of congress, was made May 6th, A. D. 1865.

"If Welton street had been extended from the lands of the congressional grant through Clements' addition, as per map of E. D. Boyd, it would have run through Block 'A' as it has done since the time of the alleged trespass, to wit, the 1st day of September, A. D. 1874; and by said map of E. D. Boyd, Welton street is laid down as running through the lands which now constitute Block 'A.' If Glenarm street were extended from the congressional grant through Clements' addition, as per map of E. D. Boyd, it would run through Block 'A' so built upon the said block as aforesaid. On the 12th day of January, A. D. 1872, C. B. Clements sold and conveyed all of his interest in the aforesaid lands, of which Block 'A' was a part and parcel, to Richard T. Clements, the plaintiff in this suit, who is still the owner of said lands. Prior to filing the map of Clements' addition by C. B. Clements, on the 13th day of January, A. D. 1870, the city of Denver had established no grades and made no improvements upon the streets run through the land embraced in Clements' addition as per survey and map of E. D. Boyd, and had not used the said streets, and had not accepted said streets by any action on the part of said city or its authorities; but that said lands were described as being in the city limits by act of legislature of Colorado of 1861, 1864, 1866. That subsequent to the filing of said map of Clements' addition on the 13th day of January, A. D. 1870, the said city of Denver did not improve, grade, open up, or take possession of the streets as per map of E. D. Boyd, embraced in the lands of Clements' addition, until the time of the alleged trespass, and then only Welton street. That from the time of the entry of said lands by pre-emption, on the 11th day of May, A. D. 1864, by Alfred H. Clements, to the bringing of this suit, city taxes have been assessed and paid upon said block as a whole, as well as upon that part of said Block 'A' now claimed for street purposes, as upon the balance

of said block. On the 11th day of September, A. D. 1874, without the consent, and against the protest, of said R. T. Clements, the city of Denver, by order of the city council, opened up Welton street, according to the aforesaid map of E. D. Boyd, through Block 'A' in Clements' addition, and in doing so removed and took down the inclosure around said Block 'A,' and took and appropriated a part of said Block 'A' for the purpose of opening Welton street, the part so taken and appropriated for said street being eighty (80) feet wide and four hundred (400) feet in length, and being the space designated as Welton street by map of said E. D. Boyd, and where Block 'A' now stands. The city refuses compensation for so opening up Welton street through said block, and taking possession of and appropriating a part of said block to street purposes. It is for this alleged trespass, and the damages growing out of the same, that this suit is brought. If the court shall find the defendant guilty, the court shall also assess the amount of damages upon the basis aforesaid; that is, by and upon such proper evidence as may be presented by either party and received by the court, as to the value of the land so taken as aforesaid, and converted into a street by the city authorities aforesaid, and any other damages, if any, growing out of such taking and appropriation of the lands aforesaid; costs in this case to go as in other cases in this court. Nothing herein shall be so construed as to prevent either party from taking this case to the supreme court."

The following is a copy of the map referred to in the stipulation, showing a portion of Clements' addition in Boyd's survey of East Denver. [See Map.]

"The area on the map, marked 'A,' is the Block 'A' alluded to in the stipulation, and upon which the alleged trespass was committed. The area marked by the outer dotted lines shows Clements' addition to the city of Denver as filed in 1870, and covering so much of Boyd's survey as is shown on this map.

"The portion of Welton street as shown on this map,

and running through Block 'A,' indicates the ground taken and occupied by the defendant as set forth in the stipulation. And Welton street, as a street, on both sides of Block 'A,' was in possession of defendant long prior to the alleged trespass.

"The line running diagonally across the map, with the lines running at right angles from it, show the congressional grant, and the position of said grant with reference to Block 'A.'

"The main map is a copy of so much of Boyd's map, known as Boyd's survey of the city of Denver, as it was made in 1859, and according to which survey the map sales of lots and blocks were made, as in the stipulation mentioned; and that portion of the main map within the lines showing Clements' addition, indicates where lots and blocks were sold, as set forth in the stipulation. The plot known as Clements' addition, etc., conforms in blocks and streets with said Boyd's survey, covering the same ground, except so much of it as is contained in Block 'A,' said block being shown on the plat of Clements' addition as it is in this map. Block 'A' is the portion of land included within Boyd's survey that was surrounded by a fence and otherwise improved in 1863 and 1864, and upon which the house, etc., was constructed, as set forth in stipulation. There never was any indication upon the map or plat of Boyd's survey of said Block 'A,' nor did any map indicate it until the filing of the map of Clements' addition in 1870. This map is to be taken as the map or plat referred to in the stipulation, and with above explanations is to be taken as part of said stipulation."

CHARLES S. THOMAS,

City Attorney.

V. D. MARKHAM, for plaintiff.

The foregoing was all the testimony submitted on the question of defendant's guilt. The defendant having been

found guilty, evidence was introduced to prove the amount of damages sustained, at the conclusion of which the court was asked to assess the plaintiff's damages upon the following basis, which was done.

"First. Take the value of Block 'A,' as shown by the evidence in the month of September, A. D. 1874, without Welton street running through or on said block; then take the value of said Block 'A,' as shown by the evidence in the month of September, A. D. 1874, with said Welton street running through said block, and the difference between the two amounts is the one item of damages.

Second. The plaintiff further asks for such other damages, if any, as were occasioned to the plaintiff by the acts of the defendant in and about the rebuilding of fences, the same having been torn down and removed by the defendant."

The court assessed the plaintiff's damages at \$3,800, and gave judgment for that amount. The defendant having duly reserved exceptions, prosecutes this appeal.

Mr. CHARLES S. THOMAS, and Mr. THOMAS M. PATTERSON,
for appellant.

Mr. V. D. MARKHAM, for appellee.

THATCHER, C. J. In 1859, E. D. Boyd made and filed a map of the city of Denver, included within whose limits was the south half of the north-east quarter of section thirty-four, township three, range sixty-eight. The title to this land just described was at that time in the United States.

On the 11th day of May, 1864, a certificate of pre-emption, and on the 1st day of December, 1865, a patent was issued to Alfred H. Clements for this tract. January 23, A. D. 1869, the patentee sold and conveyed all his interest in said land to Caleb B. Clements, who in turn sold and conveyed his interest therein to R. T. Clements. The patentee, and each of the subsequent grantees, sold and conveyed many lots and parcels of land to individuals ac-

According to the Boyd survey, the conveyances thereof referring to the map and survey of Boyd for description, but did not dispose of any portion of Block 'A.' January 17th, 1870, Caleb B. Clements filed in the recorder's office of Arapahoe county, his map of 'Clements' addition,' which, among other lands, embraced the eighty acre tract above described, and upon which was delineated Block 'A,' without any street or alleys traversing it. The addition, except as to Block 'A,' conformed to the Boyd survey. Welton street, as marked on the Boyd plat, extended through Block 'A,' and its location upon the map of Clements' addition was identical with its location on the Boyd plat, except through Block 'A.'

This block was inclosed with a fence, planted in trees and shrubbery, and occupied by A. H. Clements and the subsequent purchasers for residence purposes, from January, 1864, to September of 1874, when the city of Denver, by virtue of an ordinance, took possession of so much of Block 'A' for street purposes, as was necessary to make Welton street a continuous one as designated on the Boyd plat.

City taxes were assessed and paid upon Block 'A' as a whole, continuously from the date of its entry by pre-emption up to the time this suit was brought. Although there are fifteen specifications of error, there are but two questions presented.

1. In view of all the facts and circumstances disclosed by the record, was there a dedication (for the use of the public) of Welton street through Block 'A'?

2. In the event that Welton street was not so dedicated through Block 'A,' were the instructions of the court in relation to the measure of damages to be allowed warranted by the agreed statement of facts?

A dedication of land to public use may be made either according to the common law, or in pursuance of statute. The distinction between these two kinds of dedication is quite manifest, and must be kept constantly in view in determining the rights of the city of Denver in this con-

troversy. When the dedication is statutory no act of acceptance on the part of the city is required to impose upon it the obligation to keep the streets in repair. The moment the plat of a city or an addition thereto is made, filed and recorded by the proprietor thereof in compliance with the statute, the fee of all the streets, alleys, avenues, highways, parks and other parcels of ground, reserved therein to the use of the public, vests in such city in trust for the uses expressed. R. S., 1868, § 5, ch. 84.

As at the date of the Boyd survey and plat, the title to the land now embraced in Clements' addition was in the United States; as neither of the subsequent owners thereof had any interest therein, either legal or equitable, at that time, so far as the record shows, the filing of the plat cannot be said to have operated to vest the fee of the streets therein designated in the city for public use.

A statutory dedication operates by way of grant. The law surrounds the act of dedication with all the formalities and solemnities necessary to the creation of a grant. The plat must be signed, acknowledged and recorded. Without a substantial compliance with the statute by the proprietor of a city or addition thereto, the estate in the streets intended to be conveyed would not pass to the city in trust. That there was no statutory dedication prior to the filing of the plat of Clements' addition in 1870 is clearly apparent from the record.

Was there a common law dedication for the use of the public?

A common law dedication operates by way of *estoppel in pais*, rather than by way of grant. We must, therefore, consider the acts of the several proprietors of the Clements' tract for the purpose of determining whether by their acts they are precluded from denying the existence of a public easement through the entire length of Welton street as designated on the Boyd plat.

The constant sale of lots in this addition after the acquisition of the title from the United States, extending through a period of five years, up to the date of the filing of the

statutory plat, by reference to the Boyd map for description, upon which were laid out streets and alleys, in accordance with the original plan of Denver City, must be regarded as a ratification and adoption of the Boyd map as binding upon A. H. Clements and the subsequent proprietors, as though the plat had been prepared at his or their instance. When a vendee purchases a lot, marked on a plat of city property, designating streets thereon, the plat being referred to for a description of the premises conveyed, the popular understanding, and a reasonable construction of the intention of the grantor are, that the vendee, by virtue of the purchase, is entitled to all the appurtenant advantages, privileges and easements, which the plat proclaims to exist, so far as the land embraced by it is owned by the grantor. A lot is bought as urban property, and with the conveyance of the land pass all the incidents necessary to a proper enjoyment of the grant. The plat to which reference is made is a material part of the deed, which must be construed to have the same effect as if the plat had been incorporated into it. By the plat, the right which each lot-holder has in common with other lot-holders and the public in the streets of the city is exhibited. *Birmingham v. Anderson*, 48 Penn. 258; *Rowan's Ex. v. Town of Portland*, 8 B. Monr. 232.

Where no express reservation is made in an absolute deed, the most valuable estate which the vendor can sell necessarily passes; hence, as public streets are more desirable and valuable than private ones, it must be held that the proprietor intended to convey, as appurtenant to the lots sold, the platted streets as *public* and not as private ways. *Stone v. Brooks*, 35 Cal. 499.

The generally accepted doctrine upon this subject is expressed by Angell on Highways, § 149, in the following language: "In this country there is quite a large class of cases in which dedication has been inferred from the sale of land, described by reference to a map or plat, in which the same is designated as laid off into lots, intersected by

streets and alleys. It may be stated as a general rule, that where the owner of urban property, who has laid it off into lots, with streets, avenues and alleys intersecting the same, sells his lots with reference to a plat, in which the same is so laid off, or where there being a city on which this land is so laid off, he adopts such map by sales with reference thereto, his acts will amount to a dedication of the designated streets, avenues and alleys to the public."

It is a matter of common observation that although streets may be designated on a city plat, or on a plat of a city addition by the proprietor thereof, generally they are not all thrown open to the public until after the sale of lots thereon, and frequently not until the public convenience requires it. Until such time, the original character of the platted premises, as prairie, timber, or fallow lands remains unchanged. But whenever the increasing population and growing business interests of the city necessitate the opening of such streets, the effect of the adoption of the plat of the city, within the corporate limits of which the addition is situated, and on which plat are designated the streets running continuously through the addition, and with reference to which city plat the proprietor of the addition, as often as opportunity offers, sells lots, is to declare and dedicate the streets within the addition to public use. The unqualified recognition of the plat is not consistent with any other construction. The fact that the city acquiesces in the use of the streets for a limited period does not militate against this view. Nor is it thought that the payment of taxes on that portion of Block 'A' through which Welton street passes, the fee to which is still in the proprietor of the addition, estops the city from asserting the dedication.

Before the acceptance of the dedication the city was not bound to keep the streets open and in a safe condition. Although until the acceptance, the city was under no obligation to repair, the proprietor was nevertheless bound by his acts. *Mayor of Jersey City v. Morris Canal & Banking Co.*, 1 Beas. 554.

A dedication may be made *in presenti* to be accepted by the public *in futuro*. *Mayor of Jersey City v. Morris Canal & Banking Co.*, 1 Beas. 563; *Trustees of M. E. Church v. Council of Hoboken*, 33 N.J. 22; *Town of Derby v. Alling*, 40 Conn. 410.

It is held in the earlier cases in the State of New York, that even where there has been a dedication of streets to public use, a condemnation is necessary, and that the dedicator, even after the sale of lots abutting on the streets, is entitled to *nominal* damages, as a compensation for the fee of the streets in the front of such lots, which under the laws of that State vests in the city for the uses declared. *Wyman v. The Mayor of New York*, 11 Wend. 486; *Livingston v. The Mayor of New York*, 8 id. 85.

The doctrine of these cases, so far only as relates to the dedicator being entitled to any compensation under the circumstances, is repudiated by the court of appeals in *Bissell v. New York Central R. R. Co.*, 23 N. Y. 66, on the ground that with the sale of lots the fee of the street to the center thereof in front of the lots sold, passed to the vendee. But where the lots fronting on a street dedicated to the public use have not been sold by the proprietor, the fee of such street to the center in front of the unsold lots remains in him, charged with a public easement; and if upon condemnation the fee under the statute passed to the city, the proprietor would be entitled to nominal damages.

Where a statutory plat has been filed, the fee of the streets, as we have seen, vests under the law in the city. But as when the dedication is not statutory no such result follows, there is nothing for which the lot-owner is to be compensated. The fee does not vest in the city. The corporate authorities by their acceptance assert jurisdiction over a street dedicated to public use, and assume obligations in respect thereto, without divesting the fee from the owner of the abutting lots.

As so much of Welton street as extended through Block 'A' was a public street by dedication before the removal

of the fence that obstructed it, the city council was but exercising its lawful authority in causing the obstruction to be removed. The finding of the court upon the agreed statement of facts should have been for the defendant.

For a further discussion of the dedicatory effect of a sale of city lots with reference to a plat, see Dillon on Mun. Corp., §§ 503, 505, and cases cited.

To hold that the city must compensate the appellee where an easement already dedicated to the public is accepted by its statutory representative, is to declare that a donee must pay for the privilege of accepting a gift. The title to the fee in a street, for which, in New York, as we have seen, after there has been a dedication to the public by the proprietor, merely *nominal* damages are allowed, in the case before us, remains where it was before the acceptance of the easement by the public's statutory representative, and hence the ground for even nominal damages, which holds in that State, does not exist here.

As this disposes of the case, it is unnecessary to consider the other errors assigned. The judgment of the court below is reversed, and the cause remanded for further proceedings according to law.

Reversed.

FREE TO STREETS IN DENVER IS VESTED IN THE CITY: *Denver & S. F. R. R. Co. v. Drake*, 11 Colo. 250.

VENDOR OF LOT MARKED ON DULY RECORDED PLAT, which plat is referred to in the deed, is entitled to all the appurtenant advantages which the plat proclaims to exist, so far as his land is concerned: *Ward v. Furwell*, 6 Colo. 71.

CITY OF DENVER v. CLEMENTS.

1. The doctrine of dedication has its origin in public convenience. Public streets are *essential* for the accommodation of town or city communities, and the proprietor must be presumed to intend what is *essential* to its enjoyment. The term *street*, used on a map of a city or town, imports a *public way* for the free passage of its trade and commerce.
2. An actual intent to reserve any portion of the lands platted into streets otherwise than by express reservation on the plat, should be made manifest with as equal certainty and publicity as the plat.
Actual intent cannot be permitted to avail against an intent shown by unequivocal acts upon which the public have a right to rely.

8. Where the fee of a street remains in the dedicator, and his use and occupancy of the ground covered by the easement is acquiesced in by the city, a tax thereon will be justified and rendered equitable.

UPON a petition for a rehearing in this case the following opinion was rendered by

ELBERT, J. The two points insisted upon and emphasized by the learned counsel for the appellee in his petition for a rehearing are: 1. That there can be no dedication of lands to public use without an *intent* to dedicate on the part of the owner. 2. That the facts in this case, instead of showing an intent on the part of Clements to dedicate Welton street, through Block 'A' show an intent to *reserve* Block 'A' entire.

After a careful review of the facts and the authorities, we are confirmed in the views heretofore expressed, in the opinion of the chief justice. We are satisfied: 1. That the frequent conveyance by Clements of lots in his addition by reference to the Boyd survey and map of record, was an adoption and ratification of it, and he is bound by it as though it had been made and recorded by his express authority.

2. That the surveying by the owner of a tract of land adjoining a city into blocks and lots, streets and alleys, mapping the same, with streets thereon, designated as such, and which are continuations of public streets of the city, owned, worked, repaired, lighted and guarded by the city authorities, making the same a matter of public record, and selling lots with reference thereto in his conveyances, are acts, as the public have a right to understand them, utterly inconsistent with any other *intent* than an intent to dedicate to *public* use.

3. The doctrine of dedication has its origin in public convenience; public streets are *essential* for the accommodation of town and city communities, and a proprietor platting his lands for town or city purposes, must be presumed to intend what is *essential* for its proper enjoyment in this

respect. The term "street" used upon a map of a town or city imports a public way for the free passage of its trade and commerce. Such is its natural and usual signification, and it is inconceivable, having reference to the ordinary course of business, that a party so surveying and mapping his lands without any express reservation, should intend that the streets thereon designated as such, should be regarded as mere private ways, for the use only of those purchasing.

4. These acts, public and without restriction, are of such a high character, as evidence showing an intent to dedicate to public use, that the proprietor, as a general rule, will be estopped to assert the contrary with respect to any portion of the land so designated as streets, and in this they satisfy the definition of the term "dedication," which is the act of devoting or giving property to some proper object, in such a manner as to conclude the owner.

5. If there exist an *actual* intent to reserve any portion of the lands so platted into streets, otherwise than by express reservation on the plat, certainly it should be made manifest in some manner not only of equal certainty, but of equal publicity as the plat, otherwise an *actual intent* cannot be permitted to avail against an intent on which the law will and must insist, as being shown by unequivocal acts upon which the public had a right to rely.

6. The inclosure of Block 'A' with a fence, planting it in trees, the existence of a house off of the line of Welton street, but within the limits of the block, are not of such a character as evidence showing an intent not to dedicate, as to control and destroy the higher and better evidence of intent, as we think, afforded by the recorded plat. On the other hand, as is made plain in the opinion of the chief justice, these acts are entirely consistent with an intent to throw open Welton street to public use as soon as the growing wants of the city should demand it.

7. The effect of the levy and collection of taxes on that portion of Block 'A' through which Welton street passes cannot be said to estop the city to assert the dedication.

The fee in Clements and his occupancy and use of the ground covered by the easement, acquiesced in for the time being by the city, justifies and renders equitable the tax. *Crane v. Reeder*, 25 Mich. 320.

The petition for a rehearing is

Denied.

WELLS v. CAYWOOD.

1. The act of February 12, 1874 (Sess. Laws, p. 185), concerning married women, is an enabling statute, and must be liberally construed to effectuate the purposes of its enactment.
2. Under the statute a *femme covert* is no longer *sub potestate viri*, in respect to the acquisition, enjoyment and disposition of real and personal property.
She may do with her own property as she will, without reference to any restraints or disabilities of coverture.
She may make conveyance directly to her husband. The removal in respect to the wife of a disability that is mutual, and springing from the same source, removes it also as to the husband, and the husband may, acting in his own right, convey directly to the wife.
3. It is only in the absence of an express agreement that the law will not permit a trustee to become a purchaser at his own sale. Where the right to purchase is clearly conferred by the instrument appointing him, the law imposes no impediment to the validity of a sale so made.
4. In order to enable a purchaser at a trustee's sale to maintain ejectment, it does not devolve upon him to show that the trustee has complied with the conditions prescribed by the deed of trust. The deed to the purchaser may not be impeached on that ground by the defendant in ejectment.
5. A defendant in ejectment cannot show want of fraud in, or illegality of the consideration in a deed, under which the plaintiff claims title.
6. An entry of the word "homestead" on the margin of a recorded title under the statute (R. S., p. 385) is effective only from the time of such entry, and the fact that the wife did not join with her husband in the execution of a trust deed made prior to such entry will not invalidate the trust deed.

Appeal from District Court of Boulder County.

EJECTMENT. The plaintiff below had judgment. The facts are sufficiently stated in the opinion. The trustee's

deed adverted to by the court, and under which plaintiff claimed title, is as follows :

"This indenture, made the ninth day of October, in the year of our Lord, one thousand eight hundred and seventy-five, between William W. Caywood, as trustee of Albert W. Benson and C. D. Caywood, of the county of Boulder, and Territory of Colorado, party of the first part, and Catherine D. Caywood, of the county of Boulder, and Territory of Colorado, party of the second part, witnesseth that : Whereas, Albert W. Benson, of the county of Boulder and Territory of Colorado, did, by certain trust deed, dated the 11th day of August, A. D. 1873, which said deed was recorded in the office of the county clerk, and recorder of the county of Boulder, in the Territory of Colorado, on the 13th day of August, A. D. 1873, in book T, on page 135, convey to said party of the first part, all the premises hereinafter described, to secure the payment of a certain promissory note in said deed particularly mentioned, and upon certain conditions in said deed particularly declared. And whereás, default hath been made in the payment of said note and interest, and the said premises having by the said party of the first part been duly advertised for public sale at the front door of the court-house, in the county of Boulder and Territory of Colorado, on the 9th day of October, A. D. 1875, for the period of over thirty days, and in the manner prescribed by said trust deed were, upon the day and year, and at the place last mentioned aforesaid, in pursuance of said notice, sold at public sale, and at the said sale the said party of the second part was the highest and best bidder therefor, and bid for the tract hereinafter described the sum of three hundred and thirty-five (335) dollars.

Now, therefore, these presents witness that the said party of the first part, in pursuance of the power and authority in him vested, in and by said trust deed, and in consideration of the sum of one dollar, and also the further sum of three hundred and thirty-five dollars, by the said party of

the second part paid, the receipt whereof is hereby acknowledged, hath and doth hereby convey, remise, release and quit-claim to said party of the second part, her heirs and assigns forever, all the right, title and interest, as well in law as in equity, which the party of the first part hath acquired by virtue of the trust deed above mentioned, of, in and to all the following described tract, piece or parcel of land, situate, lying and being in the county of Boulder, and Territory of Colorado, to wit: Lot number one (1), in block number forty-eight (48), in the town of Longmont, in said county, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the reversions, remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same and any and every part thereof, with the appurtenances which the said party of the first part acquired by virtue of said trust deed. To have and to hold the aforesaid right, title and interest of said party of the first part unto the said party of the second part, her heirs and assigns forever, as fully and absolutely as the said party of the first part can, by virtue of the power and authority in him vested by said trust deed, convey the same.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed) WILLIAM W. CAYWOOD, *Trustee*. [SEAL.]

Mr. JOHN H. WELLS, *pro se*, and Mr. B. L. CARR, of counsel.

Mr. GEORGE D. REYNOLDS, for appellee.

THATCHER, C. J. This was an action of ejectment brought by the appellee against the appellant in the court below. On the 11th day of August, 1873, Albert W. Benson being at the time the owner in fee of the premises in dispute, made

a promissory note for the sum of \$250, payable to Catherine D. Caywood, the wife of William W. Caywood, two years after the date thereof. On the same date, to secure the payment of this note, Mr. Benson conveyed to William W. Caywood, as trustee, the disputed premises, with power to sell and dispose of the same at public auction in the manner prescribed in said deed of trust, in case the grantor therein should make default in the payment of the promissory note, or any part thereof, or the interest thereon, and to make, execute and deliver to the purchaser, at such sale, a good and sufficient deed of conveyance for the premises sold. After the maturity of the note, Mr. Benson having made default in its payment, the trustee advertised and sold and conveyed the premises to Mrs. Caywood, the then holder of the note. The deed of trust and the note were offered and read in evidence without objection. To the admission of the trustee's deed from Mr. to Mrs. Caywood, counsel for defendant in the lower court objected, on the sole ground that it was a deed executed by a husband to his wife. This objection was overruled, the deed admitted in evidence and an exception taken. The admission of the deed in evidence is assigned for error.

This brings us to the consideration of the question of the relation of husband and wife under the laws of this State, with respect to the independent acquisition, enjoyment and disposition of property. The general tendency of legislation in this country has been to make husband and wife equal in all respects in the eye of the law, to secure to each, untrammelled by the other, the full and free enjoyment of his or her proprietary rights, and to confer upon each the absolute dominion over the property owned by them respectively. The legislation of our own State upon this subject, although yet somewhat crude and imperfect, has doubtless been animated by a growing sense of the unjustly subordinate position assigned to married women by the common law, whose asperities are gradually softening and yielding to the demands of this enlightened and progressive age.

The benignant principles of the civil law are being slowly but surely grafted into our system of jurisprudence. "In the civil law," says Sir WILLIAM BLACKSTONE (1 Blackstone's Com. [Cooley] 444,) "husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts and injuries, and, therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband."

The courts, which have ever been conservative, and which have always been inclined to check, with an unsparing hand, any attempted departure from the principles of the body of our law, which were borrowed from England, in the States which were the first to pass enactments for the enlargement of the rights of married women, regarding such enactments as a violent innovation upon the common law, construed them in a spirit so narrow and illiberal as to almost entirely defeat the intention of the law-makers ; but generally with a promptness that left little room for doubt, a succeeding legislature would reassert, in a more unequivocal form, the same principles which the courts had before almost expounded out of existence. To understand the marked changes which our own legislation has wrought in this respect, it is necessary that we should consider some of the disabling incidents and burdens attendant upon coverture at common law. At common law the husband and wife are one person, and as to every contract, there must be two parties, it followed that they could enter into no contract with each other. "The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover, she performs every thing." "Upon the principle of an union of person in husband and wife depend almost all the legal rights, duties and disabilities that either of them acquire by marriage." 1 Cooley's Blackstone, 442.

All the personal estate, as money, goods, cattle, household furniture, etc., that were the property and in posses-

sion of the wife at the time of the marriage, are actually vested in the husband, so that of these he might make any disposition in his life-time, without her consent, or might by will devise them, and they would, without any such disposition, go to the executors or administrators of the husband and not to the wife, though she survive him. Debts due to the wife are so far vested in the husband that he may, by suit, reduce them to possession. (2 Bacon's Abridgment, 21.) The rents and profits of her land during coverture belonged to the husband.

The law wrested from the wife both her personal estate and the profits of her realty, however much it might be against her will, and made them liable for his debts.

An improvident husband had it in his power to impoverish the wife by dissipating her personal estate, and the profits of her realty over which she, under the law, by reason of the coverture, had no control.

The wife in Colorado is the wife under our statutes, and not the wife at common law, and by our statutes must her rights be determined, the common law affecting her rights, as we shall presently see, having been swept away.

By our laws it was declared that the property, real and personal, which any woman may own at the time of her marriage, and the rents, issues, profits and proceeds thereof, and any real, personal or mixed property that shall come to her by descent, devise or bequest, or be the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts. R. S. 1868, p. 454.

The legislature, however, being reluctant to allow a married woman the absolute dominion over her own real property, further provided that she could only convey her estate in lands by uniting with her husband in any conveyance thereof, and acknowledging the same separate and apart from her husband. R. S. 1868, p. 111, § 17.

It was not to be expected that our laws would long be per-

mitted to remain in this anomalous and incongruous condition, declaring in one section that the wife's real property should remain her separate estate, not subject to disposal by her husband, and in another that she could not convey it without the consent of her husband, which is necessarily implied by his uniting in a deed with her.

By "an act concerning married women," approved February 12, 1874, it is provided in section 1, that any woman, while married, may bargain, sell and convey *real* and personal property, and enter into any contract in reference to the same, as if she were sole. Section 2 provides that she may sue and be sued, in all matters the same as if she was sole. Section 3 provides that she may contract debts in her own name, and upon her own credit, and may execute promissory notes, bonds and bills of exchange, and other instruments in writing, and *may enter into any contract* the same as if she were sole. Section 4 repeals section 17 of chapter 17 of the Revised Statutes, which required the husband to unite with the wife in conveying her separate estate. This is, essentially, an enabling statute, and as such must be liberally construed to effectuate the purpose of its enactment. It confers, in terms, enlarged rights and powers upon married women. In contemplation of this statute, whatever may be the actual fact, a *femme covert* is no longer *sub potestate viri* in respect to the acquisition, enjoyment and disposition of real and personal property. This statute asserts her individuality, and emancipates her, in the respects within its purview, from the condition of thralldom in which she was placed by the common law. The legal theoretical unity of husband and wife is severed so far as is necessary to carry out the declared will of the law-making power. With her own property she, as any other individual who is *sui juris*, can do what she will, without reference to any restraints or disabilities of coverture. Whatever incidents, privileges and profits attach to the dominion of property, when exercised by others, attach to it in her hands. Before this statute

her right to convey was not untrammelled, but now it is absolute without any qualification or limitation as to who shall be the grantee. Husband and wife are made strangers to each other's estates. There are no words in the act that prohibit her from making a conveyance directly to her husband, and it is not within the province of the court to supply them.

When a right is conferred on an individual, the court cannot, without transcending its legitimate functions, hamper its exercise by imposing limitations and restrictions not found in the act conferring it. Were we to construe this enabling statute so as to deprive the wife of the right to elect to whom she will convey her property, we would it is believed thwart the legislative will whose wisdom we, as a court, are not permitted to question. The disability of husband and wife to contract with and convey to each other was, at common law, correlated and founded mainly upon the same principle, viz. : the unity of *baron and femme*. The removal in respect to the wife, of a disability that is mutual and springing from the same source, removes it also as to the husband.

The reason, which is the spirit and soul of the law, cannot apply to the husband as it no longer applies to the wife. If she may convey to the husband, the husband may convey to the wife. *Allen v. Hooper*, 50 Me. 371 ; *Stone v. Gazzam*, 46 Ala. 269 ; *Burdeno v. Ampeise*, 14 Mich. 91 ; *Patten v. Patten*, 75 Ill. 443.

Perhaps the right of the husband when acting in a representative capacity *in autre droit* to make a deed to his wife might be supported at common law. Co. Litt. 112 *a*, 187 *b* ; Com. Digest, *Baron and Femme*, D. 1. This doctrine, however, is repudiated in New York (*Leitch v. Wells*, 48 Barb. 654), but sanctioned in Pennsylvania. *Dundas' Appeal*, 64 Pa. 332.

We, however, rest our decision, not upon this mooted doctrine, but broadly upon the statute, under which a husband, when acting not in a representative capacity, but in

his own right, has, as we have seen, the right to convey directly to the wife.

But it may be urged that if not by reason of the disability of coverture, then by reason of the peculiarly intimate relation of husband and wife, and the consequent opportunity to commit and conceal fraud, the same principle that prohibits a trustee from executing a trust in favor of himself, also prohibits him from executing it in favor of his wife. This position is not without force. *Dundas' Appeal*, 64 Pa. 332. It must, however, be borne in mind, that it is only in the absence of an express or a clearly implied agreement that the law, suspicious of fraud and collusion where a fiduciary relation exists, will not permit a trustee to become either directly or indirectly a purchaser at his own sale; but where the right to purchase is conferred in clear terms by the instrument appointing him, or where, as in the case before us, the wife as the holder of the note is in unmistakable language authorized to buy at the trustees' sale, the law interposes no impediment to the validity of a sale so made. *Perry on Trust*, 602, *v*; *Dundas' Appeal*, case cited *supra*, is precisely in point.

The evidence of Eugene Wilder, one of the proprietors and publishers of the Boulder County News (which was received without objection) sufficiently proves the due publication of the trustees' notice of sale, if the proof of that fact was necessary to entitle the plaintiff to offer his deed in evidence.

In our view, in order to entitle a purchaser at a trustees' sale to maintain ejectment, it does not devolve upon him to show that his grantor (the trustee) had complied with the conditions prescribed in the deed of trust. *Reese v. Allen*, 5 Gilm. 241; *Graham v. Anderson*, 42 Ill. 515; *Taylor v. King*, 6 Munf. (Va.) 358; *Harris v. Harris*, id. 367.

In *Dawson v. Hayden*, 67 Ill. 52, it was held, if a trustee under a power in a deed of trust makes a conveyance of the premises without complying with the provision in the deed of trust requiring publication of sale for a specified period, the legal estate will nevertheless pass to the pur-

chaser, and the deed to him cannot be impeached on that ground by a defendant in ejectment. It is a proper subject of inquiry in a court of equity. A legal, though a defeasible, title was by the trust deed vested in Mr. Caywood. Perry on Trusts, § 602, and cases cited.

By the deed executed by Mr. Caywood to his wife, although inartificially drawn, the legal title passed to the purchaser and became absolute in a court of law. That it should so pass was the evident intent of the grantor therein.

The deed purports on its face to have been made for the sole purpose of executing the trust. To give it any other construction would be to defeat the manifest purpose of its execution.

As when the plaintiff rested she had shown by her deeds that the legal title to the premises in dispute was in her, the motion for a nonsuit was properly denied.

The defendant offered in evidence the deposition of A. W. Benson, which the court excluded. The exclusion of the deposition is assigned for error. The deposition tended to show that the note and trust deed offered in evidence were executed in pursuance of an agreement between Benson and Wm. W. Caywood, by which Benson was to enter under the pre-emption laws of the United States a certain tract of land, and convey the same to Mr. Caywood. Had Benson, in pursuance of the agreement, entered and conveyed the land to Caywood, he would have been guilty of great moral turpitude, involving the crime of perjury. The consideration was, therefore, illegal. *Hoyt v. Macon*, 2 Col. 502.

Can a defendant in ejectment show that the consideration for a deed, under which the plaintiff claims title, was either wanting, or was illegal or fraudulent? That a conspiracy existed to defraud the United States out of the title to one hundred and sixty acres of land the deposition tends to show. Nothing appears to relieve the consideration from the taint of illegality and fraud. The question here presented was very fully considered, in the case of *The In-*

habitants of Worcester v. William Eaton, 11 Mass. 368, in a writ of entry in which the plaintiff sought to avoid the deed under which defendant claimed title by showing that it was executed for an illegal consideration. The consideration was an agreement to compound a felony.

The court says: "A bond or other obligation, or a written promise founded upon such a consideration, may be avoided, because the law will not uphold a contract, or permit a party to enforce it, if it was made to secure the price of an unlawful act. * * * If one holds the obligation or promise of the other, to pay him money, or do any other valuable act, on account of such illegal transaction, the party defendant may expose the nature of the transaction to the court, and the law will say: 'our forms and rules are established to protect the innocent, and to vindicate the injured, not to aid offenders in the execution of their unjust projects'; and if the party, who has foolishly paid his money, repents his folly, and brings his action to recover it back, the same law will say to him: 'you have paid the price of your wickedness, and you must not have the aid of the law to rid you of an inconvenience, which is a suitable punishment of your offense.' * * * A deed of bargain and sale, signed, sealed and delivered, acknowledged and recorded, is an *actual* transfer of the land to the grantee as much as the delivery over of a sum of money or a personal chattel." The court held that the title having passed, the deed could not be avoided by showing the illegal consideration. It is not doubted that if the defense had gone not to the consideration but to the *execution* of the deed, it would have been admissible. Thus it might be shown that the deed was executed under duress, or that it had been mis-read to the grantor, or other evidence might be given tending to prove that he did not assent to it. But want of, or fraud in, or illegality of the consideration in a plaintiff's deed, may not be shown by a defendant in ejectment. The defendant's remedy, if any he has, is not in a court of law. *Doe dem. Roberts v. Roberts*, 2 Barr. & Ald.

367; *Taylor v. King*, 6 Munf. (Va.) 365; *Dyer v. Day*, 61 Ill. 336; *Hovey v. Hobson*, 51 Me. 67.

The deposition of Benson was properly excluded.

Defendant then offered to introduce in evidence a warranty deed, dated June 3, 1875, from Albert W. Benson, and Helen Benson, his wife, purporting to convey the premises in dispute to him, and containing a waiver of homestead exemption in the body of the deed. By the stipulation filed in the cause it appears that Benson, on the 4th day of February, 1875, a year and a half after the execution of the trust deed to Caywood, caused the word "homestead" to be entered of record, on the margin of his recorded title. The law requires such entry to be made, to entitle a householder to a homestead. R. S. 385. It is the record entry that proclaims to the world that the owner of the property claims it as a homestead. Until the entry is made it is not in contemplation of law a homestead, and, therefore, it cannot be said that, as the wife of Benson did not join with him in the execution of the trust deed, as is required by the Homestead Act (R. S. 386), in case of mortgages executed after the property is claimed as a homestead, that the trust deed was executed against the provisions of law. Having reference to the condition of the property at the time the trust deed was made, Benson alone was a necessary grantor, even if a trust deed is to be considered as a mortgage, within the meaning of that word as used in the Homestead Act. *Drake v. Root*, 2 Col. 689.

The subterfuge adopted by making the entry of "Homestead" on the record on the very day that Benson and family vacated the premises, cannot be held to invalidate the trust deed. The deed from Benson and wife to the defendant in ejectment was subject to the incumbrance contained in the deed of trust, and must yield to any title *legally* deduced under it. *Taylor v. King*, cited *supra*.

Wells having purchased with the record notice of the trust deed occupies no better position than his grantor. The source of the title both in appellant and appellee is the

same. The court did not err in excluding the deed from Benson and wife to Wells. As we discover no error in the record, the judgment of the court below must be affirmed.

Affirmed.

MARRIED WOMEN'S PROPERTY RIGHTS.—The laws of Colorado contemplate the free individual acquisition and enjoyment of separate property by married women: *Ooon v. Elden*, 4 Colo. 283; *Colorado Cent. R. R. Co. v. Allen*, 13 Colo. 235.

COLORADO CENTRAL R. R. CO. v. OGDEN.

1. It is the well-settled doctrine that the master is not liable for injuries sustained by one servant through the negligence of a fellow-servant. But risks arising from the negligence of the master are not included among those which the servant is presumed to assume.
2. The master is liable for his own negligence in the selection of servants, machinery and appliances. But defects must be known to the master or be such as should have been known to him as a prudent man.
3. Where it is the province of a certain employee of a railroad company to supervise repairs of defects in a railway, his negligence in respect to such defects is the negligence of the company, and notice to him of such defects as are within his province to repair, is notice to the company.
4. The general rule is that if the employee knows of the defects and continues in the service, he is deemed to have assumed the risks, and the maxim is *volenti non fit injuria*. But if a person of ordinary prudence would not have believed the defects dangerous, he may disregard them without losing his right to complain, if he suffers from the defect while pursuing his ordinary course.
5. Notice to the master by the employee of defects in associates or material does not necessarily fix the master's liability for injury to the employee. It is incumbent on the latter to show that there was no want of due and reasonable care upon his part; he is not exempt from the operation of the rule that one cannot recover for an injury which is the proximate result of his own failure to exercise ordinary care.
6. A railroad company is not *prima facie* liable to any of its servants for injuries resulting to them because of defects in their rolling stock or road-bed. The company is bound to that ordinary care which must be measured by the dangers of the service and proportioned to it, but it does not warrant or insure against defects.

Appeal from District Court of Jefferson County.

THE appellee had judgment in the court below for \$5,000.00. The facts are sufficiently stated in the opinion.

Messrs. H. M. & W. TELLER, for appellant.

Messrs. BROWNE & PUTNAM, for appellee.

ELBERT, J. This was an action of case brought by the appellee against the appellant for injuries received by him while in the employ of the appellant as conductor of one of its trains.

It appeared by the evidence that the appellee was the only conductor employed by the appellant; that it was his duty to take charge of a mixed train of cars, some for freight and some for passengers. That as such conductor it was the duty of the appellee to run all trains and to do all work that was to be done as conductor. That three-fourths of a mile from the Golden depot there was a coal bank where the company procured coal. That on the 12th day of April, 1872, the appellee took a locomotive with engineer and brakeman and went after three loaded coal cars, standing at the coal bank; that on the way he took two empty box cars and pushed them before the engine to the vicinity of the coal bank where the accident happened. The track between the yard and the coal bank was only used to haul coal cars over. It also appears by the testimony of the appellee that the track was bad and had been so for some weeks; that he had seen that it was especially bad a week before, and that he had reported to A. C. Harris, assistant superintendent, its condition. The evidence disclosed that there was some low joints. The road-bed was narrow. The ties extended six or eight inches over the bank, the earth was about eight inches outside of the rails, and water was running against the bank. There was no claim that Harris had agreed or promised to repair the roadway.

It also appears by the testimony that the appellee took with him the two box cars, not intending to have them filled with coal, but to save the labor and trouble of hauling them to the yard, as they stood between the yard and coal bank. The appellee had knowledge of the defective

condition of the roadway, and that it had not been repaired after notice. His attention was especially called to it as the train approached the defective point, and he attempted to signal the engineer to stop, but failed to attract his attention. The cars were thrown from the track, and the appellee's hip was broken, resulting in an injury more or less permanent.

The facts presented by the record involve the law respecting the important relation subsisting between a railroad company and its employees. The relation is that of master and servant.

If the superintendent Harris is to be regarded as a fellow-servant, and the negligence of which the injury was the result, as his negligence, the appellee cannot recover.

It is now the settled doctrine of both England and America, that the master is not liable for injuries suffered by one servant through the negligence of a fellow-servant. We do not deem it necessary to cite numerous authorities to a doctrine so generally recognized. The leading English case is that of *Priestly v. Fowler*, 3 M. & W. 1. The leading American case is that of *Farwell v. Boston & Worcester R. R. Co.*, 4 Metc. 49. See, also, 1 Redfield on Law of Railways, § 131, and cases there cited.

The reason of the rule commonly assigned is that it is but just and fair that the servant should take upon himself the ordinary and usual hazards of his employment over which his employer has but little or no control, and against which he is best situated and best able to guard. Knowing the perils of the employment in which he engages, he is presumed to contract with reference to them and to demand and receive a compensation which covers them.

There are also other reasons in support of the rule springing from considerations of public policy.

As that a contrary rule would subject the master to unreasonable, and not unfrequently, ruinous burdens; that it would encourage the servant to omit that diligence and caution which is his best protection; that it would tend to an abatement of that vigilance which is one of the chief

protectors of the public against the negligence of servants; that under the rule denying the remedy it becomes the special interest of the servant to protect himself, thus securing the protection of the public; that it concurs with the rule which makes the master responsible to third persons, not only for his own negligence but for the negligence of his servants in securing from both master and servant the highest diligence and caution, and thus, without hardship to any one, secure the safety of all.

Qualifying the foregoing rule is the further rule that risks arising from the negligence of the master are not included among those which the servant is presumed to assume. On the contrary, the master impliedly (if not expressly) contracts to use ordinary care and diligence (proportioned to the danger of the service) in the selection of competent servants and safe machinery and appliances, and is liable for his own negligence in these respects. *Cleveland, etc., R. R. Co. v. Keary*, 3 Ohio, 201; *Mad River, etc., R. R. Co. v. Barber*, 5 id. 541; *Ill. Cent. R. R. Co. v. Welch*, 52 Ill. 183; *Chicago, etc., R. R. Co. v. Sweet*, 45 id. 197; *Harrison v. Cent. R. R. Co.*, 2 Vroom, 293; *Warner v. Erie R. R. Co.*, 39 N. Y. 468; *Laning v. N. Y. C. R. R. Co.*, 49 id. 521; *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14.

It is under this rule that the plaintiff claims to recover. In such a case, however, the defect must be known to the master or such as should have been known to him as a prudent man having a due regard to the safety of his employees. *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. 562; *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14; *Jones v. Yeager*, 2 Dill. C. C. R. 64.

The evidence disclosed that about a week prior to the accident the plaintiff notified A. C. Harris, assistant superintendent of the road, of the bad condition of the roadway at the point where the accident occurred. That A. C. Harris was assistant superintendent; "that he was running the road in the absence of Mr. Sickels;" that he "looked after the interests of the road;" that in the absence of the roadmaster the plaintiff had reported to him other defects in the

road-bed, which he had repaired, is all that the record discloses respecting his powers and duties as an employee of the company. We think the plaintiff would have done well to have shown more fully the powers and duties of this assistant superintendent. However, as other defects in the roadway had been reported to him, and had been repaired by him, the jury might fairly presume that the repair of the road was among his duties, and say that the defect was reported by the appellee to the proper employee of the company.

Corporations, necessarily, act through agents, and it may be said, generally, that the negligence of an officer of the company to whom is committed any particular branch of its business is the negligence of the company.

The repair of the road seems to have been under the supervision of this assistant superintendent; herein he represented the company, and his negligence in respect to defects, which, within the scope of his authority, it was his province to repair, is to be attributed to the company as its personal negligence, otherwise a corporation as acting alone through its general officers would not be chargeable in any case. *Shearman & Redfield on Negligence*, § 89; *Cleveland, etc., R. R. Co. v. Keury*, 3 Ohio St. 201; *Illinois Cent. R. R. Co. v. Welch*, 52 Ill. 183; *Patterson v. P. & C. R. Co.*, 76 Pa. 389; *Clarke v. Holmes*, 7 H. & N. 9640.

In this view the appellee insists that the negligence from which the injury resulted was the negligence of the company. Equally in another view, independent of the question of notice to the superintendent, the jury may have found the negligence that of the defendant, to wit: that it was the duty of the defendant to use reasonable diligence to keep the roadway in proper repair, and that the condition of the roadway was of such a character, and for such a length of time, that the defendant knew of it, or should have known of it.

It is immaterial which view be taken, as either involves the same result. It does not appear but that the road was

well constructed in the first instance. The evidence is to the effect that it had been out of repair from two to six weeks, and the inference is that prior to that time it was in repair. Aside from this, the law presumes that the master had done his duty in this respect. *Wood's Master & Servant*, § 346.

The plaintiff had been in the employment of the company as conductor for about five months prior to the accident, and the presumption is that at the date of the employment the track was in repair. Hence we may say: 1. That the negligence of the company was not in a failure to furnish a proper roadway in the first instance, but in a failure to keep it in repair. 2. The plaintiff did not originally contract with reference to the risks incident to the condition of the roadway at the time of the accident. Conceding, then, the negligence of the company in failing to keep the roadway in repair, we are confronted by the fact, indisputably established by the testimony of the appellee himself, that he had full knowledge of the defective condition of the roadway and continued the service. The general rule is, that under such circumstances the servant cannot recover. When he knows of the defect, and continues the service, he is deemed to have assumed the risks, and the maxim is—*volenti non fit injuria*. *McGatrick v. Watson*, 4 Ohio, 566; *Ill. Cent. R. R. Co. v. Welch*, 52 Ill. 183; *McGlynn v. Brodie*, 31 Cal. 376; *I. B. & W. R. Co. v. Flanigan*, 77 Ill. 365; *Hayden v. Smithville M. Co.*, 29 Conn. 548; *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14.

But this rule has been modified by a series of decisions commencing with the leading case of *Snow v. The Housatonic R. Co.*, 8 Allen, 441, which cannot be disregarded. *Shearman & Redfield*, in their work on Negligence, say: "This rule is, however, applicable only to such defects as the servant ought reasonably to have foreseen might endanger his safety. If a person of ordinary prudence would not have believed the defect dangerous, the servant might disregard it without losing his right to complain, if while pursuing his ordinary course he suffers from such defect." *Shearman*

& Redfield on Negligence, § 95; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Britton v. G. W. Cotton Co.*, 7 Exch. 130.

The question presented, then, on the trial below, was, did the appellee, knowing of the defective condition of the roadway, come fairly within this exception to the rule? Whether the evidence so shows, in view of the determination of this case, it is not proper for us to say. •

There is undoubtedly authority for saying that where the master has promised to repair the defect, and the servant remains in the service upon such an inducement, and with a reasonable expectation that it would be repaired, that the servant may recover. *Shearman & Redfield on Negligence*, § 99; *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14; *Patterson v. P. & C. R. Co.*, 76 Pa. 389; *Laning v. N. Y. C. R. Co.*, 49 N. Y. 521; *Clark v. Holmes*, 7 H. & N. 937.

There is no claim, however, that there was any promise to repair in this case, but it is insisted in this behalf by the appellee that the fact of the notice given by him to the assistant superintendent had the effect to fix the liability of the company, notwithstanding the appellee's knowledge of the defective roadway, and that thereafter he was at liberty to act upon the presumption that the defect had been repaired, and recover for his injury.

We cannot assent to this proposition. Remaining in a service, as we have seen, with knowledge of defects in associates or material, is not necessarily negligence, unless the real danger be apparent. *Shearman & Redfield on Negligence*, § 95; *Wood's Master & Servant*, § 32.

Nor is it conclusive evidence that the servant has waived objections to the defects. *Shearman & Redfield on Negligence*, § 96.

The effect of notice by the servant to the master of defects is to rebut this last presumption; but unless followed by inducement to remain, it in nowise affects the question of the servant's negligence in remaining in a dangerous service with knowledge of the defects, except that in case of a defect of which it cannot be reasonably expected that the

master has notice, it is the duty of the employee to give him notice; and a neglect of such duty exempts the employer from responsibility. *Patterson v. P. & C. R. Co.*, 76 Pa. 394.

But while notice meets this requirement, it by no means necessarily fixes the liability of the master, nor exempts the servant from the operation of the elemental rule that one cannot recover for an injury which is the proximate result of his own failure to exercise ordinary care.

It is not enough, therefore, for the appellee in this case to show that he gave the master notice of the defective roadway in order to recover, but having knowledge of the defect, and continuing the service, in order to bring himself within the exception which we have laid down, and justify a departure from the rule that exempts the master when the servant has knowledge of the defect, he must further show that there was no want of due and reasonable care; that the defects were not such as could reasonably be foreseen might endanger his safety. If the roadway was so obviously dangerous as that a man of ordinary prudence would not have ventured, the master cannot be held liable for the result. In such case the law adjudges the servant guilty of concurrent negligence, and he cannot recover. It is the case of equal knowledge, and a voluntary exposure to known hazards.

We think the rule well laid down by Mr. Wood, in his work on Master and Servant, § 328.

“Where a servant is employed on work which, equally within the knowledge of the master and the servant, is of a dangerous nature, the master is not liable for the consequences of an accident occurring to the servant in the course of that employment, unless there be negligence on the part of the master, and the absence of rashness on the part of the servant. A servant is bound to exercise his own skill and judgment so as to protect himself in the course of his employment, and the master is not regarded as warranting generally his safety. He is himself bound to exercise proper care, and cannot claim indemnity from the master for an

injury resulting to him, which he might have prevented, if he had himself been reasonably vigilant."

Even in the case of a promise to repair, the plaintiff must still show that he has not materially contributed to the injury by his own want of ordinary prudence.

In the case of *Clark v. Holmes*, cited *supra*, COCKBURN, C. J., says: "If a jury should find that a party complaining had materially contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is well established that a plaintiff who has materially contributed to his own injury by his own negligence cannot recover, although he may show negligence in the opposite party."

In the case of *Patterson v. P. & C. R. Co.*, cited *supra*, GORDON, J., says: "In this discussion, however, we are not to forget that the servant is required to exercise ordinary prudence. If the instrumentality by which he is required to perform his service is so obviously and immediately dangerous, that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such a case the law adjudges the servant guilty of concurrent negligence, and will refuse him that aid to which he would otherwise be entitled. Why should a less stringent rule apply in the case of notice, unaccompanied by promise to repair?"

The question of negligence is to be determined by the circumstances of each particular case. In this case it depended not only on the defective condition of the roadway, its apparent danger, and the appellee's knowledge of it, but upon the manner in which the plaintiff attempted to pass over it, the rate of speed at which he ran his train, the fact that this portion of the road was designed and used for special service, if such was the fact.

Whether the box-cars which he attempted to take over the defective road were necessary for the particular service in which he was then engaged, and such as were used on this particular branch of the road, whether they were more

liable, by reason of their height or other features of construction, to the accident which produced the injury; the position of the plaintiff, that he had the entire control and management of the train, that he, at the time, was not acting under the immediate orders or instructions of an officer of a higher grade, who had a right to command him; the duty of the conductor to exercise care and caution, not only in respect to his own safety, but in respect to the property of his employer and the lives of others on the train, were all considerations for the jury to weigh in determining the negligence of the appellee, and were not to be taken from the jury by mere proof of notice.

If, under all the circumstances, the act of the appellee was that of a man of ordinary prudence, then he may recover for the negligence of the company, notwithstanding his knowledge of the defects of the road. If both, in a measure, failed to discharge their duty fully, the question is, to whose act shall the blame be imputed, whose act was the proximate cause of the injury? If the appellee's act was such as a prudent man, under precisely the same circumstances, would not have done, then, although the company utterly failed in its duty, no recovery can be had. If the injury would not have happened but for appellee's want of care, the fault cannot be imputed to the company, although its breach of duty also contributed to the injury. *Wood's Master and Servant*, § 359.

Whether or not, under all the circumstances, the negligence of the master, or the negligence of the servant, was the proximate cause of the injury, in all cases where there is any doubt, is a question for the jury. *Wood's Master and Servant*, §§ 359-377; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Patterson v. P. & C. R. Co.*, 76 Pa. 394; *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Wharton on Negligence*, § 217 and cases cited.

On this matter of notice the court instructed the jury as follows:

"If the jury find from the evidence that the injury complained of was caused by the neglect of defendant after notice of defects in its road-bed, to make the necessary repairs, and that the plaintiff was not guilty of negligence at the time of the accident, then you should find for the plaintiff."

A professional man, versed in the force of legal phrases and the definition of legal terms, would understand that the term "negligence," as used in this instruction, would include the negligence of venturing with knowledge of the defects. He would understand that, while previous knowledge of a danger was not conclusive, it was a strong circumstance in the chain of evidence to establish negligence on the part of the appellee, and, unless some reasonable excuse was shown, would warrant the jury in finding negligence. But did the jury so understand it? This instruction does not recognize in terms the knowledge of the defective condition of the roadway upon the part of the appellee, and his continuance in the service, as in themselves *prima facie* negligence, or even as facts for them to consider in determining the question of his negligence. On the other hand, we are inclined to think that it led them to believe that the effect of the notice was to leave the plaintiff at liberty to continue the employment, notwithstanding his knowledge of the defective roadway, and tempt the dangers of the service at his master's risks, provided he was not in other respects negligent. At all events, it does not give the law applicable to the facts of the case in terms sufficiently plain and full as to advise them of the effect of notice, or the effect of knowledge of the defects by the plaintiff in case of notice. A party has the right to have the law applicable to his case fairly, clearly and distinctly stated in the instructions given to the jury. *C. B. & Q. R. R. Co. v. Payne*, 49 Ill. 500.

The fifth instruction is also erroneous.

"A railroad company is bound to keep their track in such repair as to *insure* the safety of all persons lawfully upon it, and this extends to servants of the company as well as passengers."

This is not the law. The rule, respecting the safe condition of the roadway, is not the same in the case of servants as in the case of passengers. A railroad company is not *prima facie* liable to any of its servants for injuries arising from defects in its rolling-stock or road-bed.

The company must use all reasonable precautions and care to secure the safety of its employees by keeping the roadway in repair. It cannot through want of watchfulness expose them to unreasonable risks in this respect, and escape liability, but the duty imposed is that of ordinary care. This ordinary care must be measured by the danger of the service, and proportioned to it. Considering the dangerous force which a railway company puts in motion, the term "ordinary care toward its employees" imposes, without doubt, a high degree of diligence in keeping the road and all its appliances in proper repair, but it neither warrants nor insures against defects. In this respect the instruction went too far. *Shearman & Redfield on Negligence*, § 92; 1 *Redf. on Railways*, 557 (10), § 131; *Wood's Master and Servant*, §§ 329, 345; *Ormand v. Holland*, E., B. & E. 102; *Hard v. Vermont, etc., R. R. Co.*, 32 Vt. 473; *Columbus, etc., R. R. Co. v. Webb*, 12 Ohio St. 475; *Mad River R. R. Co. v. Barbour*, 5 Ohio, 541; *Indianapolis, etc., R. R. Co. v. Love*, 10 Ind. 554; *Seaver v. Boston & Maine R. R. Co.*, 14 Gray, 466; *Warner v. Erie R. R. Co.*, 39 N. Y. 468.

We deem it unnecessary to notice the other assignments. The judgment is reversed, and the case remanded for further proceedings according to law.

Reversed.

MASTER IS LIABLE TO SERVANT: *Wells v. Che*, 9 Colo. 160; *Wilson v. Denver S. P. & P. R. R. Co.* 7 Colo. 103.

SERVANT ASSUMES ORDINARY RISKS OF SERVICE: *Atchison, T. & S. F. R. R. Co. v. Farrow*, 6 Colo. 503; *Stoutz C. & P. R. R. v. Pintayson*, 16 Neb. 585.

RAILWAY SUPERINTENDENT OF CONSTRUCTION IS NOT FELLOW-SERVANT with laborers on the road: *Denver & N. P. & P. Ry. Co. v. Driscoll*, 12 Colo. 524; *St. Louis & S. F. Ry. Co. v. Weaver*, 35 Kan. 427, 431.

DUNN v. DUNN.

1. In declaring upon a covenant, an exception, if there be any in the body of the covenant, must be set out, and the subject-matter thereof excluded from the breaches assigned.
2. Where the grantor in a deed covenants that he was well seized, etc., and had good right to convey, etc., and then added that he would warrant and

defend the grantee, her heirs and assigns against all and every person lawfully claiming or to claim the whole or any part of the premises, "except as against the United States," *held*, that both covenants must be taken and construed together, and that the latter restricted and qualified the first.

Error to District Court of Arapahoe County.

THE case is stated in the opinion.

Mr. H. P. BENNET, and Mr. EDWARD L. JOHNSON, for plaintiff in error.

Mr. H. R. HUNT, and Mr. V. D. MARKHAM, for defendant in error.

THATCHER, C. J. This was an action for the breach of a covenant of seizin and of a covenant of right to convey inserted in a deed executed by the defendant to the plaintiff.

The declaration, after setting forth a description of the premises conveyed, avers that the defendant for himself, his heirs and personal representatives did covenant with the plaintiff, her heirs and assigns that he was well seized of the premises as of good, sure, perfect, absolute and indefeasible estate of inheritance, in law, in fee simple and that he had good right, full power and lawful authority to grant, bargain, sell and convey the same; that the same was free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of whatever kind and nature soever; and that the said bargained premises in the quiet and peaceable possession of the plaintiff, her heirs and assigns against all and any person or persons lawfully claiming or to claim the whole or any part of the said premises, the said defendant did and would warrant and forever defend *except* as against the United States. The breaches assigned are that the defendant was not well seized of the said premises as aforesaid, and that he had not good right to convey the same.

To this declaration a general demurrer was interposed which the court sustains. It is contended by the defend-

ant that the effect of the limiting words added to the covenant of warranty apply to and restrict the otherwise general covenant of seizin and of right to convey, and that, therefore, the exception should have been set out and the subject-matter thereof excluded from the breaches assigned. If the covenants of seizin and right to convey are so qualified by the restrictive words in the exception to the covenant of warranty, the demurrer was properly allowed (Gould's Plead., p. 165, ch. 4, § 20); otherwise, the covenants were pleaded according to their legal effect, and the breaches were properly assigned. This is the sole question discussed and presented for our consideration.

There is a series of covenants all of which it is conceded would be general but for the limiting words following the last. Is the generality of the covenant of seizin and of the covenant of good right to convey restrained by the covenant of warranty which, by express words, except the United States? In construing these covenants courts will take judicial notice that the source of title to mining property in Colorado is the United States. It is only upon compliance with the acts of congress and the statutes of the State made in pursuance thereof that the United States can be divested of, and the locator of mining property or his assigns can be invested with title thereto. With the presumed knowledge of the source of mining titles, the grantee in the deed made purchase of the property therein described.

The text-books and adjudicated cases indulge in many refinements and subtle distinctions in the endeavor to eliminate a rule of universal application in the construction of covenants when any one in a series is limited by express words generally founding the rule upon the particular collocation of the limited covenant in the series, whether it be first, last, or occupy some other place in the series. Rawle on Covenants, 498 *et seq.* and cases there cited; 3 Washburn on Real Property, 485 and cases cited.

The professed object of the rule is the ascertainment of the intention of the parties to the covenants. But when

the enforcement of the rule would evidently fail of this purpose, it is admitted that it should not be applied. The intention of the parties as gathered from the entire language employed, considered in connection with the subject-matter of the contract, must control every merely technical rule of construction. In the case before us the restrictive clause in the covenant of warranty contains a clear inferential declaration on the part of the grantor that the paramount title to the premises described is in the United States. The attention of the grantee by these limiting words was called to the fact that the grantor recognized a higher and better title than that which he conveyed. Against all persons except the United States, he covenanted to warrant and defend the title. The existence of this superior title asserted by the limiting words in the covenant of warranty is consistent with the right to convey and the seizin in fee of the premises, only when subject to the qualification expressed in the covenant of warranty. This construction will, we think, effectuate the intention of the parties as it was understood at the time the deed was made. *Cole v. Hawes*, 2 Johns. Cases, 203, is in principle closely analogous to the case before us. Rawle on Covenants, in a note on page 516, "cautions the student against relying on that case *too strongly* in practice," for the reasons, we presume, that he conceived that it does not fall within the broad rule he lays down. In that case the question before the court was, whether when a grantor covenanted that he was well seized of the premises and had good right to bargain and sell the same, and further, that he would warrant and defend the same against all claims and demands whatever, *except the lord of the soil*, the last limited covenant reached back in its effect and restrained the operation of the two preceding covenants. The court says: "The last covenant explains the first, and in construing them, both must be taken together. The deed itself declares that there existed, distinct from the grantor, a lord of the soil. This was explicitly told to the grantee by the deed. It is not to be supposed that the defendant would, in one line, covenant

absolutely that he was seized, when he admitted and it was so understood by both parties that there was a lord of the soil, and when in the next line the defendant only warranted against all *except the lord of the soil*. This exception was manifestly intended to apply to both covenants. The spirit of the agreement and good sense as well as justice require such a construction."

The cases are comparatively few in which courts have been called upon to determine the effect of such a peculiarly significant limitation of a covenant of warranty. Seeking the intention of the parties, we cannot well see how the case could have been differently decided. In our opinion the demurrer in the case before us was properly sustained.

Affirmed.

McCLURE v. SANFORD et al.

1. All laws of the Territory of Colorado relating to appeal from the probate to the district courts, previous to the act of January 31st, 1872 (p. 105), were without force and void.
2. The statute (1872, p. 105) does not require process to be issued to bring into the district court parties not joining in an appeal thereto from the probate court.
3. The district court, being a court of general jurisdiction, must be presumed to have complied with its own rules of practice in dismissing an appeal unless the contrary is affirmatively shown.
4. When the appellant fails to appear in the district court and prosecute his appeal, it is not incumbent on the court to try the case; it may be dismissed on motion.

Error to District Court of Jefferson County.

THE case is stated in the opinion.

Mr. C. S. EYSTER, for plaintiff in error.

STONE, J. At the September term, A. D. 1874, of the probate court of Jefferson county, Emma E. Sanford and P. B. Sanford obtained judgment against Charles Y. Mc-

Clure, Constance Duhem and Victor Duhem, for the sum of \$157.50, from which judgment McClure took an appeal to the district court of said county, the other two defendants not joining in the appeal.

It further appears from the record that at the April term, A. D. 1875, of the district court of Jefferson county, the said cause was continued "by order of the court;" that at the October term of said court the cause again went over, after being twice set for trial during the term; that afterward, at the April term, A. D. 1876, on the 4th day of the term, the appellant not appearing, on motion of the appellees the appeal was dismissed at the cost of the appellant and *procedendo* awarded.

That part of the transcript setting forth the dismissal of the appeal and the judgment thereon is as follows: "At this day came said appellees by their attorney, and none appearing for appellant, on motion of said appellees, the appeal herein is dismissed at cost of appellant. It is further considered by the court, that a *procedendo* be issued herein, commanding said probate court to proceed on said judgment without further delay, in such manner as the law directs, in all respects as if said appeal had not been taken."

The case is brought into this court on a writ of error by the said Charles Y. McClure, and it is assigned for error: 1st. That the appeal was dismissed before the co-defendants in the probate court, who did not join in the appeal, had been first brought into the district court by summons issuing therefrom; 2d. That it does not appear by the record that the defendant McClure was "called to prosecute his appeal;" and 3d. That the court erred in not trying the case. There are other assignments, but they are all comprehended in those above mentioned.

Upon the first and second points, counsel for plaintiff in error cited section 44 of the act concerning justices of the peace, R. S. 406, which provides that when one of several parties appeals from a justice of the peace to the district court, a summons shall issue from the district court to the

parties not joining in the appeal, and upon a return of "not found, the case shall at the first term of the court be continued, but at the second term shall be tried;" and also section 7 of an act concerning probate courts, R. S. 523, which declares "that * * * in all cases an appeal or writ of *certiorari* shall lie to the district court of the county, to be prosecuted in the same manner as appeals and writs of *certiorari* are prosecuted from decisions of justices of the peace," and it is thereupon contended that the district court could not act in this case until such summons had been issued, and that when it did act, it had authority only to try the case.

Under the original Organic Act of Colorado, the jurisdiction of probate courts, except as to probate business proper, was the same as that of justices of the peace, limited to one hundred dollars in the amount sued for, and in pursuance thereof the Probate Act cited by counsel was passed by the first legislative assembly in 1861, in which it was provided that appeals from probate to district courts should be prosecuted the same as appeals from justices of the peace. Subsequently, however, in 1863, an amendment to the Organic Act extended the jurisdiction of probate courts and wholly changed their character by making them courts of record, clothed with chancery powers, and with common law jurisdiction concurrent with the district court within the limit of \$2,000. In accordance therewith, the legislature by the act amendatory of the former acts concerning probate courts, approved Feb. 8th, A. D. 1865, R. S. 527, provided not only for the changed character of probate courts in other respects, but in sections 4, 5, 6 and 7 prescribed in detail the mode of taking and prosecuting appeals from that court to the district court. Thus the law stood up to 1867, when the supreme court of the Territory at the July term of that year, in the case of *Cass v. Davis*, 1 Col. 43, held that so much of the act of 1865 as relates to appeals from probate to district courts, is so far repugnant to the Organic Act as to be inoperative and void, and that,

therefore no appeal would lie from the judgment of a probate to the district court of the Territory. Thereafter Congress passed another act amendatory of the Organic Act, approved May 4th, A. D. 1870, which, so far as relates to the subject under consideration, is as follows: "That the organic law of the Territory of Colorado be, and the same is, hereby so far amended that an appeal shall be allowed from any final order, judgment or decree of any probate court in said Territory to the district court of the district within which such probate court is held, under such proper regulations as shall be prescribed by the law of said Territory."

In pursuance of this amendatory act, the territorial legislature, for the purpose of carrying out, and giving effect to said amendment of the organic law, passed the act concerning probate courts, approved January 31, 1872 (Sess. Laws, 9th Sess. 105), and which provides the mode in which appeals shall be taken from probate to district courts, and prosecuted therein.

From all this it follows that —

1. All laws of the Territory relating to appeals from the probate to district courts, previous to the act of January 31st, A. D. 1872, were without force and void.

2. The law of 1872, relating to such appeals, is the only law which governs in this case, and by which the question raised by the first assignment of error is to be determined; and,

3. Since the said law contains no requirement of the issuance of process to bring into the district court parties not joining in an appeal thereto from a probate court, this assignment of error is not well taken.

The second assignment of error is properly to be considered in connection with the other point made by the plaintiff in error, that the record does not allow that the appellant "was called to prosecute his said appeal" previous to its dismissal.

Both these points raise a mere question of practice, and

hence what was done, if any thing, in respect to such calling of the appellant, is not necessarily a part of the record which is silent upon this point. The district court, being one of general jurisdiction, must be presumed to have complied with its own rules of practice, unless the contrary is affirmatively shown. And the practice in this respect, being outside of any statutory requirement, is within the discretion of the court.

That the court below acted within authority in dismissing the appeal for want of appearance of the appellant to prosecute his appeal there can be no question. *Shook v. Thomas*, 21 Ill. 90; *Allen v. The City of Monmouth*, 37 id. 380. And, therefore, it was not incumbent on the court to try the case. *Shook v. Thomas*, cited above.

That the appellant had ample time and opportunity to prosecute his appeal, if he had chosen to do so, is evident from the record, which shows that the appeal was not dismissed until the fourth day of the third term after the case came into the district court, and as we can perceive no error in the record of the court below, the judgment must be affirmed.

Affirmed.

HAMILL v. THOMPSON et al.

1. When the payment of the purchase-money is a condition precedent to the delivery of a deed of conveyance, the refusal to pay the whole or any balance due, leaves the vendor at liberty to rescind the contract.
2. Where the vendor receives part of the purchase-money, he must, before seeking relief in a court of equity against the vendee, return or offer to return the amount received, with interest.
3. Where A held title to realty in trust for B, and at B's request conveyed to C, the payment of the purchase-money being a condition precedent to the delivery of the deed, and the deed, having been delivered without compliance with that condition, *held*, that on refusal of payment, B had his election either to pursue his remedy at law against C, and thus affirm the contract, or to rescind the contract and seek equitable relief.
4. Whether the rescission of a contract will be decreed rests in the sound discretion of the court, exercised with reference to all the equities of the case.

5. A mere demand for the payment of the balance of purchase-money cannot be regarded as an acquiescence in the wrongful delivery of an escrow, and as depriving the vendor of his right to rescind.
A deed delivered in violation of the conditions of an escrow can have no force or effect as a deed.
6. If a complainant mistake the relief to which he is entitled, the court may, under the prayer for general relief, adjust its decree to the full equity of the case.
7. Those only who have an interest in the *object* of a suit in equity are ordinarily required to be made parties.

Appeal from District Court of Boulder County.

THE case is stated in the opinion.

Mr. JAMES M. NORTH, for appellant.

Mr. GEORGE D. REYNOLDS, and Mr. ORRIS BLAKE, for appellees.

ELBERT, J. The bill in this case alleges that on the 25th day of July, 1875, the appellant, who was the complainant below, purchased of Davis a one-fourth interest in the Keystone mine; that at the date of the purchase the mine was owned in common by the said Davis and one Clark; that Davis did not convey the said one-fourth interest to the appellant, but by agreement held the same in trust for him; that on the 25th day of August, 1875, appellant sold said fourth interest to the defendant, Henry C. Thompson, for the sum of one thousand dollars, payable five hundred dollars within twenty days, and five hundred dollars within a reasonable time thereafter; that on the same day, at the request of appellant, Davis made a deed of the said one-fourth interest to Thompson; that by agreement of parties the deed was placed in the hands of one Andrew P. Thompson as an escrow, upon the condition that it was not to be delivered until the one thousand dollars was paid as above stipulated; that the defendant, Henry C. Thompson, paid a portion of the purchase-money, amounting in all to eight hundred dollars; that on the 27th day of September, 1875,

Andrew P. Thompson, without the consent of appellant, delivered the deed to Henry C. Thompson contrary to and in violation of the conditions of the escrow; that upon the same day Henry C. Thompson filed the deed for record; that at the time of delivery as aforesaid, there remained due and unpaid of the purchase-money two hundred dollars; that Henry C. Thompson refused to pay the same; that thereupon the appellant rescinded the contract of sale, and gave Thompson, the purchaser, notice thereof; that on the 9th day of December, 1875, and prior to filing his bill, appellant tendered him the amount of the purchase-money paid by him to appellant, with interest, which Thompson refused to accept; that he also demanded from Thompson a conveyance of said one-fourth interest in the mine, which he refused to make; that Andrew P. Thompson and one William H. Taylor, about the time of said sale, acquired by purchase an undivided one-half interest in the mine, and in connection with the said Clark and Henry C. Thompson had possession, occupied and worked the mine since the 25th day of August, 1875, and had taken out large quantities of ore of the value of sixty thousand dollars, and that the said Henry C. Thompson had received and converted to his own use the one-fourth part thereof.

The bill prays that the deed to Henry C. Thompson so placed in escrow be declared null and void, or that he be adjudged to hold said one-fourth interest in trust for appellant, and decreed to convey the same to appellant; that he also be decreed to account for one-fourth of the proceeds of the ore taken out during his occupancy of the mine; and that he be enjoined from taking ore from the mine, or in any way intermeddling with the same pending the litigation; also, that the other owners of interests in the mine, Clark, Taylor and Andrew P. Thompson, be enjoined from permitting Henry C. Thompson from interfering with the mine, and that they be enjoined from delivering to him, or accounting to him, for any share of the ore taken out of the mine during the pendency of the suit

To this bill the defendants interposed a demurrer upon the grounds: 1st, want of equity in the bill; 2d, non-joinder of proper parties, in that Simon Davis was not made a party to the bill; 3d, misjoinder of parties in that Andrew P. Thompson, William H. Taylor and Henry H. Clark were made parties to the bill; 4th, that the bill is multifarious. The demurrer was sustained and the bill dismissed.

The bill alleges, and the demurrer admits, that Davis held the title to a one-fourth interest in the Keystone mine in trust for the appellant, and at his request conveyed the same to Thompson, to whom appellant had sold. By the terms of the sale to Thompson, the payment of the purchase-money was a condition precedent to the delivery of the deed, and upon his refusal to pay the whole or any balance due, the appellant was at liberty to rescind the contract. *Burnett v. Caldwell*, 9 Wall. 290; *Jackson ex dem. Shipley v. Moncrief*, 5 Wend. 26; 2 Chitty's Contracts, 1090 (11th Am. ed.); 2 Parsons on Contracts, 679* (6th ed.).

The bill alleges the default of Thompson in making payment, and notice to him of rescission by the appellant. He who seeks equity must do equity, and the appellant having received payment of part of the purchase-money before seeking relief in a court of equity, it was necessary for him to return, or offer to return, the amount received with interest. Story's Eq. Jur., § 64 (e); *Latham v. Hickey*, 21 La. Ann. 425; *Lee v. Taylor*, id. 514.

The bill alleges an offer by the appellant to return the amount of the purchase-money received, with interest, and the refusal by Thompson to receive it. Had the conveyance placed in escrow been a deed direct from the appellant to the purchaser Thompson, upon the rescission of the contract, the appellant might have maintained ejectment. *Burnett v. Caldwell*, 9 Wall. 290; *Jackson ex dem. Shipley v. Moncrief*, 5 Wend. 26; *Wright v. Moore*, 21 id. 230.

The conveyance being from Davis, who held the title in trust for appellant, direct to the purchaser Thompson, the

appellant properly sought relief in a court of equity. That the appellant had an action at law on his contract does not oust a court of equity of its jurisdiction. On refusal of payment he had an election either to pursue his remedy at law, and thus affirm the contract, or to rescind the contract and seek the equitable relief to which the facts entitled him. Whether the rescission of a contract will be decreed rests within the sound discretion of the court, exercised with reference to all the equities of the case; "not an arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself, so far as may be, by general rules and principles." 1 Story's Eq. Jur. 693, 742.

A chief consideration is always whether the parties can be placed in *statu quo*. Upon the facts stated, it cannot be said that any difficulty of this character forbids the decree of rescission. We find nothing in the bill to support the proposition that the appellant waived his right to rescind the contract in question. His right to rescind sprang from the refusal of Thompson to pay a portion of the purchase-money then due, and not from the wrongful delivery of the escrow. The bill alleges that after the refusal of Thompson, the purchaser, to pay, the appellant rescinded the contract and gave him notice thereof. What time intervened between the refusal to pay and the rescission does not appear; and if a question whether the rescission was made within a reasonable time could arise in such a case it was not fairly presented by the demurrer.

Acquiescence in the wrongful delivery of the escrow, if shown, might lose the appellant the right to rescind, and leave him to his action at law for the balance of the purchase-money, the same as if the deed had been delivered at the time of the purchase; but no facts appear in the bill upon which acquiescence can be predicated. "Nothing short of an express satisfaction of the deed, or such an acquiescence after a knowledge of the facts as would raise

the presumption of an express ratification would give the deed validity." *Hadlock v. Hadlock*, 22 Ill. 388.

The demand for the payment of the balance of the purchase-money could not be so regarded unless the purchase-money had been paid. As the deed to Thompson was placed in escrow, and was delivered by the depository in violation of the conditions of the escrow, it had no force or effect as a deed. 3 Washburn on Real Prop. 586 (4th ed.); 1 Parsons on Contracts (6th ed.), 493. The court of equity may either direct its cancellation or may treat the vendee as a trustee and decree a conveyance to the complainant. 1 Story's Eq. Jur., § 437; *Bussell v. Stinson*, 3 Hay, 1; *Dey v. Dunham*, 2 Johns. Ch. 182.

The jurisdiction of courts of equity in cases of this character, their power to order the delivery up and cancellation of deeds and other instruments fraudulently or otherwise improperly obtained; to direct a conveyance of title where equity and good conscience demand it; to decree an account of rents and profits if such are involved, are too well understood and too fully treated of in the text-books to need discussion. 1 Story's Eq. Jur., § 692 *et seq.*; Kerr on Fraud and Mistake, 332 *et seq.*

Nor is it necessary to inquire into the propriety of the specific relief prayed in the bill. If a complainant mistake the relief to which he is entitled under the prayer for general relief, the court may adjust its decree to the full equity of the case. Story's Eq. Pl., §§ 40, 41, 42. The objection to the bill for want of equity was not well taken.

The next objection presented by the demurrer is that Davis, who held originally the title in trust for the appellant and who executed the deed to Thompson, was not made a party to the bill. The general rule in equity, as laid down by Mr. Story, is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or defendants, that there shall be a complete decree that shall bind them all. Ordinarily this is held to include those only who are interested in the object of the suit. Story's Eq. Pl., § 72.

How is Davis interested in this suit? The bill alleges and the demurrer admits his character as trustee, and the full and complete discharge of his trust by the conveyance to Thompson at the instance of the appellant, for whose benefit he held the title. Having fully discharged himself of the trust the appellant has no further claim upon him respecting it. If the appellant would have the right upon the cancellation of the deed to Thompson, to demand a re-conveyance to himself upon the ground that the first execution of trust had been ineffectual, it obviously would not accrue until the cancellation was decreed, and to have sought such a re-execution of the trust in this bill would have made it clearly multifarious, as joining two distinct claims to relief against different parties not mutually interested. Story's Eq. Pl., § 541. The appellant prayed no relief against him, nor can we see that the interest of the defendants required that he should be made a party. The relation in which he stood to the subject-matter of the suit is admitted by both parties, and he has no interest in the *object* of the suit. No decree that can be rendered between the parties can affect him, for he has no interest in the property to be affected. To claim that he may be interested in the property in some other way or character than that stated in the bill, is to retract the admissions of the demurrer. Clark, Taylor and Andrew P. Thompson, as part owners of the mine, and as working it in connection with the defendant Henry C. Thompson, are made parties defendant to the bill, and an injunction is asked restraining them from accounting to him for any portion of the proceeds of the mine. This is the only relief asked against them. In this view they are proper parties, and the bill was not multifarious by reason of their joinder.

The demurrer was improperly sustained, and the decree of the court below is reversed with costs, and the cause remanded for further proceedings.

Reversed.

CORNING v. RYAN, Administrator, etc.

1. The refusal of a probate court to allow a definite claim against an estate, when all the facts are before the court, is a final judgment or decision within the meaning of the statute (Laws 1872, p. 105), from which an appeal will lie to the district court.
2. A formal entry of judgment in such case, before an appeal will lie, is not required. An entry (R. S., p. 677, § 134) which plainly indicates the determination of the court to allow or disallow the claim is sufficient.

Appeal from District Court of Larimer County.

THE facts in this case are presented in the following stipulation, filed in the court below and made a part of the record.

“On motion to dismiss appeal and on the case, the following statement of facts is agreed upon as the facts in this case, and it is stipulated that the case be submitted to the court, a jury being waived on this statement and on the law :

1. Andrew Douty died May 15th, A. D. 1874, and that letters of administration were issued on said estate out of the probate court of Larimer county, Colorado, to Sylvester Douty, June 9th, 1874 ; that he continued as administrator until February 13, 1875, when he resigned and the defendant, John J. Ryan, was appointed administrator *de bonis non*, and is now such administrator.

2. That Sylvester Douty, as such administrator, gave the notice for the presentation of claims for allowance against said estate, fixing in such notice the 14th of December, 1874, as the time for the exhibition of demands against said estate.

3. That on Dec. 8th, 1874, the plaintiff George C. Corning filed in the said probate court, as a demand against said estate, the following note.

‘Nine months after date, we jointly and severally promise to pay to George C. Corning or order, the sum of eleven hundred and eighty and seventy-five one hundredths dol-

lars, with interest at the rate of two per cent per month from date until paid, interest payable monthly, payable without defalcation or discount at the Boulder Bank, Boulder, Colorado.

(Signed)

SYLVESTER DOUTY,
ANDREW DOUTY.'

BOULDER, *Dec. 1st, 1873.*

That said note, when filed, was accompanied by the usual affidavit by plaintiff, dated Dec. 1st, 1874; that it was due and unpaid, and that \$1,464.13 was then due on it after allowing all credits.

4. That on the 14th of Dec., 1874, the following entry was made in said cause by said probate court: 'Be it remembered that heretofore, to wit, on the 8th day of December, A. D. 1874, George C. Corning filed his claim for allowance against the estate of Andrew Douty, deceased, and this cause coming on to be heard, the court not being fully advised in the premises, it is considered and adjudged by the court, that this cause be, and stand continued until the next regular term of this court, to wit: the 8th day of February, 1875.' On the said 8th day of February, 1875, the following entry was made in said cause in said court: 'And now on this day comes the parties to this suit, and this cause coming on to be heard, and the court not being fully advised in the premises, it is considered by the court that this cause be and stand continued until the next regular term of this court, to wit, the 12th day of April, 1875.' On the 12th day of April, 1875, by the same kind of an entry the cause was continued to the 15th day of May, 1875, and on the said 15th of May, 1875, the following entry was made in the case. 'And now on this day comes the defendant by R. L. Rhodes, the attorney for said estate, and the plaintiff, being three times solemnly called, comes not, but makes default and the court being fully advised in the premises, it is ordered and adjudged by the court that the plaintiff, George C. Corning, do pay the costs of

this suit in and about the said suit in this behalf expended and that execution do issue therefor.

The case was not docketed at the succeeding terms, held in June, August and October. On the 2d day of December the plaintiff caused a notice, of which the following is a copy, to be served on John J. Ryan, the defendant, by the sheriff of Larimer county.

‘George C. Corning, plaintiff, v. John J. Ryan, administrator of the estate of Andrew Douty, deceased. In the probate court of Larimer county, to December term, 1875. The above-named John J. Ryan will please take notice, that on Wednesday, the 15th day of December, 1875, or as soon thereafter as counsel can be heard, the undersigned will move the said probate court of Larimer county for a judgment upon the note heretofore presented in said court for allowance against you, the said John J. Ryan, as administrator of the estate of Andrew Douty, deceased, which note is as follows: ‘Nine months after date, we jointly and severally promise to pay to George C. Corning or order, the sum of eleven hundred and eighty-eight and seventy-five one-hundredths dollars, with interest at the rate of two per cent per month from date until paid, interest payable monthly; payable without discount or defalcation, at the Boulder Bank, Boulder, Colorado.

(Signed)

SYLVESTER DOUTY,
ANDREW DOUTY.’

BOULDER, *Dec. 1st, 1873.*

‘Unless you then and there appear by yourself or counsel, I will move for judgment by default.’

Said notice was duly signed by plaintiff’s attorneys, and was dated Nov. 26th, 1875, and served on Ryan, the defendant, personally, by copy, by the sheriff of Larimer county, December 2d, 1875, being eleven days before the first day of the December term of said probate court. On the 15th day of December, 1875, the plaintiff appeared in said court by his attorney and moved the court to allow said demand against the said estate, as of date of its original

presentation, that is, as of date Dec. 8th, 1874, against said estate, and as though said cause had been pending in said court since said date. Defendant appearing by counsel especially for the purpose of said motion resisted it, and the court, after argument, overruled the motion and refused to allow it; whereupon, on said day, the plaintiff prayed an appeal to this court, filed his bond, which was approved and brought the case to this court.

5. It is also admitted that no part of said note has been paid, that there are no offsets and that it was executed by Sylvester Douty and Andrew Douty.

6. The questions submitted arise on the above facts, which are all the facts of the case. If the court finds for the plaintiff the amount due to this date, Sept. 5th, 1876, is \$1,963.97. It is stipulated that this statement be filed, and made part of the record of this cause."

Which stipulation was signed by the attorneys for the plaintiff and for the defendant and duly filed, and was all the testimony in the case.

By the terms of this stipulation, the case was submitted on the agreed facts therein, to be tried by the court without the intervention of a jury, and if the court should find for the plaintiff, the judgment was to be for the certain amount fixed by the stipulation. The defendant had filed a motion to dismiss the appeal on the ground that there was no such final judgment in the probate court as could be appealed from, and also that there had been a previous final judgment from which the plaintiff had failed to appeal. On the filing of his motion to dismiss the appeal, the plaintiff filed a cross motion for judgment upon the claim in his favor, and thereupon, on the same day, the whole case upon both motions was submitted upon the agreed facts as above set forth. The court, after hearing the case upon this evidence, overruled the motion of the plaintiff for judgment, and sustained the motion to dismiss the appeal, and thereupon rendered judgment against the plaintiff for costs with *procedendo* to the probate court.

Mr. Geo. D. REYNOLDS, and Mr. ALPHEUS WRIGHT, for appellant.

Messrs. HUGHES, WELBORN & BELFORD, for appellee.

STONE, J. From the judgment of the court below, dismissing the appeal upon the agreed statement of facts, the plaintiff appeals to this court, and the sole question presented by the assignment of errors and upon the record is, "did the district court err in dismissing the appeal?" If the case was properly pending in the district court, then upon the agreed facts there was an undisputed claim for a certain sum, for which the court was bound to render a judgment in favor of the plaintiff and against the defendant. But since the court refused to render such judgment, we must infer that the sole reason for such refusal, and for dismissing the appeal was, that the case was not properly depending in that court. Hence it becomes necessary for us to notice the character of the proceedings in the probate court and the appeal therefrom. The claim of the plaintiff in the probate court was for the amount due on a promissory note, duly presented and to be allowed or disallowed against an estate. The claim was verified, and no objection seems to have been made by the administrator, or any other person interested, and appears to have been presented in accordance with section 127 of the act concerning wills, executors and administrators, R. S., 676. That section provides that if such objection be made to the claim, or if cause is shown by the claimant, the hearing may be continued, and the claim "be adjudicated as is required in other cases," that is to say in litigated cases; but without such objection the court is to determine it at the time, of which notice has been given.

In this case, although the claim does not appear to have been disputed, yet, as the claim was verified before the day set for hearing, a presumption might arise that the continuance was had on account of an objection to the allowance of the claim. So far as the record shows, the court *ex mero*

motu continued the hearing for three successive terms, "not being fully advised in the premises," and at the fourth term after the presentation of the claim, allowed a "default" against the "plaintiff," and adjudged against him the costs of the "suit."

The manner of exhibiting such claims against an estate as prescribed in section 131 and elsewhere, in the act of the Revised Statutes referred to, does not constitute the presentation of such claims for allowance, actions or suits at law, in the ordinary sense of these terms, although when the allowance of such claims is contested it may ripen into, or become the basis of a suit proper. The claimant and the administrator do not stand in the relation of plaintiff and defendant until such contest arises, and the claim becomes thereby the subject of litigation. Giving to this so-called default the most liberal construction possible, it can be regarded as amounting to no more than a nonsuit, and without prejudice to the claimant. There was no judgment or decision either allowing or disallowing the claim, and the circumstance of thereafter omitting the matter from the docket in no way impaired the right of the claimant, who, having presented his claim according to the statutory requirement, was entitled to be heard thereon any time afterward until the court had determined upon it, either by its allowance or disallowance. He was, therefore, entitled to have it determined by the probate court when he moved for the allowance of his claim upon due notice to the administrator, on the 15th day of December, 1875. Was the refusal of the court at that time to allow the claim such a judgment or decision as could be appealed from to the district court? We think it was. A formal entry of judgment in such cases, after the manner of judgment in suits at law, is not absolutely required. It is sufficient if it plainly indicates the determination of the court to either allow or disallow the claim. The proceeding in such cases is indicated by the statute which prescribes the mode and manner of presenting, hearing and determining such claims: See R. S., p. 676, §§ 127 to 135. § 134 is in these words: "The pro-

bate court shall make an entry of record of every demand allowed against any estate, and shall file all papers relating to the same; such entry of allowance shall have the force and effect of a judgment." This must be construed to apply equally to an entry of disallowance. The determination of the court in such a case is not a judgment *pro forma*, but is a decision having the force and effect of a judgment. The language employed in section 192, that * * "upon the final hearing said court shall allow such demand, or such part thereof as shall be legally established, or reject the same, as to said court shall appear just, and should an executor or administrator appeal in such case," etc., clearly indicates that an appeal is contemplated by the statute, from any order or entry allowing or rejecting such claim or demand. By reference to section 2 of the act of January 31st, 1872 (9th Sess. Laws, p. 105) which confers appellate jurisdiction upon district courts in cases appealed from probate courts, it will be seen that the language significantly points to such cases as the one we are considering; "either party, or one or more of several plaintiffs or defendants may appeal from the final judgment or decision of any probate court to the district court," etc. And wherever the word judgment is used in this act the word decision is coupled with it, so that it is not a judgment alone, but a decision having the force and effect of a judgment that may be appealed from. No term in legal nomenclature has a more fixed and settled meaning than the word judgment. The term decision could not, therefore, have been used in this statute as a mere *synonym*, but must be construed to refer to such determinations, orders, findings and entries, as in this section are declared to have the force and effect of a judgment. In Freeman on Judgments, § 16, the rule is laid down to be that "every definite sentence or decision, by which the merits of a cause are determined, although it be not technically a judgment, or although the proceedings are not capable of being technically enrolled, so as to constitute what is technically called a record, is a judgment within the meaning of the law."

It is notorious that judges of these probate courts frequently fall very far short of making a proper record, and of entering what is intended as a judgment according to appropriate or common law *formula*. In such cases, whether the decision is to be considered a judgment, or in the nature of a judgment, is to be determined by looking to the subject-matter of the decision, and to its resulting effects. *Hoehne v. Trugillo*, 1 Col. 162. In this case there was but one question before the probate court: the allowance of a definite claim against an estate, a promissory note for a specific sum then due and undisputed. The court refused to allow it, and it matters not whether the ground of disallowance was a question of law or of fact in the mind of the court, for all the law and all the facts were before the court, the whole subject-matter was disposed of, and this decision was final as to the suit or demand in this particular case and in that court. *Johnson's Admr. v. Gillett*, 52 Ill. 358. To the same effect is also the decision of this court in the mandamus case of the *People ex rel., etc., v. The Judge of the County Court of Jefferson County*. Hence the claimant became then entitled to his statutory right of appeal to the district court, and having effected this appeal, it was properly depending in the district court, and should have been tried upon the statement of facts there presented by the plaintiff and defendant. We must, therefore, hold that the court below erred in dismissing the appeal, and its judgment must be reversed and the cause remanded for trial.

Reversed.

PRESENTATION OF CLAIM AGAINST ESTATE OF DECEDENT as required by statute does not constitute a suit or action, although when its allowance is contested it may become the basis of a suit: *Squires v. Ryan*, 3 Colo. 533; *Morse v. Clarke*, 10 Colo. 218.

SQUIRES v. RYAN, Administrator, etc.

Appeal from the District Court of Larimer County.

MR. GEO. D. REYNOLDS, and MR. ALPHEUS WRIGHT, for appellant.

Messrs. HUGHES, WELBORN & BELFORD, for appellee.

STONE, J. This case is brought up on appeal from the district court of Larimer county, and the record presents precisely the same state of facts as in the case of *George C. Corning v. John J. Ryan, admr.*, decided at the present term, except as to the party plaintiff and the amount of the note presented in the probate court for allowance, against the estate of Andrew Donty, deceased.

The judgment of the court below, dismissing the appeal from the probate court, is assigned for error. The reasons given in our opinion in the case of *Corning v. Ryan, admr.*, are equally applicable to this case, and we must hold that the court below erred in dismissing the appeal.

The judgment of the district court must, therefore, be reversed, and the cause remanded for further proceedings.

Reversed.

PATTERSON v. HITCHCOCK.

1. In cases involving the title to real estate, the doctrine of estoppel by conduct rests upon the broad principle of equity, that one who encourages by representations, or even stands by and sanctions the acquisition of land by another, will be estopped to defeat the purchase by afterward asserting title in himself.
2. One cannot assign error upon an instruction in his own favor, even though the instruction is erroneous.
3. What is to be regarded as a reasonable time to occupy in sinking a discovery shaft in the manner and to the depth required by law is, when the facts are undisputed, a question of law. But when the question is submitted to the jury with the instruction that ninety days is not a reasonable time, he against whom the verdict is rendered cannot be heard to complain upon this ground, if the jury should determine that a less period than ninety days is a reasonable time.
4. The record of the certificate of location of a mining claim does not necessarily disclose the title.
5. If a located lode terminates at any point within the location, or departs at any point from the side lines, the location beyond such point, and to that extent, is defeasible if not void, before patent.

Appeal from District Court of Boulder County.

THE facts are stated in the opinion. The defendant in the court below had judgment.

MR. W. A. HARDENBROOK, for appellant, and MR. HUGH BUTLER, of counsel.

MESSRS. BELFORD & REED, and MR. W. R. GORSLINE, for appellee.

ELBERT, J. On the 16th day of August, 1875, the appellee made application at the United States land office for a patent for the "American lode."

Thereafter, and within the time limited by law, the appellant filed an adverse claim, as owner of the "Bull of the Woods" lode.

This was an action of ejectment brought by the appellant against the appellee to recover the possession of the ground embraced within the side lines of the two lodes at their intersection.

At the trial in the court below, a question of estoppel was presented, arising out of representations made by appellant pending negotiations for the purchase of the American mine by the appellee.

Touching the estoppel which the appellee sought to establish, the court instructed the jury as follows :

"If you believe, from the proof in the case, that the defendant, by his agent, Smith, applied to the plaintiff, Patterson, for the purpose of ascertaining whether the plaintiff claimed any interest in, or knew of any lode claimed by him that would conflict with the title of the American mine, and the plaintiff knew that the defendant contemplated purchasing the American mine, it was his duty then to assert his claim, if he had any, to any property the defendant was about to purchase ; and if the plaintiff had full knowledge of the matters inquired about and failed then to assert his claim, and the defendant, or his

agent, was influenced to purchase the American mine by what the plaintiff said at that time, he is estopped from asserting such claim against the defendant at this time. That is, he is concluded by his declaration or conduct, which has influenced the conduct of another to his prejudice. The rule being that when one by his words or conduct willfully causes another to believe the existence of a certain state of things, whereby he is induced to act on that belief, so as to alter his own previous position, such person is concluded from asserting against the other a different state of things as existing at the same time. There must be a representation or concealment of material facts. The representation must be made with knowledge of the facts. The party to whom made must be ignorant of the truth of the matter. It must be made with the intention that the party to whom made should act upon it. The other party must have been induced to act upon it."

The giving of this instruction is assigned for error.

In cases involving the title to real estate, the doctrine of estoppel by conduct rests upon the broad principle of equity, that one who encourages by representations, or even stands by and sanctions the acquisition of land by another, will be estopped to defeat the purchase by afterward asserting title in himself.

The *intent* of the doctrine is to restrain fraud, and compel good faith and fair dealing, and in this view it is to be rigidly enforced.

The *effect* of the doctrine is to withdraw title to realty from the operation of the statute of frauds, to leave it resting in parol, to preclude its assertion by evidence less conclusive, less certain, and more liable to the taint of human imperfections, than the written evidence required by the statute; and, in this view, its enforcement should be carefully guarded, and unhesitatingly refused, except where all the elements of an estoppel are present.

The instruction complained of, so far as it gives the essential elements of an estoppel, follows the language of Mr.

Bigelow. Bigelow on Estop., p. 437. 1. There must have been a representation or concealment of *material* facts. 2. The representation must have been made with *knowledge* of the facts. 3. The party to whom it was made must have been *ignorant* of the truth of the matter. 4. It must have been made with the *intention* that the other party should act upon it. 5. The other party must have been *induced* to act upon it.

The second and fourth propositions must be accepted as qualified by the authorities. The second is true unless the party making the representations was bound to know the facts, or ignorance of them was the result of gross negligence. Bigelow on Estop., 476, and cases there cited.

The fourth is true with the qualification that gross and culpable negligence upon the part of the party sought to be estopped, the *effect* of which is to work a fraud on the party setting up the estoppel, supplies the place of intent. *Henshaw v. Bissell*, 18 Wall. 271 ; 3 Washb. on Real Prop. 80.

The omission, however, of these qualifications were in the appellant's favor, and he cannot be heard to complain of the instruction on this ground. If the evidence supplied, or tended to supply, these five essential elements of an estoppel, the court was warranted in submitting the question to the jury, and the instruction given with the above modifications, correctly stated the law.

Let us inquire if the evidence warranted the submission.

First, was there a representation or concealment of material facts ?]

In the conversation had between Smith and Patterson, just prior to the purchase of the American mine by Hitchcock, and pending the negotiation therefor, Smith testified, that he, acting as the agent of Hitchcock, inquired of Patterson, if he knew of any other claims that conflicted with the American. Patterson replied that he did not, except, possibly, the Inter-Ocean lode. This was a false representation, if the claim which Patterson *now* sets up had

then any existence. "At the same time" Smith testifies, "I remarked to him that his 'Bull of the Woods' claim crossed that (the American), but I understood that to be a subsequent location. I cannot give his reply to that, but I know he assented to it. He did not claim to me that there was any conflict between the American mine and the Bull of the Woods." Upon Smith's assertion that the Bull of the Woods claim was "a subsequent location," Patterson's failure to claim otherwise, if he did so claim, was a concealment of a material fact. Smith, however, testifies to an actual assent replied (though he does not remember the words of the reply), and this amounted to a representation as to a material fact.

Second. Was the representation made with knowledge of the facts?

There is no claim, nor is there any foundation for saying that Patterson had not full knowledge of the questions to which he spoke. The facts inquired of rested peculiarly within his own knowledge. The presumption is, that every one is acquainted with his own rights, if he have reasonable opportunity to know them.

Third. Was the party, to whom the representations were made, *ignorant* of the *truth* of the matter?

Upon this question there is more difficulty. The certificate of location of each lode was of record, and to these records both agent and principal had access equally with Patterson. The appellant insists that the case comes within the rule, that "where the condition of title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." Undoubtedly this is the rule where the record discloses the title, as is the case generally, with patented lands. *Brant v. Virginia Coal & Iron Co.*, 3 Otto, 337. But the record of the certificate of location of a mining claim required by law does not necessarily disclose the title—nor did it in this case. The law prescribes that the certificate shall contain: 1st, the name of the lode; 2d, the name of the locator; 3d, the date of

location ; 4th, the number of feet claimed on each side of the center of the discovery shaft ; 5th, the general course of the lode, as near as may be. This, however, gives the purchaser no information respecting conflicting claims. For this he is dependent on examination and inquiry. If a conflicting claim be ascertained, the record still does not necessarily disclose the better title. Location and record still relate back to the date of discovery for the inception of title. Location and record may both be prior to those of a cross lode, and still the latter be the older and better title, by reason of an earlier discovery, perfected within the statutory time, of which the record gives no information

In the case at bar, the date of the certificate of location of the American mine was June 16, 1874 ; of the record, June 29, 1874. The date of the certificate of location of the Bull of the Woods lode was July 11, 1874 ; of the record July 13, 1874. In the body of this certificate the location is stated as April 17th, 1874.

This record did not disclose any condition of title upon which Smith, as the agent of the purchaser, Hitchcock, could rely. It was for him still to inquire as to the date of discovery of the respective lodes, and as to whether the requirements of the statutes respecting discovery, discovery shafts, location and records had been complied with.

Having reference to the record, therefore, this was not a case where the condition of title was known to both parties, or where both had the same means of ascertaining the truth respecting it. To ascertain priority of right, as before stated, Smith was dependent on examination and inquiry. Under the circumstances, he properly applied to the appellant for information touching his cross lode, the Bull of the Woods.

If the priority of right, which the appellant claims, has any foundation *now*, it must have had existence *then*, and that too within the knowledge and intent of the appellant ; and knowing that Smith was negotiating for the purchase of the

American lode, every principle of good faith and fair dealing required him to then make known his claim.

Fourth. As to the actual intent of the appellant, in making these representations, we need not inquire. If their effect was to work a fraud, it supplies the place of intent to defraud. Under the circumstances, he must have contemplated his representations would be relied upon. It was not to be expected that he would make a false admission adverse to his own interest.

Fifth. Was the other party *induced* to act upon the representations ?

Smith testifies : " If he (Patterson) had said he had any claim there, I should not have paid the money until that was settled."

This is but a summary of the evidence on the points, but it is sufficient for our purpose ; and we think there was sufficient to warrant the court in submitting the question of estoppel to the jury.

To every essential element of an estoppel, there was more or less evidence. Of the weight and conclusiveness of this evidence, the jury were the judges.

The instruction of the court by which it was submitted, as we have seen, was more favorable to the appellant than, under the law, he was entitled to ask.

We find here no ground for reversal.

It is claimed that the court erred in instructing the jury that "Ninety days was not a reasonable time to occupy in sinking a discovery shaft, in the manner and to the depth required by law." The instruction was as follows :

"The discoverer of a lode, by virtue of that discovery, becomes entitled to a reasonable length of time in which to perfect the work required by law ; and for that time he is permitted to retain possession of the property without interference ; and the law protects him in his possession, while the work of development goes on, as well as after the development is completed ; but, in the meantime, his work must progress with reasonable diligence. The discovery of

the plaintiff's claim was made prior to the time the act of February 13, 1874, took effect, which was on the first day of June, 1874. That act provides that the discovery shaft shall be sunk within sixty days from the date of the discovery. The legislature seemed to consider sixty days a reasonable time for the discoverer of a lode to complete the work of sinking the shaft, and I instruct you that if the plaintiff discovered the Bull of the Woods lode on the 17th day of April, A. D. 1874, the law required that he should proceed to sink his discovery shaft with reasonable diligence and within a reasonable time; ninety days is not a reasonable time to occupy in sinking a discovery shaft, in the manner and to the depth required by law."

What is to be regarded as a reasonable time, when the facts are undisputed, is a question of law: *Wiggins et al. v. Buckham*, 10 Wall. 129; *Leaming v. Wise*, 73 Penn. 175; *Morgan v. McKee*, 77 id. 228; *Douse v. Wheeler*, 26 Mich. 195; *Nudd v. Wells*, 11 Wis. 417.

If the court erred at all in this case, it was in submitting the question of reasonableness of time to the jury. There was no dispute about the facts upon which it was to be determined. They were a part of the appellant's own showing. He fixed the date of his discovery on the 17th of April; the commencement of work on the discovery shaft, in the latter part of June; his witness Veale fixed it about the middle of June; the completion of the shaft was fixed by both as the 11th of July. The shaft was five feet wide, nine feet long, and ten feet deep; the time occupied in sinking it was, at most, twenty-five days; the time from the date of discovery to the completion of the shaft was eighty-five days; the time from the date of discovery to the commencement of work on the shaft was about sixty days. Upon these undisputed facts, the question, whether the appellant had completed his discovery shaft, within a reasonable time, was a question of law for the court.

Had the evidence shown, or tended to show, that the delay in sinking the shaft was the result of extraneous circum-

stances—such as personal disability, inaccessibility of the lode, obstructions by heavy snow or other impediments—then the question of reasonableness of time would have been for the jury, under the instructions of the court. But the evidence presented no features of this character, requiring the aid of a jury. Nevertheless, the court submitted the question to the jury, instructing them that ninety days was not a reasonable time. This limitation did not preclude the jury from finding that eighty-five days was a reasonable time, if such had been their opinion. The court having the undoubted right to determine the question, absolutely, the appellant cannot be heard to complain that it fixed a limit that permitted a finding in his favor by the jury.

The law contemplates that the discoverer of a lode shall prosecute the work of sinking his discovery shaft with, at least, ordinary diligence.

The time reasonable in which to do a given work, as a matter of law, must be referred, measurably, to the time necessary to do it as a matter of fact. Since, as a matter of fact, it took twenty-five days to sink this shaft, it is difficult to see why, as a matter of law, a reasonable time in which to do it would be eighty-five days. Such a period exceeds any possible time required by reason or necessity.

It appears in evidence that during this period the appellant did sink a cross-cut of about equal dimensions at another point on the lode; and had he sunk a third shaft of equal size, he would still have had ten days in which to have had a fourth well under way. Under all the circumstances, we think it was a matter of grace to the appellant that the court left the question to the jury under an instruction that did not preclude a finding in his favor.

The mistake of the court, in stating that the act of 1874 went into effect on the 1st instead of the 16th of June, was immaterial. The appellant's discovery was prior to either date, and whether the act went into effect on the 1st or the 16th was indifferent.

Error is assigned upon the refusal of the court to give the following instruction :

"It is essential to a mining claim that it should be made upon the line of a lode ; and it is, therefore, incumbent on the defendant, in making out his defense, to show that the vein of the American mine runs into or through the ground in controversy. If he has offered no testimony to show that the vein of the American lode enters, or passes across the territory of the Bull of the Woods location, and there are no other proofs in the case from which you can find that fact, the defendant must fail and the plaintiff would be entitled to a verdict."

Error is also assigned on the refusal of the court to admit evidence to show that the American lode did not cross the Bull of the Woods lode, although the location crossed it.

There was no error in refusing the instruction.

When a locator has shown a compliance with the requirements of the law in making his location, he is entitled *prima facie* to all the rights which the law attaches to a valid location.

The extent to which a location must be *on* a lode, in order to its validity *prima facie*, is fairly measured by the extent to which it is necessary to show it on the lode in order to entitle the locator to stake his boundaries, make his record, and, if he desires, perfect his title by patent.

The refusal of the court to allow the appellant to show that although the American location crossed the Bull of the Woods lode, the American vein or lode did not cross it, presents a more difficult question.

May a location *prima facie* valid be defeated in whole or in part by showing a termination or departure of the vein at some point within or along the side lines of the location ?

The evidence of Van Wattering respecting the underground workings, within the limits of the intersection of the two locations, did not connect the workings with the American lode, or show its actual presence ; much less did it

show that the American vein extended to or across the vein of the Bull of the Woods.

The question presented is, therefore, unembarrassed by any question of fact. Both locations are made under the act of 1872. It will be observed that the rights secured by section 3 of the act attach to locations made, in the language of this section, "*on* any mineral vein, lode or ledge." To arrive at the intention of the legislature we must consider the act as a whole; accepting the broader or doubtful expressions of one section, as limited or explained by other sections. The term "*on* any mineral vein, lode or ledge," must be read in the light of the requirement of section 2 of the act. This section limits the location to 1,500 feet in length, "*along* the vein or lode," and declares that "*no claim shall extend more than 300 feet on each side of the middle of the vein at the surface.*"

These provisions are plain and explicit, and require, not in express terms it is true, but by necessary implication, that the location should be on the lode the entire extent of the 1,500 feet. With a location off the lode, compliance with the law would be impossible in the matter of width, as the basis of measurement provided by the law would have no *existence*. By necessary implication, the work requisite to fix the course and position of the lode was also contemplated in order to enable the locator to embrace it within the lines of his location. These requirements interpret the expression, "*on* a vein or lode," as used in section 3 of the act. They afford undoubted evidence that this was the character of location to which it was intended that the rights conferred by the section should attach.

It is claimed, however, that a mislocation, however it may affect the miner's right to the lode located, will not affect his right to the surface ground, either in whole or in part; that under the act of 1872 the surface ground is not a dependent grant.

Under the act of 1866, "surface ground was allowed for the convenient working of the lode or vein, and for no other purpose."

Such is the language of Justice FIELD, in the case of *The Eureka Mining Co. v. The Richmond Mining Co.*, 4 Saw. 302. Under this act the right to surface ground was clearly dependent upon the right to the lode located. It failing, all incidents thereto attaching would also necessarily fail.

Although the act of 1872 enlarges the rights of the locator by a grant of "all veins, lodes and ledges, the top or apex of which lie within his surface lines," we are still of the opinion that his right to the surface ground continues dependent upon his right to the principal lode and that his right to other lodes within his surface limits is equally dependent.

This enlargement of the rights of the locator was doubtless intended to stimulate his enterprise by increasing his reward ; but the controlling reason was to prevent the controversies which were constantly arising respecting veins and lodes connected or associated with the lode claimed. These controversies obstructed the full and proper enjoyment of the principal lode granted, and the design was to settle and prevent them.

In this, and in the case of surface ground, it was intended to grant that which was associated with the principal lode, by proximity, within prescribed limits. When this association ceases, in the case of surface ground, the reason for granting it ceases.

A *mineral vein or lode* is a leading term in both acts. There must be a lode discovered and appropriated by compliance with the requisites of location. This is the prominent and pronounced subject of the grant. This was what the miner had discovered, and claimed by right of discovery. The security of his title thereto was the practical necessity with which the act dealt. All else, we think incident thereto : under the act of 1866, the right to the surface ground ; under the act of 1872, both the right to surface ground, and to other veins, lodes and ledges.

The principal lode constitutes the measure of the miner's right to the surface ground, as the surface ground when thus

determined, in turn, constitutes the measure of his right to other veins, lodes and ledges, subject to the express limitations of the law.

It follows, therefore, that if the lode located terminates at any point within the location, or departs at any point from the side lines, that the location beyond such point, and to that extent, is defeasible if not void.

Whether after the issuance of a patent, a judicial investigation may be had, which might ultimate in annulling so much of a mining location as was not made in accordance with the provisions of law, presents a different question, which we do not decide.

The court erred in rejecting the offer of evidence to show that the American lode did not cross that of the Bull of the Woods, within the limits of the ground in controversy.

Had the plaintiff been able upon the trial to show this fact, it is clear that the defendant could not have insisted upon the estoppel which he claimed, as there would be no subject-matter to which it could apply. It is equally clear that while the plaintiff's location might not have been good as against a prior location of the American mine, still his right to recover the premises, in the absence of any valid location by the defendant, would rest upon very different considerations.

Judgment is reversed and the case remanded for further proceedings according to law. *Reversed.*

ELEMENTS OF ESTOPPEL: *Griffith v. Wright*, 6 Colo. 249; *Birch v. Steppeler*, 11 Colo. 407, 410; *Yates v. Hurd*, 8 Colo. 345.

ERRONEOUS INSTRUCTION IN PARTY'S OWN FAVOR: *Denver C. I. & W. Co. v. Middaugh*, 12 Colo. 461.

LODE MINING: *Wolfey v. Lebanon Mf. Co.* 4 Colo. 116; *Armstrong v. Lower*, 6 Colo. 389.

EX PARTE FARNHAM.

A writ of *habeas corpus* will not issue to enable this court to review a judgment that is merely irregular or erroneous. Where a conviction is wholly void, a prisoner may be released on *habeas corpus*, under Sec. 1825, Gen. Laws.

PETITION for *habeas corpus*. The case is sufficiently stated in the opinion.

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Mr. C. S. EYSTER, and Mr. THOMAS MACON, for the relator.

THATCHER, C. J. The judgment of the court was pronounced in due form of law. The warrant of commitment, we must presume, in the silence of the petition, is regular on its face. The error upon which the relator relies concerns the action of the court, in receiving the verdict. If, as alleged in the petition, the verdict was received, and the jury discharged during the enforced absence of the relator, in jail, we entertain no doubt that the court erred in thereafter pronouncing judgment upon the verdict, and that by writ of error, if the error complained of is apparent of record, the judgment would be reversed. Such was the decision of the Territorial supreme court, in *Green v. The People*, 3 Col., at the February term, 1876. The action of the court below in the premises was a radical departure from the well-established mode of procedure, when the defendant is on trial for a felony. It is an error of which the relator may avail himself in the manner prescribed by law. There was, however, no jurisdictional defect in the court. Under the constitution and the laws, the court is clothed with complete authority to pronounce the very sentence from the effect of which the relator now seeks to be relieved.

A writ of *habeas corpus* will not issue to enable this court to review a judgment that is merely irregular or erroneous. In the case before us the sole ground of complaint is in no sense *jurisdictional*. The subject of complaint is an irregularity only. Hurd on Habeas Corpus, p. 328, illustrating the distinction between the sentence of a court void for *illegality*, in which case a writ of *habeas corpus* will lie, and the sentence or judgment of a court, erroneous by reason of any *irregular* proceeding preliminary to the judgment, in which case the writ will not lie, says: "It would be *irregular* to sentence a man to imprisonment in his absence where the absence was occasioned by the order

of the court pronouncing the sentence. It would be *illegal* to sentence him to *imprisonment* for a crime which was punishable by a pecuniary fine only."

We are not permitted to review and, in effect, nullify in this collateral proceeding an erroneous judgment of a court, having authority to pronounce the same, and thus to assign to the writ of *habeas corpus* the office of a writ of error, whose distinctive functions are quite well defined. *In re Gaylord Blair*, 4 Wis. 523; *Petition of Crandall*, 34 id. 179; *Ex parte Kellogg*, 6 Vt. 511; *People v. Cassels*, 5 Hill, 167; *Commonwealth ex rel. v. Keeper of Jail, etc.*, 26 Penn. 279; *Passmore Williamson's Case*, 2 Casey, 9.

But counsel for the relator contend that as sec. 1325, General Laws, provides, *inter alia*, that where the relator is in custody by virtue of process from any court legally constituted, he may be discharged "where there is no general law, nor any judgment, order or decree of a court to authorize the process, if in a civil suit, *nor any conviction if in a criminal proceeding*," that it is incumbent on us to issue the writ on the ground that there has been no conviction. The distinction to which we have before adverted between a conviction that is absolutely void and a conviction that may be reversed for errors committed at the trial, must be kept in mind. It is only where there has been no conviction, or, what is the same thing, a conviction that is wholly void, and not where there has been an erroneous conviction before a competent tribunal, that the prisoner may be released on *habeas corpus* under the section just quoted. The court below did not encroach upon a jurisdiction that did not belong to it. In failing to administer justice in conformity with salutary prescribed methods, it committed error, but the judgment of the court is and will continue to be in full force and effect, until reversed by a court of review. The writ must be denied.

Writ denied.

WRIT OF HABEAS CORPUS WILL NOT ISSUE to enable the court to review a judgment that is merely irregular or erroneous (*Hirschburg v. People*, 6 Colo. 148); but it will lie to discharge a prisoner where the conviction is wholly void: *Hirschburg v. People*, 6 Colo. 148; *Smith v. Hess*, 91 Ind. 22, citing the principal case.

IN CONTEMPT PROCEEDINGS, ONE COURT WILL NOT REVIEW proceedings of a court of co-ordinate powers and jurisdiction: *Cooper v. People*, 13 Colo. 372.

WIDNER v. WALSH.

1. To enable a party to recover in an action upon a due bill payable in specific property, no time being mentioned, a demand is necessary. Otherwise when time and place are specified.
2. A contract for the delivery of property being entire, the promisee is not bound to receive a part, though the parties may, by consent, sever the contract.
3. In an action upon two due bills payable in specific property, one requiring demand, the other not, and the parties having severed the contract by delivering and receiving part of the property from time to time, *held*, that the plaintiff, to maintain his action, must show a demand and refusal as to the first due bill, and as to the residue remaining undelivered on the second.
4. A personal demand elsewhere than at the place designated in a due bill for the delivery of personal property is good, unless met by an offer to pay at the designated place.
5. A right of action, which has accrued by reason of a refusal upon demand to deliver specific articles of property according to contract, is waived by a subsequent demand, if the party upon whom the demand is made indicates a readiness to deliver according to contract.

Error to Probate Court of Boulder County.

THIS was an action commenced before a justice of the peace by Walsh, the defendant in error, against Widner, the plaintiff in error, upon two due bills payable in property. Judgment having been rendered against Widner, he appealed to the probate court, when a trial was had before a jury. A verdict was rendered in favor of Walsh, upon which judgment was entered for \$150.99 damages and \$413.40 costs. To reverse this judgment Widner prosecutes this writ of error.

Mr. ALPHEUS WRIGHT, for plaintiff in error.

Messrs. BERKLEY & BLAKE, for defendant in error.

ELBERT, J. This was an action brought by Walsh against Widner on two due bills payable in property as follows :

“BOULDER, August 31st, 1874.

Due E. M. Walsh fourteen thousand brick at my kiln
north of Boulder. AMOS WIDNER.”

The other due bill differed from the preceding only in that it was “due thirty days after date.”

Upon the first mentioned due bill demand was necessary to entitle the plaintiff to recover. *Lobdell v. Hopkins*, 5 Cow. 516; *Vance v. Bloomer*, 20 Wend. 196; *Stewart v. Smith*, 28 Ill. 397; *Bilderbunk v. Burlingame*, 27 id. 397.

Upon the second, time of payment and place of delivery being both specified, no demand was necessary. It was for the maker to move. *Vance v. Bloomer*, 20 Wend. 196; 2 Pars. on Cont. 651, note (*m*) and cases there cited.

Upon such a contract, the maker is bound to deliver the whole, for the contract is entire, and the promisee is not bound to receive a part. The parties may, however, by consent, sever the contract, delivering and receiving a part, from time to time, when it becomes a contract for the residue. No question arises as to the defendant's readiness and ability to comply with this contract at the time it became due. Brick appear to have been delivered upon this due bill to the plaintiff, from time to time, as suited his convenience. These acts of the parties, the one in receiving and the other in delivering, from time to time, a part of the brick due, had the effect to sever the entirety of the contract, and to make any remaining, undelivered portion due on demand. *Vance v. Bloomer*, 20 Wend. 196; *Roberts v. Beatty*, 2 Penn. 69.

It was, therefore, necessary for the maintenance of his action that the plaintiff should show a demand and refusal as to the first due bill, and as to the residue remaining undelivered on the second. A personal demand elsewhere than at the kiln was good, unless met by an offer to pay at the kiln. *Rice v. Churchill*, 2 Denio, 145; *Higgins v. Emmons*, 5 Conn. 76.

There was much conflicting evidence respecting a number

of demands made at different times and places by the plaintiff, and refusals by defendant. The last demand appears to have been made in front of the "Colorado House." Respecting this demand the plaintiff testifies that the defendant "muttered something that he did not hear." Buttes testifies that the defendant said something, but he could not understand what it was. The defendant testifies that in response to this demand, he told the plaintiff he could have the brick, if he sent out for them. Kirshberg testifies that the defendant responded "you shall have them." Harris testifies that the defendant responded "all right."

If at any time the defendant refused, on demand, to deliver the brick according to contract, an action accrued to the plaintiff, but if the plaintiff subsequently made another demand for the brick, and the defendant, in response, indicated his willingness and readiness to deliver according to contract, then the plaintiff waived his right of action on all former demands and refusals, and was bound to receive the brick. *Buck v. Buck*, 18 N. Y. 337; *Gould v. Banks*, 8 Wend. 562.

The defendant asked an instruction substantially to this effect, and the court erred in refusing it.

The second, third, fourth and fifth instructions given by the court on behalf of the plaintiff, in this view, were also erroneous. Each went to a distinct demand, and instructed the jury that if there was a refusal, the plaintiff was entitled to recover, ignoring the law in case the jury found a subsequent and last demand by the plaintiff, and a readiness upon the part of the defendant to deliver the brick according to contract.

The judgment is reversed and the case remanded for further proceedings according to law.

Reversed.

MORGAN et al. v. DOD.

1. Where one delivers chattels to another as indemnity for suretyship, the law regards such delivery as a pledge merely. Nor does it alter the case in a court of equity that the property is transferred by an absolute bill of sale, nor even if the contract stipulates that the pledge shall be irredeemable.
2. A pledgee, who was surety on a promissory note, transferred the property to the payee for the purpose of discharging the debt: *Held*, that the transfer did not change the status of the property, and that the pledgor had the right to redeem even after maturity.
3. A pledgee can sell only, and for the purpose of applying the proceeds to the extinguishment of the debt. Such sale must be at public auction after due notice to the pledgor or owner.
4. Where a party acts upon the misapprehension that he has no title to property, a court of equity will relieve him from the legal effect of instruments which surrender such unsuspected title.

Error to Probate Court of Arapahoe County.

SUIT in equity. The defendant in error, Dod, borrowed from Morgan, one of the plaintiffs in error, two hundred and fifty dollars, giving his note therefor, payable in thirty days, Babcock, the other plaintiff in error, signing the note as surety. To indemnify Babcock, Dod gave him the possession of a mare and harness, with a bill of sale of the property. There was also delivered to Babcock by one Millspaugh, who also signed the note as surety, a mare and colt, with a bill of sale and two promissory notes payable to Millspaugh, for one hundred and one hundred and fifty dollars respectively, and which notes were duly assigned to Babcock. This property of both Dod and Millspaugh was all conveyed and delivered to Babcock to induce him to sign the note and to indemnify him against loss therefor, since Morgan had refused to loan the money on this property itself as security, but had accepted Babcock's name. The note fell due on Thursday of the week, but the three days' grace allowed made it payable upon Saturday, since the third day of grace fell on Sunday, Morgan insisted upon payment of the note by three o'clock P. M. on

Saturday, and the note not being paid at that time, he demanded payment of Babcock, who, claiming that the property was then forfeited to himself, delivered it all over to Morgan, who accepted it in satisfaction of the debt and delivered up the note to Babcock. This occurred about four o'clock. After Babcock had turned the property over to Morgan, Millspaugh complained to Dod of his own loss and the two went to see Babcock to learn if there was any way to get back Millspaugh's property. This talk was renewed on Sunday, when Dod requested Babcock to see Morgan and make terms for getting back Millspaugh's property, stating that he would lose or give his own mare and harness to save that of his friend Millspaugh. Babcock accordingly saw Morgan, who, on the next day, Monday, agreed to give up Millspaugh's mare and colt and the two notes upon payment of the two hundred and fifty dollars. Babcock agreed to this which was afterward assented to by Dod, and the money was paid to Morgan. About a week afterward Dod demanded his mare and harness of Morgan and upon refusal to deliver brought an action at law, and failing in this, filed his bill against both Morgan and Babcock, charging collusion to defraud the complainant, etc. Pending the suit, the mare, while still in the possession of Morgan, became injured and died. At the final hearing upon the facts, the court rendered a decree against Morgan for two hundred and fifty dollars, as the proved value of the mare and harness, and awarded costs against Morgan and Babcock jointly.

Messrs. BENEDICT & PHELPS, for plaintiff in error.

Messrs. SYMES & DECKER, for defendant in error.

STONE, J. Upon the facts in this case, and under the general assignment of error, that the complainant was not entitled to any relief whatever, the first question presented is, what was the nature of the conveyance of the goods of the defendant in error to the plaintiff Babcock? The con-

veyance was by a bill of sale, absolute in terms, and accompanied by actual delivery of the property. The admitted purpose of the conveyance was to indemnify Babcock, as security upon defendant's note to Morgan. This purpose determined the character of the transaction as a pledging; where one delivers a chattel to another as security for a debt or as indemnity for suretyship therein, the law regards such delivery of the property as a pledge merely. Story on Bailments, §§ 286-300. Nor does it alter the case in a court of equity that the property or chose in action is transferred to the creditor or surety by an unconditional bill of sale or assignment, nor even if the contract had stipulated that the pledge should be irredeemable. *Id.*, § 345. As limited to cases in equity, this doctrine is well settled. *Newton et al. v. Fay*, 10 Allen, 510.

The defendant then had a right to redeem the property pledged upon payment of the debt, either upon maturity of the note or even after default. Story on Bailments, §§ 318, 345, 346 and 348.

And he had the whole of the day upon which the note fell due in which to pay. Before default on that day, Babcock transferred the property to Morgan in discharge of the debt. This he had no right to do; he could only transfer his interest as pledgee. The transfer did not change the status of the property. Morgan, as the common creditor of both Dod and Babcock, could only take and hold it as second pledgee until the debt was paid. Story on Bailments, §§ 324, 327 and 350.

Neither Babcock nor Morgan had the right to sell the pledge except for the purpose of applying the proceeds of the sale in discharge of the debt; and the sale must have been at public auction and upon due notice to the pledgor or owner. Nor could the pledgee become a purchaser even at such public sale. *Middlesex Bank v. Minot*, 4 Metc. 325; Story on Bailments, § 310.

Morgan could hold the property merely as collateral, and upon payment of the note, which was done two days

after maturity, Dod was entitled to a return of his property. But here it is contended by counsel for plaintiffs that the agreement of Dod to pay the amount of the note after default and to give his horse and harness, part of the pledged property, in consideration that Morgan would restore the other part to Millspaugh, the real owner, the consummation being without fraud, and the subsequent ratification of that agreement constituted a new and independent contract which was valid and binding upon him.

We have examined this proposition with considerable care, and are convinced of its unsoundness in that this new contract, viewing it as such, lacks the essential element of adequate consideration. It is proper to observe here that it is an admitted fact in the evidence, that all the parties to the original transaction, Morgan, Babcock, Millspaugh and Dod, really believed that the pledged property upon default in payment of the note at maturity, became forfeited to Babcock, with the right to treat it as his own absolutely, and that by the transfer to Morgan the latter became in like manner the absolute owner. This belief was founded upon the conclusions of the parties as to the effect of the unconditional character of the bill of sale, and while it gives a color of plausibility to the position assumed by counsel for plaintiffs, that it is a sufficient consideration to support a contract for the compromise of a doubtful claim, or to end or avoid litigation, yet it must be borne in mind that here was neither compromise of any claim, doubtful or otherwise, nor was there litigation pending, or impending, which actuated Dod in the payment of the two hundred and fifty dollars. The avowed purpose was to get back a part of the pledge, upon payment of the original debt. The sole consideration was that Morgan should do the very thing which in law he was bound to do.

This brings us to the question whether a mistake of the law will avail to discharge an obligation assumed thereunder.

The maxim *ignorantia legis neminem excusat*, when ap-

plied to civil contracts, has undergone much discussion, and many exceptions have been made by the courts. And while no rule of exception of general applicability has been formulated, there is, nevertheless, ample authority, based upon sound reasons, to support such exceptions in given cases. This whole subject is fully discussed by Mr. Story in his work upon Equity Jurisprudence, and in section 121 he says: "It has been laid down as unquestionable doctrine, that if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another, a court of equity will relieve him from the effect of his mistake." And in the next section he adds: "Indeed, where a party acts upon the misapprehension that he has no title at all in the property, it seems to involve, in some measure, a mistake of fact that is, of the fact of ownership, arising from a mistake of law. A party can hardly be said to intend to part with a right or title of whose existence he is wholly ignorant; and if he does not so intend, a court of equity will, in ordinary cases, relieve him from the legal effect of instruments which surrender such unsuspected right or title." In section 138 c, the same learned author says: "And where the result of denying relief will be to give the other party an unconscionable advantage, and the fact of such misapprehension is admitted or proved to the entire satisfaction of the court, it would be strange if it were not a sufficient ground for equitable interference. The denial of relief in such cases would seem to be at variance with the long-established doctrines of courts of equity, and a reproach to the law itself."

The same doctrine is recognized in Bispham's Principles of Equity, § 187, and in Kerr on Fraud and Mistake (Bump's ed.), page 398. Nor is the application of this doctrine confined altogether to equity, it being distinctly recognized under the head of inadequacy of consideration by the general law writers. 1 Parsons on Contracts, 437; Chitty on Contracts, 46; Addison on Contracts, § 315.

The relinquishment by Dod of his property to Morgan was clearly without consideration. And other elements of the bargain render it unconscionable. Dod, when he made the note for two hundred and fifty dollars, received but two hundred and twenty-five, Morgan retaining twenty-five dollars as interest for thirty days, which was at the rate of about eleven per cent per month. Upon payment of the full amount of the note, the rights of no third party had intervened to prevent the parties being placed in *statu quo* by the decree, yet while Morgan had received all he was entitled to by the original contract, he still held of the pledged property a portion equal in value to the amount of the debt.

We are satisfied that the facts warranted the decree, and since Babcock was not without fault in transferring the property to Morgan at the time he did, we think the equity discretion of the court in decreeing costs against him jointly with Morgan was not erroneously exercised.

The questions raised upon the pleadings we do not consider of sufficient importance to call for any decision other than that we think the bill, though inartificially drawn, sets forth facts sufficiently to entitle the complainant to the relief prayed for, and hence the demurrer was properly overruled. As we can perceive no error in the record, the decree of the court below must be affirmed. *Affirmed.*

TRANSFER ABSOLUTE ON FACE MAY BE SHOWN BY PAROL to be a more security or pledge. *Butler v. Rockwell*, 14 Colo. 135.

HARDESTY et al. v. PRICE.

Where personal property was levied upon by a county collector of revenue, because of delinquent taxes thereon, and the owners resumed possession, giving a forthcoming bond conditioned to abide the decision of the board of county commissioners as to the legality of the assessment: *Held*, in an action of covenant on the bond, that the same was void.

Appeal from District Court of Bent County.

THE appellee recovered a verdict in the court below for \$649.72. Motions for a new trial and in arrest were inter-

posed and overruled, and judgment rendered upon the verdict. The essential facts are stated in the opinion.

Mr. M. B. GERRY, Mr. C. S. THOMAS, and Mr. A. P. HERFORD, for appellants.

Mr. JOHN F. BOSTWICK, and Mr. CHAS. E. GAST, for appellee.

ELBERT, J. This was an action of covenant brought by the appellee upon the following bond, which presents the facts necessary for our decision.

“Know all men by these presents that Richard J. Hardesty as principal, and Daniel R. Smith and Jacob Gross as sureties, are held and firmly bound unto M. B. Price, treasurer of Bent county, Colorado, in the penal sum of fifteen hundred dollars, lawful money of the United States, for the payment of which sum we do hereby jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents. Witness our hands and seals, this, the seventeenth day of June, A. D. 1875.

The conditions of the above obligation are such that whereas a certain assessment is delinquent in said Bent county, the same being assessed on the goods, chattels and property of Hardesty brothers, as appears by the tax list of A. D. 1872:

The amount due as tax of A. D. 1872.....	\$458 92
Penalty as provided by law.....	279 26
Costs of collection.....	200 00

for which several above-named sums, the said M. B. Price, as treasurer aforesaid, did seize and levy upon, on the 8th day of June, A. D. 1875, in the county of Bent aforesaid, the goods, chattels and property of said Hardesty brothers, the following stock, viz.: two yearlings, one two-year-old and thirty three and four year old steers with these brands ☐ on the left side, of the value of six hundred dollars, and whereas the said Richard J. Hardesty is desirous of re-

taining the said property in his possession until the meeting of the board of county commissioners of Bent county aforesaid, on the 1st Monday of July, A. D. 1875, at Las Animas, the county seat of said county of Bent, at which time said board, after hearing all the evidence in the cause, will determine whether there has been an unlawful assessment against the said firm of Hardesty Brothers.

Now, therefore, if the said Richard J. Hardesty shall have, or cause to have said property to be forthcoming and delivered to said M. B. Price, treasurer aforesaid, on the 8th day of July, 1875, at the county seat aforesaid, or the above bounden Richard J. Hardesty, his heirs, executors and administrators, shall well and truly submit to the decision of said board, faithfully abiding by the judgment had in the determination of the case, doing without hindrance the award of said board in all things, in good faith, then this obligation to be void; otherwise to remain in full force and effect.

RICHARD J. HARDESTY, [L. S.]

DANIEL R. SMITH, [L. S.]

JACOB GROSS. [L. S.]

Signed, sealed and delivered in presence of

D. P. WILSON."

The recitals of the bond sufficiently show the circumstances under which, and the purpose for which, the bond was executed and delivered.

The question is presented, is this a valid bond? There is no claim that it is a statutory bond. It is admitted that the county commissioners had no power to arbitrate the matter submitted to them, and that this, the second condition of the bond, is void. It is insisted, however, that it is good at common law, as a voluntary obligation for the delivery of the cattle.

As a general rule, any obligation entered into voluntarily, and for a good consideration, is valid at common law unless it contravenes the policy of the law, or is repugnant to

some provision of the statute. *Pritchell v. The People*, 1 Gill, 530; *United States v. Linn*, 15 Pet. 290; *Morse v. Hudson*, 5 Mass. 315; *Thomas v. White*, 12 id. 368; *Thompson v. Buchanan*, 2 J. J. Marsh. 416.

The release of the cattle from the distraint was a sufficient consideration moving to the appellants, and having received the benefits of the contract, they cannot be heard to question the authority of the county collector to make it, unless there is involved in the transaction such an injury to public interests as will render it void.

By sec. 12, art. 6, chapter 21, R. S. 184, the county treasurer is made ex-officio collector of taxes. Turning to the act of Feb. 11th, A. D. 1870, concerning revenue, Session Laws, 103, we find his powers and duties prescribed respecting the collection of delinquent taxes: Sec. 54 provides that if any person shall neglect, or fail to pay his tax, until after the 30th day of December following the levy of the same, the treasurer may make the same by distress and sale of his personal property. Sec. 55 provides that in case of distraint the treasurer shall give notice of the time of the sale, within five days after the day of the taking, and that the time of the sale shall not be more than ten days from the day of the taking, and otherwise fully prescribes his duties in such a case.

In the case of personal property omitted from the tax list, sec. 122 provides that the treasurer may assess.

Sec. 124, that the person so assessed by the treasurer may appeal to the county commissioners, if he considers the assessment erroneous, and expressly provides that "no such appeal shall operate to release property seized for taxes," unless the commissioners shall decide that no taxes were due from the person so assessed.

Where the property appears upon the tax list, as assessed by the assessor, no contingency of appeal or release was contemplated, as there the statute provides for the correction of erroneous assessments, prior to the delivery of the tax lists to the treasurer. Nowhere is there to be found

any power, or authority, on the part of the treasurer to release property seized for delinquent taxes. Having made the distraint, it was the duty of the treasurer to proceed to make the taxes by sale, under the provisions of the act.

As it appeared on his lists, it was not for him to inquire into the legality of the tax, or entertain any question respecting it. Sec. 49 of the act made the "list and warrant," his authority and justification against any illegality in the proceedings prior to receiving the list," and section 118 made his willful neglect, or refusal to perform any of the duties imposed by the act, a misdemeanor, punishable by fine and imprisonment.

Voluntary bonds in furtherance of a statute may be sustained as good at common law. *United States v. Linn*, 15 Peters, 290. But this transaction instead of being in furtherance of the statute cannot be regarded otherwise than in contravention of its object and purposes, admitting that its object was the ultimate collection of the tax, its effect is to postpone and delay, and perhaps defeat, to this extent, the revenue of both county and State.

Nearly three years have elapsed since the distraint was made; the county is involved in expensive litigation; the tax remains uncollected, and, for aught we know, should the judgment be affirmed, uncollectible.

If permissible in this case to this collector, it is permissible in all like cases to all collectors.

In practice, the tendency would be to involve the revenue in doubtful and expensive litigation, and open the door to the grossest frauds.

The consideration of the defendant's undertaking was the plaintiff's neglect and omission to perform his statutory duty.

The release of the property seized, and its delivery to the tax payer, was in contravention and defeat of the object and purposes of the revenue act and fraught with mischief to the public service. The bond is therefore void. *Packard v. Tisdale*, 50 Me. 376.

And the same principle is involved in the cases: *Hodson v. Wilkins*, 7 Greenleaf, 113; *Denny v. Lincoln*, 5 Mass. 385; *Moore v. Allen*, 3 J. J. Marsh. 613.

As the defect was fundamental and appeared upon the face of the record, the objection was well taken by motion in arrest of judgment.

The appellants, in the court below, were permitted to file amended pleas, upon the condition agreed to by them in open court, and entered of record, "that they would pay all costs, which had accrued and which would thereafter accrue, without reference to the determination of any issue which had been, or thereafter might be joined therein, on the final judgment upon the merits of the controversy."

The appellee, therefore, will recover his costs both in this court and the court below.

The judgment of the court below is reversed, and the case remanded with directions that it be dismissed.

Reversed.

The chief justice, having been of counsel, did not sit in this cause.

ANY OBLIGATION VOLUNTARILY ENTERED INTO for a good consideration is valid at common law, unless it contravenes the policy of the law, or is repugnant to some provision of the statute: *Porter v. Stapp*, 6 Colo. 34.

ABBOTT v. MONTI.

1. Whether the chancellor shall direct or refuse an issue to be tried by a jury rests wholly in his discretion, under the statute (R. S., p. 98, § 35), and error cannot be assigned upon the order in either case.
2. Where a defendant in a suit in chancery desires affirmative relief, he should seek it by cross bill. *Tucker v. McCoy*, *ante*, p. 284.

Error to Probate Court of Clear Creek County.

THE case is stated in the opinion.

MESSRS. H. M. & W. TELLER, for plaintiff in error.

MR. M. S. TAYLOR, for defendant in error.

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THATCHER, C. J. This is a suit in equity brought by the complainant to enforce her alleged right to a deed to lot eighteen in block forty-nine, in Georgetown. After the issues were made up, and the cause was ready for hearing, the complainant moved the court to direct an issue to try the controverted fact as to the *ownership* of the lot in dispute.

To determine this issue was to determine all the issues involved by the pleadings in the cause. It was in effect a motion to the court that the entire case made by the bill, answer and replication, might be submitted to a jury for its verdict. This, to say the least, had the complainant's motion been granted, would not have been in conformity with approved practice. *Milk et al. v. Moore*, 39 Ill. 584.

The court denied the motion to refer the controverted fact of ownership to a jury. This act of the court is assigned for error.

The mode of procedure in this cause is regulated by statute, which declares that pleadings and proceedings in such actions "shall be as in cases in chancery, except that oral testimony may be introduced upon the trial of the cause." R. S., § 5, p. 621.

The rules of practice and proceedings prescribed by statute for the government of the district courts apply to the probate courts. § 35 of chapter 13, R. S., provides that "the said district courts may in their discretion direct an issue or issues to be tried by a jury whenever it shall be judged necessary in any cause in equity; the mode of trial shall be the same as has been heretofore practiced in courts of equity. In every such case the order of the court may specify and set down the issue or issues to be tried so as to avoid the necessity of formal pleadings, as heretofore practiced."

Whether the chancellor shall direct or refuse an issue rests wholly in his discretion, and we fail to discover any valid reason why it should not so rest. If an issue be directed, the verdict of the jury thereon is not binding upon

the chancellor's conscience. He is not only at liberty to disregard it, but it is his duty to decide the cause according to the dictates of his own judgment, and the convictions of his own conscience. *Garrett v. Stephenson*, 3 Gilman, 278.

In an action at law, the verdict of the jury is of higher and more solemn import. It is the foundation upon which the judgment of the court must rest. In a suit in equity, the verdict is not necessarily the foundation of the decree. It is merely incidental, and may be, and if the chancellor's conscience is not satisfied with it, must be, wholly unheeded. No error can be assigned upon the order of the court, either granting or refusing an issue. The trial by jury, in such case, is not a matter of right. *Sheetz's Appeal*, 35 Penn. 94; *Black v. Lamb*, 1 Beasly (N. J.), 108; *Ward v. Hill*, 4 Gray, 593; *Crittenden v. Field et al.*, 8 Gray, 626; *State v. Orwig*, 25 Iowa, 289.

A decree was entered in favor of the defendant, granting him affirmative relief. It was decreed that he was the owner and entitled to a deed for the lot in dispute. The court erred in entering such a decree upon the state of the pleadings. No specific relief was prayed. His only prayer is that he be hence dismissed with his reasonable costs and charges. In the case of *Tucker v. McCoy*, decided at the April term, 1877, this court held in accordance with the undoubted rule in chancery pleadings, which is applicable to this case, that a defendant desiring affirmative relief should seek it by a cross bill.

The decree will be reversed and the cause remanded, with directions to the court below to allow the complainant to file an amended bill, and the defendant to file a cross bill, if they so desire, without prejudice to the testimony already taken, and for further proceedings not inconsistent with this opinion.

Reversed.

CROSS-BILL IS PROPER MODE FOR OBTAINING AFFIRMATIVE RELIEF in equity: *Montt v. Bishop*, 3 Colo. 606; *Nippel v. Hammond*, 4 Colo. 223.

CLARK v. HOWELL.

1. Under the statute (R. S., p. 540, § 14), where a plaintiff in replevin suffers a voluntary dismissal or nonsuit, and judgment of *retorno habendo* is awarded, the defendant in an action on the replevin bond cannot show property in the plaintiff in replevin, either in mitigation, or in bar of the action.
2. In pleading the defenses provided by the statute, in an action on a replevin bond, the plea should regularly negative the exception, but the defect may be cured by replying the exception.

Appeal from District Court of Boulder County.

DEBT on a replevin bond. Clark, the defendant below, pleaded, among other defenses, "that judgment in the suit of replevin was rendered on motion to quash the writ, and that the merits of the case were not determined therein, and that the goods and chattels mentioned in said bond and declaration were at the time of replevy the goods and chattels of the said Baker Silver Mining Co, the plaintiffs in replevin, and not those of Charles P. Chedsy."

To this plea the plaintiff replied that the plaintiffs in the replevin "voluntarily dismissed their suit," and the defendant rejoined, denying the voluntary dismissal.

The cause was tried without the intervention of a jury, and the court, after finding for the plaintiff in the sum of \$800, the penalty of the bond, rendered judgment against the defendant in \$200 damages. Exception was duly reserved to the finding and judgment, and to reverse this judgment the defendant prosecutes this appeal.

Messrs. H. M. & W. TELLER, for appellant.

Mr. ALPHEUS WRIGHT, for appellee.

STONE, J. Action of debt by appellee on replevin bond, in which appellant was a surety. Breaches assigned are a failure to prosecute with effect, and to make return of the property as awarded in the judgment of *retorno habendo*.

The principal error complained of is, that the court awarded more than nominal damages, when evidence was received which proved that the principal obligor—the plaintiff in replevin—had never parted with the title to the property, although Chedsey, the defendant in replevin, had purchased the property (five head of oxen) from one having it in possession, and exercising acts of ownership over it.

The latter clause of section 14 of the replevin act, R. S. 540, creates an estoppel against the defendant in a suit on the bond, setting up title in the plaintiff in replevin, where such plaintiff has suffered voluntary dismissal or nonsuit. The section is as follows: “In any action upon any bond, given as required by the provisions of this chapter, where the merits of the case have not been determined in the action of replevin in which such bond was given, the defendant may plead such fact, and also their title, or the title of any one or more of them to the property in dispute in such action of replevin, *except in cases where the plaintiff, in such action of replevin, shall have voluntarily dismissed his suit, or submitted to a nonsuit therein.*”

This section in its entirety is an exception to the common-law rule, but taking the place of the common law it becomes our rule, the last clause being an exception itself to the statutory rule.

The law then, as limited by this statute, undoubtedly is, that where a plaintiff in replevin suffers a voluntary dismissal or nonsuit, and judgment of *retorno habendo* is awarded, in a suit on the replevin bond, the defendant cannot in bar of the action, or in mitigation of damages, show property in the plaintiff in replevin. The plea contemplated by section 14 of the replevin act is single, and the replication that the plaintiff in the replevin suit voluntarily dismissed the suit, went to the entire plea. Regularly the plea should have excluded the exception made by the statute, but the plaintiff having replied the exception the same result was reached. The rejoinder to this replication presented the issue: was there a voluntary dismissal of the replevin suit?

The record, after showing that there was a motion to quash the writ of replevin, which was met by a cross motion of plaintiff in replevin for leave to amend, recites as follows: "Thereupon it is ordered by the court that the plaintiff have leave to amend the said writ, by paying costs of this term in this suit. Whereupon the plaintiff not amending, but consented to a nonsuit. Thereupon it is ordered by the court that a writ of *retorno habendo* be awarded against the plaintiff," etc.

The record evidence, that the plaintiff in replevin "consented to a nonsuit," sufficiently supported the replication of "voluntary dismissal."

Evidence, therefore, of property in the defendant's principal obligor (the plaintiff in replevin) was inadmissible, and, although received, was properly disregarded by the judge who tried the case, without the intervention of a jury. The finding and judgment of the court was fully supported by all the evidence entitled to be considered.

This disposes of all the errors assigned, and the judgment must be affirmed.

Affirmed.

IN REPLEVIN, AFTER VOLUNTARY DISMISSAL OR NONSUIT, and judgment of restitution, the defendant in an action on the bond cannot show property in the plaintiff, in mitigation or in bar: *Imel v. Van Deren*, 8 Colo. 33.

CITY OF CENTRAL v. WILLOOXEN.

1. Where a defendant would deny the execution of an instrument in writing, upon which action is brought, he must file a verified plea for that purpose. (R. S., p. 506, § 14.) An affidavit of merits has a distinct office, essentially different from that of a verified plea and cannot be substituted therefor.
2. Where evidence is let in not authorized by the pleadings, in a trial to the court, it may be properly disregarded in the rendition of the judgment.
3. Where one receives from a municipal corporation warrants drawn upon its treasurer, presentation to that officer, or the allegation in the declaration of facts which will excuse the presentation, is necessary before an action can be maintained on the warrants.
4. A remittitur must be for a sum *certain*, otherwise it will be disregarded.
5. A motion to strike a bill of exceptions from the files, after joinder in error and the cause has been set down for hearing, cannot be entertained.

Error to District Court of Gilpin County.

THIS was an action of assumpsit, brought by Wilcoxen against the City of Central. The declaration consisted of the common counts for work and labor, money had and received, money paid, laid out and expended, and money found due upon an account stated. The defendant filed the general issue and a special plea :

“*Actio non* ; because it says the only cause of action sued on in the said several counts of plaintiff's declaration are the several instruments in writing set out with said declaration, and avers that fourteen of said instruments in writing amounting to \$976. 75 purport to be city warrants drawn by Robert Teats as mayor of defendant on city treasurer, and being fraudulently drawn by said Teats, the said Teats and plaintiff and divers other persons acting in collusion with said Teats and said plaintiff, drew and caused to be drawn said false and fraudulent instruments for the purpose of heating and defrauding defendant, and that said pretended warrants were drawn in favor of persons to whom defendant was in no manner indebted, and for pretended accounts and claims against defendant which had never been audited or allowed by the city council of the City of Central, and that defendant was never at any time indebted to the parties in whose favor said pretended warrants were drawn, and that said plaintiff was a party to said fraudulent transaction, and that the residue of said instruments are city warrants of the City of Central, drawn by Thomas Mullen as mayor of said city, and were delivered by order of city council of said city to plaintiff, and accepted by plaintiff in full satisfaction and discharge in payment for services rendered by plaintiff for defendant and accepted by plaintiff in lieu of money, and less than their par value, the said defendant paying said plaintiff the difference between the par value of said warrants and the cash value thereof, and this the said defendant is ready to verify,” etc.

The cause was tried at the April term, 1874, of the district court, without the intervention of a jury. The plain-

tiff offered in evidence a number of city warrants purporting to have been issued by the City of Central and directed to its treasurer. Objection was made by the defendant because the execution of the warrants had not been proved. The objection was sustained and the plaintiff required to produce evidence of the execution of the warrants, after which they were again offered in evidence. The defendant again objected to their introduction, "because the execution of the same is not proven, and because they have not been indorsed to the plaintiff, and because those warrants which had been presented for payment were not evidence in support of this action, and were not yet due, because there was no evidence that there was any money in the treasury of defendant that could be legally applied to the payment of the same."

The objection was overruled and the warrants received in evidence. The defendant produced evidence, over the objections of the plaintiff, to support the allegations of its special plea. The court gave judgment for the plaintiff in the sum of \$815.60. To reverse this judgment the defendant sued out this writ of error.

Mr. H. M. OROHOOD, for plaintiff in error.

Messrs. SYMES & DECKER, for defendant in error.

THATCHER, C. J. Under the pleadings, whether the claims for which the city warrants in controversy were issued, were allowed by the council of Central City, or whether the mayor and Henry Grannis, whose name is signed thereto as clerk, were, in behalf of the city, authorized to execute the warrants, are not pertinent inquiries. No issue was tendered, that, under the statute, would permit the defendant to deny the authority of the mayor and clerk to execute the warrants in question.

Section 14 of the Practice Act (R. S., p. 506) provides, "No person shall be permitted to deny, on trial, the execution of any instrument in writing, whether sealed or not,

upon which any action may have been brought, or which shall be pleaded or set up by way of defense, or set-off, unless the person so denying the same shall, if defendant, verify his plea by affidavit, and if plaintiff, file his or her affidavit denying the execution of such instrument."

This language is free from ambiguity. In terms it requires a defendant, if he would deny the execution of the instrument, to file a *verified plea* for that purpose. Such a plea would be a demand that the plaintiff should prove, not only the *signatures* of the officers who issued the warrants in behalf of the city, but also that they had authority to issue them. *Delahay v. Clement*, 2 Scam. 577; *City of Central v. Brown*, 2 Col. 704.

In the absence of a verified plea, such proof is dispensed with. We find that the defendant has verified none of its pleas. The city seems to have lost sight of the marked distinction between an affidavit of merits and a verified plea. An affidavit of merits was filed, and this was treated by counsel on both sides, in the court below and in this court, as a verified plea. The office of an affidavit of merits is clearly defined by statute, and is essentially different from that of a plea. It necessarily precedes the defendant's pleas, and cannot be substituted for them. *Martin v. Skehan*, 2 Col. 619.

Even if we were disposed to give the affidavit of merits the effect of a verified plea, it would not avail the defendant, so vague and uncertain is it. The affidavit alleges "that *some* of the said pretended warrants filed with the said declaration are fraudulent and void, and were never executed by the defendant." What particular warrants, or how many are within the ban of the affidavit, is left wholly to conjecture.

In no view of the pleadings was the plaintiff required to prove, or the defendant permitted to deny the due execution of the warrants.

The defendant having, by its failure to interpose the verified statutory plea, precluded itself from controverting the

prima facie cause of action by impeaching the warrants on the ground that they were executed without authority, the evidence let in by the court, tending to prove their unauthorized issue, was properly disregarded in the rendition of the judgment. 1 Dillon on Mun. Corp., p. 500, *et seq.*, and cases cited.

City warrants, numbered 372, 387, 388, 419, 421 and 424, were improperly admitted in evidence as they were not yet due. As to these warrants, the action was prematurely brought. They had never been presented for payment, nor are facts alleged in the declaration that would excuse the holder from presenting them. 1 Dillon on Mun. Corp., § 410, and cases cited; 1 Daniel on Negotiable Instruments, § 430.

But the defendant in error files a remittitur for the amount of the unrepresented warrants. To this practice we see no objection, if the court had the data before it to determine the residue for which judgment might be entered. But an examination of the record shows that the judgment is based upon the warrants introduced in evidence after rejecting (as the record recites) warrants numbered 424, 426, 427 and 430, for what reason, the bill of exceptions is silent. No warrant numbered 430 was introduced in evidence. We are, therefore, at a loss to know upon what data the judgment is founded, and must disregard the remittitur.

The motion to strike the bill of exceptions from the record having been interposed not only after the joinder in error was filed, but after the cause was set down for hearing, cannot be entertained.

The judgment of the court below is reversed, and the cause remanded for further proceedings according to law.

Reversed.

Upon petition for rehearing, the following opinion was rendered.

Per Curiam: Even if it were conceded (a point not necessary to decide) that this court must be controlled by

the transcript filed March 16, 1875, when it varies from the transcript filed February 8, 1876, the remittitur filed in this cause is not of a character to entitle it to consideration. *I is not for a sum certain.* It assumes that the judgment rendered is based in part upon warrant No. 424, when, in fact, both transcripts recite that this warrant was rejected. We are unable to determine from an examination of the record in what manner the court below arrived at its finding. The element of uncertainty as to the exact basis upon which the judgment is founded, and *as to the amount proposed to be remitted is so great*, that if we were to allow a remittitur in this case, an unsafe precedent would be established. When a remittitur is filed for no *certain* sum, it will be disregarded.

Petition denied.

EXECUTION OF WRITTEN INSTRUMENT must be denied by verified plea: *Lee v. Grimes*, 4 Colo. 186; *Furthest v. Bodicker*, 10 Colo. 509.

EXEMPTION OF EXCESS ABOVE AD DAMNUM is proper: *Duncan v. Whedbee*, 4 Colo. 145.

MOTION TO STRIKE BILL OF EXCEPTIONS FROM FILES after joinder in error and cause set down for hearing cannot be entertained: *Learned v. Fitch*, 6 Colo. 590.

DOWNING v. BROWN.

1. A memorandum book kept by a public officer for his own convenience, and not required to be kept by law, the entries in which could not affect any legal rights, cannot be the subject of forgery, it not being a record, or authentic matter of a public nature, or a book belonging to any public office.
2. In an action for libel, where a crime has been charged, a plea of justification setting up truth as a defense may be supported by a preponderance of evidence only.
3. In the absence of ambiguity, words must be taken to mean what they legally import. But where the language is ambiguous as applied to the plaintiff, it becomes a question for the jury, and the extraneous circumstances under which it was used may be taken into consideration to ascertain its meaning.
4. Where the defendant in an action for libel fails to sustain, or abandons a plea of justification, such failure or abandonment is evidence of malice and continued malice, and may be taken into consideration by the jury in estimating damages.
5. Controverted questions of fact are always for the jury to determine, and it is clearly error for the court to assume that any disputed fact has been established.

Error to District Court of Arapahoe County.

ACTION on the case for libel. The declaration, after stating the venue in the margin and the title of the court and term, was as follows :

“Jacob Downing, the plaintiff in this suit, by E. L. Smith, L. B. France and Charles & Phelps, his attorneys, complains of Henry C. Brown, the defendant in this suit, who has been summoned, etc., of a plea of trespass on the case: For that whereas the said plaintiff, before and at the time of the committing by the said defendant of the several grievances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors and other worthy citizens of the Territory of Colorado. Yet the said defendant, well knowing the premises, but wickedly and maliciously intending to injure the said plaintiff and to bring him into public scandal and disgrace, and cause to be suspected and believed by those neighbors and other worthy citizens that he, the said plaintiff, had been and was guilty of forgery, and to vex, harass and oppress the said plaintiff, on, to wit: the 27th day of December, A. D. 1873, at the county of Arapahoe, in the Territory of Colorado aforesaid, wickedly, falsely and maliciously did print and publish and cause to be printed and published of and concerning the said plaintiff, in a certain newspaper called The Denver Tribune, whereof the said defendant was then and there the proprietor, a certain false, scandalous, malicious and defamatory libel, in one part of which said libel there was and is contained the following false, scandalous, malicious, defamatory and libelous matter following, of and concerning the said plaintiff, to wit :

“FORGERY AND ITS CONSEQUENCES — THE MOTION OF A CITIZEN FOR THE ARREST OF JACK DOWNING (meaning the said plaintiff).

To the Editor of the Tribune :

"In your paper of last evening you publish the report of a city council committee, which shows to a *certainly*, so far as I am able to judge, that J. Downing (meaning the said plaintiff) has been guilty of forgeries enough to confine him (meaning the said plaintiff) in the penitentiary not less than 200 years, could he (meaning said plaintiff) live so long. Our statute provides that any one convicted of forgery shall be punished by confinement in the penitentiary for a term of not less than one nor more than fourteen years."

And in another part of which said libel there was and is contained the following false, scandalous, malicious, defamatory and libelous matter following, of and concerning the said plaintiff, to wit :

"But there is no limitation to prosecutions for forgery. For this crime a party (meaning the said plaintiff) may be prosecuted, convicted and punished at any time during his (meaning the said plaintiff) natural life. There seems to be any number of clear cases (meaning clear cases of forgery) against Downing (meaning the said plaintiff). Why is he (meaning the said plaintiff) not arrested? Where is the district attorney? The crime of forgery by our statute (see Revised Statutes of Colorado, page 208, sec. 69) is defined as follows, viz. : Every person who shall falsely make, utter, forge or counterfeit any record or other authentic matter of a public nature, or any charter, letters patent, deed, lease, indenture, writing, obligation, etc., etc., shall be deemed guilty of forgery, and upon conviction thereof shall be punished by confinement in the penitentiary for a term of not less than one year nor more than fourteen years. I for one am in favor of having Judge DOWNING (meaning the said plaintiff) arrested and tried for forgery ; who seconds the motion ?"

And thereby then and there meaning that the said plaintiff was and is guilty of the crime of forgery, contrary to the statute in such case made and provided, and that the

said plaintiff should be tried for the crime of forgery ; and thereby and then and there meaning that the said plaintiff was and is guilty of having falsely made, uttered, forged and counterfeited records and other authentic matters of a public nature ; and also thereby then and there meaning that the said plaintiff was and is guilty of having falsely made, uttered, forged and counterfeited charters, letters patent, deeds, leases, indentures and writings obligatory, contrary to the statute of the Territory of Colorado in such case made and provided.

Second Count :

And the said plaintiff further saith that the said defendant, further contriving and intending as aforesaid, afterward, to wit: On the 27th day of December, A. D. 1873, at the county of Arapahoe aforesaid, falsely and wickedly and maliciously did print and publish and cause to be printed and published of and concerning the said plaintiff in the said newspaper called The Denver Tribune, whereof the said defendant was then and there the proprietor, a certain other false, scandalous, malicious and defamatory libel, in one part of which said libel there was and is contained the following false, scandalous, malicious, defamatory and libelous matter following, of and concerning the said plaintiff, to wit:

“More facts of Jack Downing’s (meaning the said plaintiff) reign. How the property interests of Denver were led to the altar. My conscience (meaning the conscience of the said plaintiff) hath a thousand several tongues, and every tongue brings in a several tale, and every tale condemns me (meaning the said plaintiff) for a villain. Perjury, foul perjury, in the highest degree ; murder, stern murder, in the direst degree, all several sins, all used in each degree, throng to the bar crying all Guilty ! Guilty ! — *Richard III.* And yet Jack Downing (meaning the said plaintiff) affects to laugh with a low guttural sound, thus : Ha ! ha !! ha !!!”

And thereby then and there meaning that the said plaintiff was and is guilty of the crime of perjury, contrary to the form of the statute in such case made and provided; and also then and there meaning that the said plaintiff was and is guilty of the crime of murder, contrary to the form of the statute in such case made and provided; and also thereby then and there meaning that the said plaintiff hath confessed to himself that he, the said plaintiff, was and is guilty of the said several crimes of perjury and murder, contrary to the form of the statute in such case made and provided.

Third Count:

And the said plaintiff further saith that the said defendant further contriving and intending as aforesaid, afterward, to wit: on the day and year last aforesaid, at the county of Arapahoe, aforesaid, falsely, wickedly, and maliciously did print and publish, and cause to be printed and published of and concerning the said plaintiff in the said newspaper, called The Denver Tribune, whereof he, the said defendant, was then and there the proprietor, a certain other false, scandalous, malicious and defamatory libel, in one part of which said libel there was and is contained the following false, scandalous, malicious and defamatory and libelous matter following, of and concerning the said plaintiff, to wit:

“ My conscience (meaning the conscience of the said plaintiff) hath a
thousand several tongues,
And every tongue brings in a several tale,
And every tale condemns me (meaning the said plaintiff) for a villain.
Perjury, foul perjury, in the highest degree;
Murder, stern murder, in the direst degree;
All several sins, all used in each degree;
Throng to the bar crying all, Guilty! Guilty!”
—*Richard III.*

And yet Jack Downing (meaning the said plaintiff) affects to laugh with a low guttural sound thus: Ha! ha!! ha!!!”

Thereby then and there meaning that the said plaintiff was and is guilty of the crime of perjury, and that he, the said plaintiff, being arraigned at the bar of his own conscience had then and there pleaded guilty to the charge of the crime of perjury.

Fourth Count :

And the said plaintiff further saith that the said defendant further contriving and intending as aforesaid, afterward, to wit: on the day and year last aforesaid, at the county of Arapahoe, aforesaid, falsely, wickedly and maliciously did print and publish, and cause to be printed and published of and concerning the said plaintiff, in the said newspaper, called The Denver Tribune, whereof the said defendant was then and there the proprietor, a certain other false, scandalous, malicious and defamatory libel, in one part of which said libel there was and is contained the following false, scandalous, malicious, defamatory and libelous matter following of and concerning the said plaintiff, to wit:

“ My conscience (meaning the conscience of the said plaintiff) hath a
thousand several tongues,
And every tongue brings in a several tale,
And every tale condemns me (meaning the said plaintiff) for a villain.
Perjury, foul perjury, in the highest degree ;
Murder, stern murder, in the direst degree ;
All several sins, all used in each degree ;
Throng to the bar crying all, Guilty ! Guilty ! ”
—*Richard III.*

And yet Jack Downing (meaning the said plaintiff) affects to laugh with a low guttural sound thus: Ha ! ha !! ha !!!”

Thereby then and there meaning that the said plaintiff was and is guilty of the crime of murder contrary to the form of the statute in such case made and provided, that the conscience of the said plaintiff charged him, the said plaintiff, with the crime of murder as aforesaid, and that

he, the said plaintiff, had pleaded guilty to such charge of murder so made by his conscience aforesaid.

Fifth Count :

And the said plaintiff further saith that the said defendant further contriving and intending as aforesaid, afterward to wit : on the 29th day of December, A. D. 1873, at the county of Arapahoe, aforesaid, falsely, wickedly and maliciously did print and publish, and cause to be printed and published of and concerning the said plaintiff in a certain newspaper, called The Denver Tribune, whereof the said defendant was then and there the proprietor, a certain other false, scandalous, malicious and defamatory libel in the words following, to wit :

“They tried to clear a murderer at Joliet, Illinois, the other day by proving insanity. It wouldn't work, and the murderer was hung. A subsequent examination of his brain proved it to be unusually correct. It would be well for Jake Downing (meaning the said plaintiff) to reflect on these things.”

Thereby then and there meaning that the said plaintiff was and is guilty of the crime of murder, that when the said plaintiff should be brought to trial therefor he would be convicted and hung for the crime of murder.

Sixth Count :

And the said plaintiff further saith that the said defendant further contriving and intending as aforesaid, afterward, to wit : on the 29th day of December, A. D. 1873, at the county of Arapahoe, aforesaid, falsely, wickedly and maliciously did print and publish, and cause to be printed and published of and concerning the said plaintiff in a certain newspaper, called The Denver Tribune, whereof the said defendant was then and there the proprietor, a certain other false, scandalous, malicious and defamatory libel of and concerning the said plaintiff in the words following, to wit :

"Boss Tweed said he was a statesmen previous to being locked up as a felon. Wonder what Jack Downing (meaning the said plaintiff) would give as his occupation in the event of a similar contingency, which is far from unlikely."

Thereby then and there meaning that the said plaintiff is guilty of having committed felonious offenses, and that the said plaintiff will probably be convicted and incarcerated as a felon.

Seventh Count :

And whereas also heretofore, to wit: on the 9th day of September, A. D. 1873, according to the form of the statute in such case made and provided, an election was duly had within and for the county of Arapahoe, for the election of councilman to represent the first representative district of the Territory of Colorado in the tenth legislative assembly of the Territory of Colorado, and also for the election of a sheriff, a probate judge and divers other county officers for the said county of Arapahoe, and whereas, also, Towsland within the said county of Arapahoe was and had been before the day last aforesaid in the year last aforesaid duly appointed and designated by the board of county commissioners of the said county of Arapahoe as one of the precincts for the purposes of the election aforesaid, and whereas the said plaintiff before and at the time of the committing by the said defendant of the several grievances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of his neighbors and other worthy citizens of the Territory of Colorado, yet the said defendant, well knowing the premises but wickedly and maliciously intending to injure the said plaintiff, and to expose him to public hatred, contempt and ridicule, and to cause to be suspected and believed by those neighbors and other worthy citizens that the said plaintiff had been and was guilty of "stuffing the ballot-box" then and there used at the said election, and to vex, harass and oppress the said plaintiff on, to wit: the 10th day of January,

A. D. 1874, at the county of Arapahoe, aforesaid, wickedly and maliciously did print and publish and cause to be printed and published of and concerning the said plaintiff in a certain newspaper, called The Denver Tribune, whereof he, the said defendant, was then and there the proprietor, a certain other false, scandalous, malicious and defamatory libel, containing among other things the false, scandalous, malicious, defamatory and libelous matter following, of and concerning the said plaintiff, to wit:

“The ring and the ballot-box, some of the frauds of last fall’s canvass (meaning the election aforesaid), Jack Downing (meaning the said plaintiff) as ring-master and ballot-box stuffer, all about the Towsland business,” thereby then and there meaning that the said plaintiff was, is and had been guilty of “stuffing” the ballot-box at the election aforesaid, at the precinct of Towsland aforesaid, in the county of Arapahoe, aforesaid, and also thereby then and there meaning that he, the said plaintiff, at the election aforesaid at the precinct aforesaid, illegally and fraudulently introduced into the said ballot-box illegal and fraudulent ballots, contrary to the form of the statutes in such case made and provided, by means of the printing and publishing of which said several false, scandalous and malicious libels by the said defendant, of and concerning the said plaintiff, he, the said plaintiff, had been and is greatly injured in his aforesaid good name, reputation and credit, and brought into public scandal, infamy and disgrace, public hatred, contempt and ridicule, with and among all his neighbors and other good citizens of the Territory of Colorado, insomuch that divers of those neighbors and citizens to whom the innocence and integrity of the said plaintiff in the several premises were unknown, have on occasion of the printing and publishing of the said several libels from thence hitherto suspected and believed and still do suspect and believe the said plaintiff to have been and to be a person guilty of forgery, perjury, murder, stuffing ballot-boxes at elections, and divers fel-

onies and other offenses, and thereby the said plaintiff hath been and is greatly injured in his aforesaid good name and otherwise at, to wit: the county of Arapahoe, aforesaid, to the damage of the said plaintiff of one hundred thousand dollars and therefor he brings his suit," etc.

To this declaration the general issue was interposed by the defendant, and to the first and seventh counts the defendant filed the following special pleas, to which the plaintiff replied generally *de injuria* :

"And as to the publication of the said several words of and concerning the said plaintiff, as in the first count of the said declaration mentioned, the said defendant saith that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that before the publication of the said words of and concerning the said plaintiff in the said first count mentioned, to wit: on the 10th day of January, A. D. 1868, at the county of Arapahoe, in the Territory of Colorado, aforesaid, feloniously and falsely did make, alter and forge a certain registry and record and authentic matter of a public nature in the office of the probate court of the county and Territory aforesaid, and then and there being a record and authentic matter of a public nature in the office of the said probate court, to wit: certain written statements containing descriptions of town lots in the city of Denver, in said county and Territory, called filings on town lots, and being written applications for deeds for town lots from the probate judge of said county and Territory, purporting to be made and filed in accordance with the provisions of an act of congress, entitled "an act for the relief of the citizens of Denver, in the Territory of Colorado" approved May 28, 1864. And the defendant avers that the said plaintiff feloniously and falsely did make, alter and forge the said certain filings and statements in writing aforesaid, the said filings and statements being of the tenor following, to wit: "To the probate judge of Arapahoe county: I, M. C. Dailey, hereby apply for a deed to lots 17, 18, 19, 20, in block 67; lots 25,

26 in block 136 ; lots 26 and 27 in block 142 ; lots 5 and 6 in block 160, in the east division in the city of Denver, Colorado Territory, under the act of congress, entitled 'an act for the relief of the citizens of Denver, in the Territory of Colorado,' approved May 28, 1864, and claim the same by title from the Denver Town Company, and by improvements made thereon.

DENVER, *May* 10th, 1865.

M. C. DAILEY.'

And did make and forge the following written statement and record of the said probate office aforesaid, to wit: 'To the probate judge of Arapahoe county: I, M. C. Dailey, hereby apply for a deed to lots 26 and 28, 29 and 30 in block 165 ; lots 23 and 24 in block 166 ; lots 1, 2, 25 and 26 in block 232 in the east division of the city of Denver, Colorado Territory, under the act of congress, entitled 'an act for the relief of the citizens of Denver, in the Territory of Colorado,' approved May 28, 1864, and claim the same by title from the Denver Town Company, and by improvements made thereon.

DENVER, *May* 15, 1865.

M. C. DAILEY.'

To the great damage of the said city of Denver, in the county and Territory aforesaid, and contrary to the form of the statute in such case made and provided. And the defendant avers that under the acts of congress and the legislative assembly of the Territory of Colorado, providing for the entry of town sites and the disposal of the trusts created thereby, the town lots in said city of Denver which remained undisposed of by being deeded and conveyed to the respective occupants and owners of the improvements thereon, according to their respective interests, belonging to the said city of Denver in trust for the use and benefit of the inhabitants of said city, to be disposed of according to the laws of the legislative assembly of Colorado Territory, and that the lots mentioned and described in the said false

and forged written statement and applications for deeds were lots which belonged to the said city in trust, under the provisions of said acts of congress and of the legislative assembly aforesaid, and that said statements and applications for deeds, falsely made and forged as aforesaid, were by the said plaintiff placed upon the files and records of the said probate court of the said county, to wit: at the time aforesaid, and were intended by the plaintiff to defraud the said city of Denver out of the town lots aforesaid.

And the said plaintiff did by the false and corrupt making of the said written statements thereby commit the crime of forgery. Wherefore the said defendant, at the several times when, etc., in the said first count mentioned, at the county and territory aforesaid, spoke and published of and concerning the said plaintiff the said words in the said first count mentioned to have been spoken and published of and concerning the said plaintiff, as it was lawful for him to do for the cause aforesaid, and this the defendant is ready to verify. Wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc.

And for a further amended plea in this behalf to the first count of the plaintiff's said declaration, the defendant comes and defends the wrong and injury when, etc., and as to the publishing of the said several words of and concerning the said plaintiff, as in the first count of said declaration mentioned, the said defendant saith that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that before the publishing of said words of and concerning the said plaintiff, in the said first count mentioned, to wit: on the 10th day of December, 1867, at the county of Arapahoe and Territory of Colorado, with the intent to defraud and cheat the city of Denver in the county and Territory aforesaid, falsely, deceitfully and corruptly in and upon a certain registry and record book of filings, then and there being a record and authentic matter of a public nature in the office of the probate court

of the said county of Arapahoe and Territory of Colorado, that is to say, in the book of record of filings of written statements of the lots of the Denver town site, containing the recorded lists of filings on town lots, or record of the written statements called filings, then and there being a record of the written statements and applications for deeds for lots in the town site of the said city of Denver, and purporting to be made, filed and recorded in accordance with the provisions of the act of congress entitled an act for the relief of the citizens of Denver, in the Territory of Colorado, approved May 28, 1864, by the probate judge of said county and Territory, for the several use and benefit of the rightful owners and occupants of the said lots mentioned and set forth in said registry and record book, and made by said plaintiff when he was the probate judge of said county, as hereinafter particularly set forth, and when acting as such trustee as probate judge. And the defendant says that said registry and book of the record of said statements in writing was made and kept by the probate judges of the said county as a record and authentic matter of a public nature, and as a record of the said probate court's acts and proceedings in relation to carrying out the said trust under the said act of congress, and under the provisions of an act of the legislative assembly of the Territory of Colorado regarding the entry of town sites upon the public land, and the disposition of the trusts imposed thereby, and acts amendatory thereof. And the defendant says that the said plaintiff, while he was probate judge of said county and Territory, to wit, on the 10th day of December, 1867, falsely, feloniously and corruptly did alter and forge the said registry and record and authentic matter of a public nature in the office of the probate court of said county and Territory aforesaid, by false and corrupt insertions, interlineations and alterations made in writing and figures as follows, to wit: on page of said registry and book of record of statements numbered six, did change to block 196 in right of block 96, and on page numbered thirteen of

said book did make the following insertion, to wit: '60 Ashley Franklin 23 & 24, 105, 26, 62, 5 & 6, 136, 7 & 8, 109, East Denver, deeded.' The said plaintiff meaning thereby that lots 23 and 24 in block 105, and lot 26 in block 62, and lots 5 and 6 in block 136, and lots 7 and 8 in block 109, in the east division of the said city of Denver, had been conveyed and deeded to Ashley Franklin. And on page numbered 16 of said registry and record book of statements did make the following false insertions and interlineations, to wit: '70, E. S. Marlow, 13, 14, 15 & 16, 46, 31 & 32, 20, 1, 2, 3 and, 4, 21, deeded.' The said plaintiff meaning thereby that lots 13, 14, 15 and 16 in block 46, and lots 31 and 32 in block 20, and lots 1, 2, 3 and 4 in block 21, had been conveyed and deeded to E. F. Marlow. And on page numbered 18 of said registry and record book of filings did make the following insertions and interlineations, to wit: '80, Alexander F. Safely, 23 and 24, 21, 19 and 20, 56, 3, and 4, 77, deeded.' The said plaintiff meaning thereby that lots 23 and 24 in block 21, and lots 19 and 20, in block 56, and lots 3 and 4 in block 77, had been deeded to Alexander F. Safely. And on page numbered 40 of said registry and record book of statements did make the following insertions and interlineations, to wit: 'Henry L. Bouthat, 5, 29, 12, 42, 11, 64, 1, 74, West Denver, deeded.' Said plaintiff meaning thereby that lot 5 in block 29, and lot 12 in block 42, and lot 11 in block 64, and lot 1 in block 74, in the west division of said city of Denver, had been duly deeded and conveyed by the probate judge of said county to Henry L. Bouthat.

And the defendant avers that said insertions and interlineations made by said plaintiff as aforesaid were falsely and fraudulently made and forged with the intent to defraud the said city of Denver. And the defendant avers that under and by virtue of the acts of Congress providing for the entry of town sites and the entry of the land occupied by the inhabitants of the city of Denver, by the probate judge of Arapahoe county, in trust for the benefit of

the owners and occupants of lots and owners of the improvements thereon, under said acts of Congress, and by virtue of the acts of the legislative assembly of the Territory of Colorado providing for the carrying into effect and the disposition of the said town lots in accordance with said trust, all the lots in said city of Denver to which there was no owners or occupants entitled to deeds from the probate judge, and all lots which remained undisposed of to individual claimants under the provisions of said acts belonged to the said city of Denver in trust for the use and benefit of all the inhabitants of said city, and the said vacant and unoccupied lots were by the provisions of said acts to be transferred to said city or sold and the proceeds thereof transferred to said city in trust for the inhabitants thereof aforesaid. And that the lots mentioned and described in the false, corrupt and forged insertions, interlineations in the above-described book of record of statements and applications for deeds, were lots which belonged to said city of Denver in trust, and which were vacant and unoccupied and remained undisposed of to individual claimants under the provisions of the said acts of Congress and of the legislative assembly aforesaid, and that said false, corrupt and forged insertions, interlineations in said record book of statements and applications for deeds for said lots, were made by said plaintiff in and upon the records of the probate court of Arapahoe county aforesaid, at the time aforesaid, and were intended by said plaintiff to defraud the said city of Denver out of the town lots belonging to the said city as aforesaid, and that said city was by said acts so defrauded.

And the said — — did thereby corruptly and feloniously commit the crime of forgery. Wherefore the said defendant at the several times whence, etc., in the said first count mentioned to have been spoken and published of and concerning the said plaintiff, as it was lawful for him to do for the cause aforesaid. And this the defendant is ready to verify."

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“And as to the publishing of the said several words of, and concerning the said plaintiff, as in the seventh count of said declaration mentioned, the said defendant saith that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that before the publishing of the said words of and concerning the said plaintiff, as in the said seventh count mentioned, to wit: on the 1st day of September, A. D. 1873, at the county of Arapahoe and Territory of Colorado, that the said plaintiff unlawfully, wickedly and corruptly, intending to hinder and prevent the free and indifferent election of members of the legislative assembly and other officers to be voted for at the election precinct at the election mentioned in said seventh count aforesaid, and by illegal and corrupt means to stuff the ballot box and to cause illegal and fraudulent ballots fraudulently to be introduced into the said ballot-box used at the said voting precinct in the county and Territory for the election of officers, as mentioned in said seventh count of said plaintiff's declaration aforesaid, did, on the 3d day of September, A. D. 1873, at the county and Territory aforesaid, unlawfully, wickedly and corruptly promise one Albert Cowgill (he, the said Cowgill, being a judge of election at the said precinct and election aforesaid mentioned in the said seventh count of said plaintiff's declaration) a large sum of money, to wit: the sum of four hundred dollars, as a gift, bribe and reward to him, the said Albert Cowgill, to corruptly, wickedly and fraudulently introduce or cause and procure to be introduced a large number, to wit: one hundred illegal and fraudulent ballots into the said ballot-box at the said election aforesaid, and did then and there, in a certain directory, to wit: a city directory of the city of Denver, mark and check off a large number of names, to wit: one hundred, and deliver the said directory with the names so marked and checked off as aforesaid to said Albert Cowgill, and directed and requested him, the said Cowgill, to vote them, that is, to wickedly, corruptly and fraudulently introduce the said names on ballots into

the ballot-box aforesaid at the election mentioned and described in the said seventh count aforesaid, in order and with the intent to induce, procure and corrupt the said Albert Cowgill by means of the said bribe, gift and reward, and the marking and delivering to him of the names in the said directory, as aforesaid, to corruptly, wickedly and fraudulently stuff the said ballot-box, and introduce into the said ballot-box at the said election mentioned in the said seventh count, illegal and fraudulent ballots, to the great obstruction and hindrance of the freedom of election; and the said plaintiff did thereby commit the crimes, misdemeanors and offense of bribery, of attempting to stuff the ballot-box and to introduce fraudulent and illegal ballots into the said ballot-box, and of attempting by bribery and corrupt promises an unlawful interference in the election aforesaid. And the said defendant aforesaid says that the supposed libelous matter and words mentioned in the said seventh count of plaintiff's said declaration were all written and published solely with reference to the committing by the said plaintiff of the said acts of bribery and attempts to stuff the ballot-box hereinbefore described and set forth, and none other. Wherefore the said defendant, at the several times when, etc., in the said seventh count mentioned, at the county and Territory aforesaid, spoke and published of and concerning the said plaintiff the said words in the said count alleged, as it was lawful for him to do for the cause aforesaid. And this the said defendant is ready to verify. Wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him," etc.

The cause was tried at the April term, 1875, resulting in a verdict for the defendant, upon which judgment was entered. To reverse this judgment the plaintiff sued out this writ of error.

The "book of filings," or "memorandum" of filings, the character of which is determined in the opinion, appears from the evidence to have been "a memoranda of filings of

city lots, that were deposited in the office of the probate judge." That it was obtained and kept by the original trustee (James Hall), under the town site act, and was used by him as a matter of convenience merely, as an index to the filings. To the introduction of this book in evidence the plaintiff objected because it was immaterial, because the book was not a record, because it was not required by law to be kept, and was not an authentic matter of a public nature. The objection was overruled and an exception duly reserved.

It does not appear that any evidence was offered at the trial by the defendant to sustain the first special plea to the first count.

Of the instructions given to the jury and upon which error was assigned, it is deemed necessary to give the following :

"It is claimed on behalf of the plaintiff that the article containing quotation from Shakespeare charges the plaintiff with both the crime of murder and the crime of perjury, while the defendant asserts that it charges neither murder nor perjury, nor any other crime than forgery ; that it simply contrasts Richard with Downing, representing the former arraigned at the bar of his own conscience, and convicted by it of murder, perjury, and all other sins, and Downing, unstricken by conscience, affects to laugh at his own forgeries. In determining the true intent and meaning of this article you should look, not only at its heading, the quotation referred to, and the sentence that immediately follows the quotation, but also all of the article in its whole tenor and effect, as well to the witnesses who have testified to the understanding of its meaning, which they respectively had when they first read it, and while the subject was fresh in their minds."

The plaintiff also assigned error upon certain of the instructions, because the court, in such instructions, assumed facts to have been proved which it was the province of the jury alone to determine, and of which the following is one

of a number: "Did Downing ever have the book in his possession? Were the forged entries in the book when he received it? If they were not there in the book, were they therein when he delivered it to his successor? Were the fraudulent forged claims in Downing's handwriting disguised?" etc.

MR. J. Q. CHARLES, MR. E. L. SMITH, and MR. L. B. FRANCE, for plaintiff in error.

MESSRS. SYMES & DECKER, BROWNE & PUTNAM, and MR. THOMAS M. PATTERSON, for defendant in error.

THATCHER, C. J. This was an action on the case for libel, brought by plaintiff in error against the defendant in error in the court below.

The declaration contains seven counts. The first alleges that the defendant had charged the plaintiff with the commission of perjury; the second with the commission of perjury and murder; the third with the commission of perjury; the fourth with the commission of murder; the fifth with the commission of murder; the sixth with the commission of felonious offenses; the seventh with "stuffing the ballot-box" at a certain general election in Arapahoe county. To the whole declaration the plea of the general issue was interposed. To the first count, two pleas of justification were filed, the first of which averred that the plaintiff had forged two certain filings, or applications for lots, purporting to be signed by M. C. Dailey; and the second alleges, that the plaintiff, with intent to defraud the city of Denver, altered and forged a certain registry, or record book, and authentic matter of a public nature, in the office of the probate judge of Arapahoe county, by insertions, interlineations and alterations in writing and figures on certain designated pages of said book.

To the seventh count a plea of justification was filed.

To the counts from the second to the sixth, inclusive of both, the general issue was the sole plea.

An important inquiry relates to the character of the "filing book" introduced in evidence. Can forgery be predicated of it under our statutes?

Sec. 69, chap. 22, p. 208, R. S., provides, "that every person who shall falsely make, alter, forge, or counterfeit any record, or other authentic matter of a public nature * * * shall be deemed guilty of forgery."

Sec. 87 of the same chapter makes it a felonious offense for any "public officer or other person to forge, deface or falsify any document or instrument recorded, or any registry, * * * or to alter, deface or falsify any *minute*, document, book, or any proceeding whatever, of or belonging to any public office within this Territory."

A record is defined by Bouvier, in his law dictionary, to be a written memorial made by a public officer, authorized by law to perform that function, and intended to serve as evidence of something, written, said, or done.

We are satisfied that the probate judge's memorandum-book was not required by law to be kept. It was a convenient book of reference, in which entries were made, generally by the probate judge, who was acting as trustee for the occupants of lots within the limits of the congressional grant, and occasionally by the beneficiaries' attorneys. It contained brief memoranda, purporting to give the names of certain persons who had made applications for lots—the dates such applications were made—whether a deed for the lot or lots applied for had been executed, and in some cases, whether adverse filings had been made on the same lots, and various other minutes which could only be made intelligible by oral testimony. The original applications deposited as required by law, with the probate judge, stood as pleadings in every case of contest between adverse claimants in the probate court. R. S., p. 622. But the trustee's minute in the "filing-book" served no such purpose, nor was it in any sense evidentiary. It was not an authorized memorial of the trustee's acts and proceedings. But if not a record, it is contended that it is an authentic matter of a public nature. Authentic, in legal parlance, means "vested with

all due formalities and legally attested." Webster's Dic. No such claim can be made for this book; nor do we think that it can be asserted that it is a book "of or belonging to any public office." In our opinion, it has no *official* character.

To give to the entries in the memorandum-book, concerning which forgery is charged and proof offered, the inviolable sanctity of a record, or other authentic matter of a public nature, would be an innovation whose consequences would necessarily be mischievous. *Moore v. Kline*, 1 Pen. & Watts, 129; *In re Corryell*, 22 Cal. 179; *Weed v. Weed*, 25 Conn. 344; *State v. Young*, 46 N. H. 266.

The only adjudicated case cited by counsel for defendant in error in support of the view that an alteration or insertion of a minute in the memorandum-book, with intent to defraud (*Ream v. Commonwealth*, 3 Serg. & Rawls, 207), is forgery, does not go to the extent claimed by counsel. In that case, the forgery of which Ream was convicted was of an enrollment, "*directed by law*, and preserved for the use of the public."

Of what efficacy in law was the memorandum of filings purporting to have been made by Alexander Safely and others?

If the memorandum had been genuine, it could affect no legal rights—it could have been the foundation of no legal liability. However reprehensible may have been the conduct of the plaintiff in error, and however corrupt his motives may have been, we are reluctantly impelled to the conclusion that, in no view of the case, were the unauthorized memoranda in the so-called "filing-book," the subject of forgery.

It is assigned for error, that the court instructed the jury that when the truth of the charge is plead in justification, the plea need only be supported by a preponderance of evidence.

As to the soundness of this instruction, the authorities are in conflict. When a person is on trial for a crime, when

life or liberty is in jeopardy, every reasonable doubt arising from the evidence as to his guilt must be resolved in favor of his acquittal. In every such case, if the jury is not satisfied, beyond a reasonable doubt, of the prisoner's guilt, however strongly the evidence may preponderate in that direction, the law will not tolerate a conviction. In civil causes a different rule generally prevails, and although many authorities except from the rule the plea of justification interposed in a civil action for libel, and require that the truth of the charge shall be established beyond a reasonable doubt, we fail to discover any controlling reason for such an exception. When a party, desiring to vindicate his character against the libelous aspersions of others, seeks redress in a court, it would seem but just that controverted questions raised by the pleadings should be tried, and a verdict rendered in accordance with the rules applicable in other civil causes.

In England, there was a substantial reason for requiring a more conclusive degree of certainty of the truth of the charge in a civil action for libel which does not apply in this country. There, if the plea of justification, where a felony had been charged, was sustained by the verdict of a jury, the verdict stood as an indictment. Says Lord KENYON, in *Cook v. Field*, 3 Esp. 133, "where the defendant justifies words which amount to a charge of felony, and proves his justification, the plaintiff may be put upon his trial by that verdict without the intervention of a grand jury." Here no such result follows, and the reason of the rule ceases to operate. Neither life nor liberty is in any degree imperiled by the verdict. No other consequences follow it than follows a verdict in any other civil cause. It does not take the place of an indictment. If the truth of the words published is by a preponderance of evidence proved to the satisfaction of the jury, the plea is sustained. The adoption of this rule does not change or modify the presumption of innocence which the law raises in favor of the plaintiff, nor does it waive the necessity of proving every

element that enters into the crime charged, by evidence of a kind and quantity that in the minds of the jury overturns the case made by the plaintiff. *Ellis v. Buzzell*, 60 Me. 210, reported also in 11 Am. Rep. 204, is a leading case in support of this view. See, also, *Folsom v. Brown*, 5 Foster, 114; *Spruill v. Cooper*, 16 Ala. 791; *Mathews v. Huntley*, 9 N. H. 147; *Kincade v. Bradshaw*, 3 Hawk's Law (N. C.) R. 63.

Where perjury is charged, the evidence of two witnesses, or one witness and corroborating circumstances, is necessary to sustain the plea of justification; but the requisite evidence being adduced however it may conflict with other testimony, as in any other civil case, the jury must weigh it, and will be warranted in finding a verdict in support of the plea, although they may not be satisfied of the truth beyond a reasonable doubt. *Spruill v. Cooper*, cited *supra*.

What meaning the publisher designed should be attached to the language he employed, neither court nor jury, as a general rule, need inquire. But the sense in which it may be understood by those to whom it is published is material. In the absence of ambiguity, words must be taken to mean what they legally import, without regard to the secret intent of the publisher. If in legal contemplation they clearly charge a felony, the publisher cannot be allowed to impute to them at the trial a different meaning. The ordinary and necessary import of the language in Article "A," is, that the plaintiff in error had committed forgery. Whatever meaning the defendant in error may have designed to convey, the language is not capable of any other construction. *Townshend on Slander and Libel*, § 139.

It is insisted that the crimes of perjury, murder and all other sins are imputed to the plaintiff in error by article "B," which is as follows:

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**"MORE FACTS OF JACK DOWNING'S 'REIGN.'
"HOW THE PROPERTY INTERESTS OF DENVER WERE 'LED
TO THE ALTAR.'"**

**"My conscience hath a thousand several tongues ;
And every tongue brings in a several tale ;
And every tale condemns me for a villain.
Perjury ! foul perjury !! in the highest degree ;
Murder ! stern murder !! in the direst degree ;
All several sins, all used in each degree,
Throng to the bar, crying all, Guilty ! Guilty !"**

—Richard III.

"And yet Jack Downing affects to laugh with a low guttural sound, Ha ! ha !! ha !!!"

This language, as applied to the plaintiff in error, is not free from ambiguity, and, to ascertain its meaning, the notorious extraneous circumstances (which were fully disclosed at the trial), under which it was used, may be taken into consideration. In the light of such circumstances, whether the entire article, taken together, having reference not only to the quotation, but to the heading and concluding sentence, are to be interpreted as charging the plaintiff in error with the crimes of murder and perjury, and all other sins, or as only contrasting Richard with the plaintiff in error, "representing the former arraigned at the bar of his own conscience, and convicted by it of murder, perjury, and all other sins, and the plaintiff in error, unstricken by conscience, affecting to laugh at his own forgeries," with the commission of which the defendant in error had before charged him in the Denver Tribune, of which he was the proprietor, was properly submitted to the jury.

The effect of the language in article "B" upon the community (taken as a whole, its meaning is doubtful) could only be determined by a jury, after hearing the testimony of witnesses as to the occasion upon which, and the circumstances under which the language was used. In order to ascertain its sense, the jury should be made to occupy, as

far as possible, the situation of the parties to whom it was published. Says Townshend on Slander and Libel, p. 166 : "For the purpose of its construction, language is to be regarded not merely with reference to the words employed, but according to the sense or meaning which, *all the circumstances of its publication considered*, the language may be fairly presumed to have conveyed to those to whom it was published. The language is always to be regarded with reference to what has been its effect, actual or presumed, and the sense is to be arrived at *with the help of the cause and occasion of its publication*."

Thus, in *Van Rensselaer v. Dale*, 1 Johns. Cases, 279, the language, "John Keating is as damned a rascal as ever lived, and all who joined his party and the procession on the Fourth of July are a set of black-hearted highwaymen, robbers and murderers," in view of the concomitant circumstances, and having reference to the transaction to which it related, did not, it was held, import that Keating and his party were either highwaymen, robbers or murderers. *Quinn v. O'Gara*, 2 E. D. Smith, 388.

The instructions, so far as variant from the rules here laid down for the purpose of determining the meaning of the language used, are erroneous.

Although the instruction that "the defendant is justified in law, and exempt from all responsibility if the matter be true," would be unobjectionable if confined to the counts to which the truth was specially plead in justification, it tended, in the unrestricted form in which it was given, to mislead the jury. Pleas of justification were interposed only to the first and seventh counts. The general issue was the only response to the other five, under which truth could not be proved in justification. The truth must always be specially plead. *Porter v. Botkins*, 59 Penn. 484. Townshend on Slander and Libel, § 409 ; Starkie on Slander and Libel, 543*.

The court refused to instruct the jury, upon the request of the plaintiff, as follows :

"The jury are instructed that if a material part of a plea of justification fails, the plea fails altogether, and if a defendant in an action of libel interposes a plea of justification, and abandons or fails to prove his plea, such failure to prove, or abandonment of the plea, may be taken into consideration by the jury in estimating damages. It is evidence tending to show malice, and continued malice."

The refusal was error. This instruction correctly states the law, and was warranted by the evidence. When the defendant republishes a criminal charge by putting it on the records of the court, he does it at his own risk. If at the trial he fails to prove its truth, he intensifies the injury originally done to the plaintiff. In such case, the failure of truth may properly be considered in estimating damages. *Updegrove v. Zimmerman*, 13 Penn. 621; *Fero v. Ruscoe*, 4 N. Y. 165; *Jackson v. Stetson*, 15 Mass. 48; *Wilson v. Nations*, 5 Yerg. 211; *Spencer v. McMasters*, 16 Ill. 405.

The court erred in assuming, in certain parts of its charge, that forgery and the other crimes imputed to plaintiff in error, had been proved; and that the question for the jury to determine was, whether the plaintiff in error had committed them.

Controverted questions of fact are exclusively for the jury, and it was clearly error in the court to assume that any of the facts in dispute had been established. No authorities need be cited in support of a doctrine so universally recognized.

The judgment of the court below must be reversed with costs and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

HITTSON v. DAVENPORT.

Where a defendant pleads the statute of limitations to a declaration in debt upon a specialty, a reply setting up a new promise is bad on general demurrer.

Appeal from District Court of Arapahoe County.

THE facts are stated in the opinion.

Messrs. MILLER & CLOUGH, for appellant.

Messrs. WELLS, SMITH & MACON, and Mr. G. B. REED, for appellee.

ELBERT, J. This was an action in debt, instituted on two sealed instruments for \$5,000 and \$10,000 respectively, each dated Palo Pinto, Texas, March 14, 1871. The sixth plea interposed by the defendant was, that the cause of action accrued without the Territory of Colorado, more than three years next preceding the institution of the suit. The plaintiff replied, 1st, That the cause of action accrued within three years; and 2d, that the defendant ratified, renewed and confirmed the said writings obligatory at Palo Pinto, Texas, after the lapse of the said three years, and within the three years next preceding the institution of the suit, to wit: on the first day of January, 1874. To this last replication, the defendant filed a general demurrer, which the court overruled, and the defendant electing to abide by his demurrer, judgment was entered thereon. This constitutes the third assignment of error.

Section 16, R. S., 439, under which the plea was interposed, declares "that it shall be lawful for any person, against whom any action shall be commenced, in any court in this Territory, where the cause of action accrued without the Territory, upon a contract or agreement, expressed or implied, more than two years before the commencement of the action, or upon any sealed instrument in writing, or judgment or decree of any court, more than three years

before the commencement of the action, to plead the same and give the same in bar of the plaintiff's right of action."

The first section of the act declares that "*the action shall be commenced within six years next after the cause of action shall accrue, and not afterward.*" This is the formula generally employed by similar statutes, and is that which has received the construction of the courts. The sixteenth section declares that "*it shall be lawful to plead the lapse of the three years, and give the same in bar of the plaintiff's right of action.*"

We are unable to see that the peculiar wording of the sixteenth section enables us to give it any other or different force than if it had adopted the usual prohibitory words of the first section, and said that the actions named therein "shall be commenced within three years, and not afterward." The section simply declares in terms that the defendant in such cases may plead what under the first section it is the practice, without any such provision, to plead, to wit: the fact that the cause of action had not accrued within the statutory time, in bar of the plaintiff's right to recover. To such a plea, equally under the one section as under the other, where the action is assumpsit, the plaintiff might reply a new promise, and if proven it would avail to take the case out of the statute. The question presented in this case upon the pleadings is, will a new promise avail to take a case out of the statute where the action is debt on specialty? The question is not free from difficulty.

It will be observed that under our statute, as well as under that of 21 James I, the removal of the statutory bar by a new promise is not by force of any provision therefore in the statute. The doctrine that a new promise, in action of assumpsit, would take a case out of the statute, appears to have been originally based upon the proposition that the statute was never intended to prevent the recovery of a debt acknowledged to be due, and that a debt so acknowledged did not fairly come within the meaning and intendment of the statute. The statute, then, was regarded by the courts as a statute of presumptions, presuming pay-

ment from lapse of time—a presumption which could not be insisted upon when the debt was acknowledged as subsisting and unpaid. Under this view arose a series of decisions allowing the slightest acknowledgment to take the case out of the statute, which well nigh destroyed its efficacy. In time, however, the statute became to be regarded as a statute of repose, having regard to the peace and welfare of society, “not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge lost.” The promise is no longer regarded as rebutting a presumption of payment, but as a new contract.

After an elaborate review of the decisions of England and America, Mr. Angel says: “That it clearly appears both on principle and authority that the promise is a *new* contract, springing out of, and supported by the original consideration.” Angel on Lim., § 231. The practice, however, continued, of declaring on the old contract and replying the new promise.

While the doctrine allowing a new promise to take an action of *assumpsit* out of the statute is firmly established, it has been very frequently questioned, both in England and America. Sergeant Williams, in *Hodsdon v. Harridge*, 2 Saunders, 64, remarks: “After all it might perhaps have been as well if the letter of the statute had been strictly adhered to; it is an extremely beneficial law, on which the security of all men depends, and is, therefore, to be favored; and although it will now and then prevent a man from recovering an honest debt, yet it is his own fault that he postponed his action so long, besides which the permitting of evidence of promises and acknowledgments within the six years seems to be a dangerous inlet to perjury.” PEARSON, J., quoting this in *Thompson v. Gilbreath*, 8 Jones (N. C.), 495, says: “The justness and force of this remark by a judicious and learned writer has of late years been admitted and yielded to by the courts; and the inclination now is

to adhere to the letter of the statute, except where a departure from it is firmly fixed by a direct authority."

This changed view of the statute and its purposes taken by the courts, and the profession, throws light upon the decisions when the question of the force of a new promise arose in an action of debt.

In the case of *A'Court v. Cross*, 3 Bing. 328, although the action was *assumpsit*, Chief Justice BEST is regarded as stating correctly the doctrine of the English decisions upon this question. He says, referring to the statute of James, "The statute says that actions on the case, account, trespass, debt, detinue and replevin, shall be brought within six years after the cause of action, and not after. These actions, it will be observed, are mentioned in the same section of the act, and the limitation of the time within which they must be brought, is the same in all of them. In all of them, except *assumpsit*, the six years commence from the moment there is a cause of action, and *that time cannot be enlarged by any acknowledgment*. But in *assumpsit* it has been holden that although six years have elapsed since the debt was contracted, if the debtor promises to pay it within six years, he cannot avail himself of the protection of this statute, because this promise, founded on a moral consideration, is a new cause of action." In *Tanner v. Smart*, 6 Barn. & Cres. 603, the court, speaking of the same statute, says: "That although the act places all actions of trespass, detinue, case, etc., on the same footing as to time, it is only in *assumpsit* that an acknowledgment has been held to take from a defendant its protection."

Subsequently, the statute of 9 George IV was enacted, commonly known as Lord Tenterden's act. The first section of this act provided that an acknowledgment or promise must be in writing, and signed by the party chargeable thereby, in order to take a case out of the statute, including in terms "actions of debt" as well as actions upon the case. A similar provision is adopted in statutes of limitation of many of the American States.

From our own statute this important provision is omitted. In such States as have not made a similar provision a part of their act of limitations, we believe the doctrine of the case of *A'Court v. Cross*, *supra*, has been followed, whenever the question arose, without exception.

Speaking of the statute of James, Mr. Angel, in his work on Limitations, § 209, says: "In every form of action but that of assumpsit, the construction has been in unison with the words and policy of the law."

In North Carolina, in the case of the *Governor v. Hanrahan*, 4 Hawks, 44, in an action in debt, on a sheriff's bond against several defendants, TAYLOR, C. J., says: "I think the bar of the statute could not be removed, even by the promise of all when they are sued on the bond, although, if a presumption of payment from length of time had been relied upon, such promise would have been proper and strong evidence, to repel it. But where a positive bar by statute is relied upon, a new promise cannot revive the remedy on the bond."

The same doctrine is held in the case of *Morrison v. Morrison*, 3 Dev. 402, which was an action of debt on simple contract. DANIEL, J., says: "The action of debt being founded on the original contract, the plea of the act of limitations is a bar. The replication that the defendant's intestate promised to pay the debt within three years, next before the time of suing out the writ, is not good."

In *Thompson v. Gilreath*, 3 Jones, 493, PEARSON, J., says: "The doctrine that the statute of limitations can be repelled by proof of a new promise is confined to actions on promises," and this doctrine is re-affirmed by the same judge in the case of *Taylor v. Spivley*, 11 Iredell, 427.

In Alabama, the case of *Crawford et al. v. Childress*, *ex.*, 1 Ala. (N. S.) 483, is an authority to the same effect, and is an instance of the application of the rule in a chancery suit, founded upon specialty.

In Maryland, the case of *Young v. Mackall*, 3 Md. Ch. 400, the Chancellor says: "But the decisions of the courts

are conclusive to show that evidence of this kind is not sufficient, nay, that even an express promise to pay the debt will not revive the remedy upon the bond barred by the statute, though upon such promise suit may be maintained, and the bond, though over twelve years standing, may be offered in evidence as the inducement of the promise," and in support of this cites *Veasy v. Bassett*, 7 Harr. & J. 461; *Lamar v. Mauro*, 10 G. & J. 50. To the same effect is the case of *Carroll v. Lee, etc.*, 3 id. 504.

In Connecticut the same doctrine is held in the cases of *Gustin v. Brattle*, Kirby, 209, and *Fuller v. Hancock*, 1 Root, 238.

In New Jersey, in the case of *Ludlow v. Van Camp*, 2 Halst. 413.

In New Hampshire, in the cases of *Rice v. Wilder*, 4 N. H. 336; *Downer v. Shaw*, 28 id. 151. In the last case cited, Wood, J., says: "No cases have been cited by the vigilant counsel for the plaintiff, nor have we been able, after long and patient research, to find a single case in which a different doctrine has been holden, or even that gives countenance to the idea that the time may be enlarged beyond that mentioned in the statute within which an action may be brought and maintained in any other form of action than assumpsit by reason of the acknowledgment of the debt or payment of any part of it, or even by a new express promise."

We also have been unable to find any case where such a replication has been held good in an action of debt, unless under a statute allowing it. The rule, as held by these authorities, obtains in all actions of debt, without reference to whether the original contract be a simple contract or specialty.

Respecting specialties, we get but little aid from the English authorities, as they were excepted from the operation of the statute.

It seems to us, however, that there is another objection to the replication of a new promise where the original contract is specialty.

In *Field's Case*, 2 Rawle, 351, Chief Justice GIBSON holds that a promise to pay a specialty debt, which has been discharged by a certificate of bankruptcy, does not revive the original debt as a debt by specialty; the original debt is merely a consideration which renders a new promise available. He says: "There is but one case in the English books in which an opinion is intimated that a specialty might be revived by parol. * * * It is impossible to conceive how an instrument can regain its properties once lost, except by a repetition of the solemnities from which it originally derived them."

In *Ludlow v. Van Camp*, 2 Halst. 113, FORD, J., remarks: "It is said that courts of law always allowed a simple contract after it had been barred by the statute of limitations, to be revived by a new promise, in consideration of the old debtor or duty, and therefore a bond may be revived in like manner. But the analogy does not hold, for if the way to revive an old promise is by making a new one, then the way to revive an old debt is by making a new one." See, also, *Graham v. Hunt*, 8 B. Monr. 7.

If it were permissible in such a case to declare upon the original specialty, it is difficult to see how a replication of a new promise could be framed without a departure.

In *assumpsit* the settled practice is to bring the suit on the old contract, and reply the new promise. In such case the new promise supports the declaration, but how can it be said that a parol promise to pay supports a declaration in debt on specialty?

In *Tunner v. Smart*, 6 Barn. & Cres. 603, Lord TENTHEDEN remarks: "When the case of *Hart v. Parker*, 1 B. & A. 92, was decided to be inapplicable to actions of trespass, Lord ELLENBOROUGH gave what appears to be the true reason, that in *assumpsit*, 'an acknowledgment of the debt is evidence of a fresh promise,' and that promise is considered as one of the promises laid in the declaration, and one of the causes of action which the declaration states. If an acknowledgment had the effect which the cases in the

plaintiff's favor attribute to it, one should have expected that the replication to a plea of the statute would have pleaded the acknowledgment in terms, and relied upon it as a bar to the statute. Whereas the constant replication, ever since the statute, to let in evidence of an acknowledgment is, that the causes of action accrued (or the defendant made the promise in the declaration), within six years, and the only principle upon which it can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and as such constitutes a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; when it does not support them (though it may show clearly that the debt has never been paid and is still a subsisting debt) the plaintiff fails."

Again, after reviewing some of the English decisions, he says: "All these cases proceed upon the principle that under the ordinary issue on the statute of limitations an acknowledgment is only evidence of a promise to pay, and unless it is conformable to, and maintains the promises in the declaration though it may show the demonstration that the debt has never been paid and is still subsisting, it has no effect."

The principles of pleading here laid down we think applicable to the replication under consideration. We do not understand it to allege a new delivery of the old contract, but an acknowledgment from which a new promise is to be implied; it is this or it is nothing. Whatever objections may be urged against this section of the law is matter for legislative attention. It is our duty to interpret it as it reads by the light of the authorities. This interpretation must be the same whether the time limited be long or short, so long as the legislature acted within constitutional limits. Under the authorities it must be held that the court erred in overruling the defendant's

demurrer to the second replication, and it follows that evidence of a new promise was not admissible under the first replication to take the case out of the statute. The judgment of the court below is reversed and the cause remanded with directions to enter up judgment of dismissal.

Reversed.

REPLY TO PLEA OF STATUTE OF LIMITATIONS to declaration in debt upon a specialty, setting up new promise, is bad on general demurrer: *Toothaker v. Boulder*, 13 Colo. 225.

MONTI et al. v. BISHOP.

1. A voidable decree must stand as a valid, subsisting decree, unless reversed by a court of review.
2. Where a defendant in a suit in equity obtains affirmative relief upon answer praying only to be "hence dismissed," etc.; and without having filed a cross-bill, he is not in the position of one who alleges error in a decree in his own favor, and is not entitled to relief in this court.
3. Under the laws of Colorado a mere dismissal of a writ of error operates as a *nonsuit*, and not as a technical affirmance of the decree.

Error to Probate Court of Clear Creek County.

MARGARET BISHOP, the defendant in error, filed her bill in the probate court of Clear Creek county, to acquire title under the provisions of chapter eighty-four of the Revised Statutes, to lots numbered eighteen, nineteen and twenty in block number forty, in the town of Georgetown. Monti and Caze, the plaintiffs in error, answered severally, concluding with the general prayer to be "hence dismissed," etc. Replications were put in, and upon the hearing the court decreed, among other things, that the defendant in error was entitled to all of lot eighteen, and the south forty feet of lot nineteen in block forty as described in her complaint, and to a deed of conveyance therefor from the duly constituted corporate authorities, and that the plaintiffs in error were entitled to lot twenty and five feet in width of the north side of lot nineteen in said block. To reverse this decree the plaintiffs in error seek the interposition of this court.

Mr. M. S. TAYLOR, for plaintiffs in error.

Messrs. POST & COULTER, for defendant in error.

Per Curiam. This court held, in the cases of *Tucker v. McCoy*, (*ante*, p. 234), and *Abbott v. Monti* (*ante*, p. 561), that if, in a suit in chancery, the court below should decree to the defendant affirmative relief, upon an answer (in the absence of a cross-bill), praying only that the defendant may be hence dismissed, that such decree would be erroneous. In such case, if the complainant should prosecute his writ of error to this court, he would be entitled to a reversal of the decree. The decree, although voidable, must stand as a valid, subsisting decree, unless reversed by a court of review. The statute contemplates that the complainant shall make all adverse claimants parties defendant, so that the rights of all parties asserting adverse claims to the same property may be determined in the one proceeding. If a defendant in such a suit fails to file his cross bill, and a decree is entered in favor of the complainant upon the allegations and proofs, the defendant may not afterward bring an original suit against the complainant in the first suit. He must assert his rights in the manner prescribed by law in the first proceeding, and by the decree in that suit, unless the same be reversed, he is bound.

In the case before us the defendants in the lower court were decreed to be the owners and entitled to a deed for one lot and forty feet in width of another out of the three lots in controversy, the remaining portion of the lots being decreed to the complainant. The defendants filed no cross bill. Dissatisfied with the decree for one lot and a fraction of another, although having reference to the state of the pleadings, they strictly were entitled to none, they sued out their writ of error. They are in no situation, having reference to their assignment of errors to complain of a decree which gave to them more than they asked. In no conceivable event, in the present state of the pleadings, could they hope for a more favorable decree. The complainants might

well complain that the decree for the defendants is unwarranted by the pleadings. But, hitherto, they have not sued out a writ of error. They have silently acquiesced in the decree. Under our practice either party, complainant or defendant, feeling aggrieved by the decree, is at liberty to prosecute his writ.

The writ of error is a writ of right, to which either party is entitled at any time within the limitation fixed by law. *Harding v. Larkin*, 41 Ill. 419.

A reversal of the decree could not benefit, and would certainly injure Monti and Caze, unless we should allow them to file a cross bill; but they seek the reversal for no such purpose. They are not in the position of one who alleges error in a decree in his own favor and seeks the interposition of a court of review to enable him to amend his pleadings in the court below, or to correct some other error therein, so that an impregnable decree may be entered. In such case he might be entitled to a reversal. 2 Tidd's Practice, 1134; *Jones v. White*, 4 Scam. 338; *Capron v. Van Noorden*, 2 Cranch, 126.

As the plaintiffs in error, having reference to the specifications of error, have not made out a case entitling them to any relief in this court, and as the defendant in error, as far as now appears to us, is content with the decree, we will not in this proceeding disturb it. We are more willing to adopt this conclusion, as, under our laws, a mere dismissal of a writ of error operates as a nonsuit, and not as a technical affirmance of the decree. *Freas v. Englebrecht* (*ante*, p. 377). The plaintiff in error is not precluded from suing out another writ.

The writ will be dismissed with costs.

Dismissed.

IN EQUITY, AFFIRMATIVE RELIEF is only obtainable by cross-bill: *Slaty v. Beebe*, 4 Colo. 52; *Mills v. Buttrick*, 4 Colo. 53.

MERE DISMISSAL OF WRIT OF ERROR, prior to the amendment of the statute in 1887, amounted merely to a nonsuit, and not to a technical affirmance of the judgment, but since 1887 the effect is the same as an affirmance: *McMichael v. Groves*, 14 Colo. 52.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

EXTRA ANNOTATIONS
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NOTES

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CASES IN 3 COLORADO.

3 COLO. 1, WIDNER v. BUTTLES.

3 COLO. 2, MARR v. WETZEL.

Attack on judgment for jurisdictional infirmity.

Cited in *Mortgage Trust Co. v. Redd*, 38 Colo. 458, 8 L.R.A.(N.S.) 1215, 120 Am. St. Rep. 132, 88 Pac. 473; *Hallack v. Loft*, 19 Colo. 74, 34 Pac. 568,—holding that judgment may be attacked for jurisdictional infirmity; *Wilson v. Hawthorne*, 14 Colo. 530, 20 Am. St. Rep. 290, 24 Pac. 548, holding that jurisdiction of defendant may be questioned in action on judgment.

Reversal for error.

Cited in *Colorado C. R. Co. v. Blake*, 3 Colo. 417, holding that error in sustaining demurrer to plea is no ground for reversal, if same defense is available under another plea.

—In admitting evidence.

Cited in *Last Chance Min. & Mill. Co. v. Ames*, 23 Colo. 167, 47 Pac. 382, holding that admission of immaterial evidence is reversible error; *Howe v. Frith*, 43 Colo. 75, 17 L.R.A.(N.S.) 672, 127 Am. St. Rep. 79, 95 Pac. 603, 15 A. & E. Ann. Cas. 1069, holding that admission of improper evidence that probably affected result is reversible error.

Similar pronunciation of names.

Cited in *Moore v. Allen*, 26 Colo. 197, 77 Am. St. Rep. 255, 57 Pac. 698, holding that name "Waldimer" is not *idem sonans* with "Waltimore."

Cited in note in 100 A. S. R. 322, on *idem sonans*.

Limitation to testimony on depositions.

Cited in *Rice v. Ward*, 93 Tex. 532, 56 S. W. 747, holding that testimony must be limited to interrogatories, in taking deposition.

3 COLO. 8, SLOAN SAW MILL & LUMBER CO. v. GUTTSHALL.
Reversal for error in sustaining demurrer.

Cited in *Brown v. People*, 3 Colo. 115, holding that error in sustaining demurrer is no ground for reversal, where defendant has been permitted to litigate all allegations.

What takes case out of statute of frauds.

Cited in *Mighell v. Dougherty*, 86 Iowa, 480, 17 L.R.A. 755, 41 Am. St. Rep. 511, 53 N. W. 402, holding that necessity of harvesting does not take agreement to sell growing grain out of statute of frauds.

Cited in notes in 49 A. D. 339, on delivery and acceptance taking verbal sale of goods out of statute of frauds; 96 A. S. R. 220, on acceptance of goods to satisfy statute of frauds; 10 L.R.A.(N.S.) 639, on subsequent acceptance as taking sale out of statute of frauds.

3 COLO. 15, SCHAEFER v. GILDEA.

Waiver of complete performance.

Cited in *Sutherland*, Dam. 3d ed. 2159, on right to recover for part performance on quantum meruit, where employee permits contractor to proceed with work, after failure to fulfil in point of time.

Cited in note in 115 A. S. R. 259, on acceptance of work as waiver of imperfect performance.

3 COLO. 22, TALPEY v. DOANE.**3 COLO. 26, GLENN v. BRUSH.**

Definition of sham answer.

Cited in *Stokes v. Farnsworth*, 99 Fed. 836, holding that sham answer is one good in form, but false in fact.

Suspension of judgment pending appeal.

Cited in *Sharon v. Hill*, 26 Fed. 337; *Denver & R. G. R. Co. v. Crawford*, 11 Colo. 598, 19 Pac. 673,—holding that judgment is suspended for all purposes pending appeal.

Cited in note in 37 A. S. R. 32, on effect of appeal and right to appeal on conclusiveness of judgment.

3 COLO. 43, TIFFANY v. MORRISON.**3 COLO. 47, LONDONER v. STEWART.**

Admission of secondary evidence.

Cited in *Pringey v. Guss*, 16 Okla. 82, 86 Pac. 292, 8 A. & E. Ann. Cas. 412, holding inadmissible secondary evidence of writing in possession of one not party, in another state.

3 COLO. 51, HADLEY v. FISH.

When writ of error lies in statutory proceedings.

Cited in *Vance v. Rockwell*, 3 Colo. 240, holding that writ of error will not lie to determination of court acting in summary proceed-

ing, not according to course of common law; *Sloan v. Strickler*, 12 Colo. 179, 20 Pac. 611, holding that writ of error lies to review final decree for sale of decedent's land to pay debts; *Pilgrim Consol. Min. Co. v. Teller County*, 20 Colo. App. 311, 78 Pac. 617, holding that writ of error will not lie to review special proceedings for relief from unjust assessment.

3 COLO. 53, GOTTLIEB v. HARTMAN.

Effect of pledge by bailee.

Cited in *Shafer v. Lacy*, 121 Cal. 574, 54 Pac. 72; *Newton v. Cardwell Blue Print & Supply Co.* 41 Colo. 492, 92 Pac. 914,—holding that pledgee acquires no title as against owner, where bailee pledges goods with intent to convert proceeds.

Necessity for demand before action of trover.

Cited in *Muse v. Wright*, 103 Ga. 783, 30 S. E. 662, holding demand before action of trover unnecessary, where it would have been unavailing.

Cited in *Sackett*, *Instruct. Jur.* 3d ed. 1509, on absence of necessity for demand in trover where property was converted.

Cited in note in 24 A. S. R. 808, on conversion of personalty sufficient to sustain trover.

Error in instructions as to credibility of witnesses.

Cited in *Last Chance Min. & Mill. Co. v. Ames*, 23 Colo. 167, 47 Pac. 382; *Ward v. Ward*, 25 Colo. 33, 52 Pac. 1105; *Cameron v. Wentworth*, 23 Mont. 70, 57 Pac. 648,—holding erroneous instruction authorizing jury to disregard entire uncorroborated testimony of witness, probably testifying falsely intentionally.

Cited in note in 86 A. D. 330, on instructing jury to disregard testimony of competent witness.

Distinguished in *Bell v. Kaufman*, 9 Colo. App. 259, 47 Pac. 1035, holding correct, instruction in effect that jury are judges of credibility of witnesses.

Disregard of entire testimony of witness testifying falsely.

Cited in *Sackett*, *Instruct. Jur.* 3d ed. 276, on right to disregard entire testimony of witness, who has wilfully sworn falsely.

Basis of hypothetical question.

Cited in *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577, holding that hypothetical question, framed upon assumption that evidence proves certain facts and within range of evidence, is unobjectionable.

Cited in *Abbott's Crim. Tr.* 2d ed. 329, as to what constitutes proper basis for hypothetical question; *Abbott's Civ. Tr.* 2d ed. 146, on right to base hypothetical question upon hypothesis specially framed on certain facts which evidence tends to establish; *Abbott's Crim. Tr.* 2d ed. 330, on truth of facts assumed in hypothetical question as for jury.

Cited in note in 53 A. R. 308, on hypothetical questions to experts.
Colo. Ann.—6.

Admissibility of opinion of experts.

Cited in *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221, holding that opinion of physician as to sanity of defendant, based upon facts testified to by himself and others, is competent.

3 COLO. 64, WOLFLEY v. LEBANON MIN. CO.**3 COLO. 65, FARLEY v. PEOPLE.**

Appeal from justice's court to district court.

Cited in *Footé v. Walker*, 3 Colo. 339, holding that appeal will not lie from judgment of justice of peace to district court.

3 COLO. 67, RE GARVIN.**3 COLO. 68, GREEN v. PEOPLE.**

Assault at common law.

Cited in *State v. Frisbee*, 142 N. C. 671, 55 S. E. 722, holding that there was no such offense at common law as malicious assault.

Waiver of right of defendant to be present.

Cited in *Smith v. People*, 8 Colo. 457, 8 Pac. 920, 5 Am. Crim. Rep. 615; *State v. Myrick*, 38 Kan. 238, 16 Pac. 330,—holding that right of defendant in prosecution for felony to be present cannot be waived by counsel.

Cited in note in 14 L.R.A.(N.S.) 605, on right of accused to waive presence at receipt of verdict upon trial for felony.

Reception of verdict in absence of defendant.

Cited in *Ex parte Farnham*, 3 Colo. 545, holding error to render verdict in charge of felony during enforced absence of defendant in jail.

3 COLO. 72, BARTELS v. ARMS.

Rights of bailee as to bailment.

Cited in *Jensen v. Eagle Ore Co.* 47 Colo. 306, 107 Pac. 259, holding that bailee cannot refuse to deliver bailment to bailor on ground that stranger is owner.

Recovery in replevin by agent as bar.

Cited in *Messenger v. Northcutt*, 26 Colo. 527, 58 Pac. 1090, holding that recovery in replevin by agent of owner is bar to recovery by owner.

Amendment of allegation in replevin.

Cited in *Abbott's Pleadings*, 2d ed. 1815, on amending allegation of right to possession as agent so as to state absolute ownership.

3 COLO. 77, GOODRICH v. MICHAEL.

Sufficiency of delivery of personalty transferred.

Cited in *Ray v. Raymond*, 8 Colo. 467, 9 Pac. 15, holding that such

delivery as property will admit of is necessary to complete assignment of personality for creditors.

3 COLO. 80, BELL v. RHODES.

3 COLO. 82, COWELL v. COLORADO SPRINGS CO. Affirmed in 100 U. S. 55, 25 L. ed. 547.

Availability on appeal of objection to form of verdict.

Cited in *Rice v. People*, 40 Colo. 377, 90 Pac. 1031, holding that objection that there should have been five separate findings goes to form or verdict and cannot be raised for first time on appeal.

Inclusion of defendants in verdict for "defendant."

Cited in *Waddingham v. Dickson*, 17 Colo. 223, 29 Pac. 177, holding that verdict for "defendant" sufficient where both defendants, though answering separately, make same defense.

Right to object to irregularity of organization of corporation.

Cited in *Cook, Corp.* 6th ed. 1804, on curative effect of legislature's recognition of irregularly incorporated companies; *Cook, Corp.* 6th ed. 1811, on inability of grantor of land to de facto corporation to deny legality of grant on ground of grantee's irregular incorporation.

Validity of condition in deed as to liquors.

Cited in *Judd v. Robinson*, 41 Colo. 223, 124 Am. St. Rep. 128, 92 Pac. 724, 14 A. & E. Ann. Cas. 1018; *Guyer v. Auers*, 132 Ill. App. 520; *Smith v. Barrie*, 56 Mich. 314, 56 Am. Rep. 391, 22 N. W. 816,—holding that condition defeating conveyance if grantee should sell liquor on premises is valid.

Creation of condition subsequent.

Cited in note in 79 A. S. R. 762, on what words create condition subsequent.

Mode of taking advantage of breach of condition.

Cited in notes in 93 A. S. R. 575, on mode of taking advantage of breach of condition subsequent; 44 A. D. 757, on right to avoid deed for breach of conditions subsequent.

3 COLO. 94, KANSAS P. R. CO. v. LUNDIN, Later appeal in 4 Colo. 433.

Liability of railroad company for damage by washing away of roadbed.

Cited in *Farnham, Waters*, 2810, on liability of railroad company for damages resulting from washing away of part of roadbed due to insufficiency of passageway.

Recovery of exemplary damages.

Cited in *Denver, S. P. & P. R. Co. v. Woodward*, 4 Colo. 162, holding that damages recoverable under statute for death are compensatory; *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 366, 5 Pac. 119, holding that exemplary damages cannot be awarded in action for mal-

cious prosecution; *Kansas P. R. Co. v. Cutter*, 19 Kan. 83, on recovery of exemplary damages in action under statute for death.

Cited in *Farnham, Waters*, 2811, on nonliability of railroad company for punitive damages for failure to provide against floods.

Measure of damages for death.

Cited in *Denver, S. P. & P. R. Co. v. Woodward*, 4 Colo. 1; *Mitchell v. Colorado Mill. & Elevator Co.* 12 Colo. App. 277, 55 Pac. 736; *Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352,—holding that compensatory damages are estimated accumulations of deceased during remainder of life, having reference to his age, occupation, habits, bodily health and ability.

Cited in *Sutherland*, Stat. Const. 3d ed. 1292, on construction of word damages in statutes permitting recovery for wrongful death; *Sutherland*, Dam. 8d ed. 3743, on admissibility of evidence of past earnings, habits of industry, sobriety, and mental and physical capacity to aid in estimating damages resulting from death.

Cited in notes in 48 A. D. 639, on measure of damages for death of relative; 1 L.R.A.(N.S.) 199, on evidence of habits and character of person injured or killed, as affecting damages.

Scientific books as evidence.

Cited in note in 40 L.R.A. 556, on scientific books and treatises as evidence.

Use of annuity tables in estimating damages.

Cited in *Rooney v. New York, N. H. & H. R. Co.* 173 Mass. 222, 53 N. E. 435, denying use of annuity tables in determining amount of damages for loss of ability to earn wages.

3 COLO. 195, *JAEGER v. WHITSETT*.

Estoppel from failure to read instrument.

Cited in *Askey v. Fidelity Sav. Assn.* 37 Colo. 432, 86 Pac. 1025, holding that members of loan association, failing to read certificate in pass-book cannot claim that they made deposits under belief that it was savings bank; *Willard v. Ostrander*, 46 Kan. 591, 26 Pac. 1017, holding that vendee, failing to read bill of sale, cannot object to absence of agreed warranty; *Horner v. Lowe*, 159 Ind. 406, 64 N. E. 218, holding that grantee, failing to examine deed, cannot object to absence of agreed covenants; *Crusen v. Pottle*, 3 Neb. (Unof.) 453, 91 N. W. 858, denying relief to grantee from mortgage assumed in deed which he failed to read.

3 COLO. 109, *PACKARD v. SPELLINGS*.

Time of signature of bill of exceptions.

Cited in *Davis v. People*, 23 Colo. 495, 48 Pac. 513, holding that bill of exceptions may be signed and sealed after term within time fixed by court; *Pettit v. People*, 24 Colo. 517, 52 Pac. 676, holding that bill of exceptions signed and sealed by trial court one day after record is certified by clerk cannot be considered as part of record.

3 COLO. 113, MARTIN v. COLE, Affirmed in 104 U. S. 30, 26 L. ed. 647.

Variation of blank indorsement by parol.

Cited in *Doom v. Sherwin*, 20 Colo. 234, 38 Pac. 56; *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145; *Smith v. Caro*, 9 Or. 278,—holding that legal liability of indorser of note in blank cannot be varied by parol.

Cited in note in 17 L.R.A.(N.S.) 840, on right to show by parol that indorsement unrestricted in form was for collection only.

Distinguished in *Kinsel v. Wieland*, 38 Colo. 296, 88 Pac. 153, holding that parol evidence is admissible to show circumstances under which person, not connected with note, indorsed same.

Sufficiency of plea of restrictive indorsement.

Cited in *Dunn v. Ghost*, 5 Colo. 134, holding that plea and offer of proof to make general indorsement, restrictive, or to show that contract was different from that expressed, cannot be done.

3 COLO. 115, BROWN v. PEOPLE.

What constitutes payment into court.

Cited in *People use of Howard v. Cobb*, 10 Colo. App. 478, 51 Pac. 523, holding that payment to clerk of money which he is not, by law, or order of court, authorized to receive, is not payment into court.

Reversal for error in sustaining demurrer.

Cited in *Colorado C. R. Co. v. Blake*, 3 Colo. 417, holding that error in sustaining demurrer is no ground for reversal, if same defense is available under another plea.

3 COLO. 125, KANSAS P. R. CO. v. TWOMBLY, Affirmed in 100 U. S. 78, 25 L. ed. 550.

Disturbance of verdict.

Cited in *Aspen Times Pub. Co. v. Russell*, 18 Colo. 75, 31 Pac. 503, holding that appellate court should not disturb verdict, when supported by competent evidence.

Contributory negligence as matter of defense.

Cited in *Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705; *Denver & R. G. R. Co. v. Ryan*, 17 Colo. 98, 28 Pac. 79; *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348,—holding that contributory negligence is matter of defense.

Province of jury.

Cited in *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848, on province of jury.

Contributory negligence as question for jury.

Cited in *Denver & R. G. R. Co. v. Spencer*, 27 Colo. 313, 51 L.R.A. 121, 61 Pac. 606, holding that question of contributory negligence is for jury, where different minds may draw different conclusions from facts.

3 COLO. 132, KELLER v. KLOPPER.

Evidence in forcible entry.

Cited in note in 77 A. D. 555, on giving title in evidence in forcible entry and detainer.

Against whom action of unlawful detainer is maintainable.

Cited in *Torrey v. Berke*, 11 S. D. 155, 76 N. W. 302, holding action of unlawful detainer not maintainable, where defendant obtained possession under purchase from occupant, holding record title.

Validity of conveyance by married woman.

Cited in *Knight v. Lawrence*, 19 Colo. 425, 36 Pac. 242, holding deed by married woman valid.

3 COLO. 137, BEST v. HOPPIE.

Liability of indorsers of note.

Cited in notes in 27 A. R. 580, on liability of stranger indorsing note; 91 A. D. 711, on liability of stranger indorsing note before delivery; 72 A. S. R. 677, on effect of indorsement by stranger before delivery; 4 Eng. Rul. Cas. 550, on presumptive order of liability among parties to bill or note.

Nonsuit as res judicata.

Distinguished in *Denver & R. G. R. Co. v. Hes*, 25 Colo. 19, 53 Pac. 222, holding that judgment of nonsuit is not bar to subsequent suit on same cause of action.

3 COLO. 139, CITY NAT. BANK v. GOODRICH.

Transfers in fraud of creditors.

Cited in notes in 34 A. S. R. 399, on vendee's knowledge as affecting validity of fraudulent conveyance; 31 L.R.A. 647, on participation in fraudulent intent of debtor which will invalidate transfer to pay or secure debt as to other creditors.

Validity of chattel mortgage where mortgagor retains possession.

Cited in *Wilcox v. Jackson*, 7 Colo. 521, 4 Pac. 966; *Wilson v. Voight*, 9 Colo. 614, 13 Pac. 726; *Brasher v. Christophe*, 10 Colo. 284, 15 Pac. 403; *Eckman v. Munnerlyn*, 32 Fla. 867, 37 Am. St. Rep. 109, 13 So. 922; *Bank of Perry v. Cooke*, 3 Okla. 584, 41 Pac. 628,—holding chattel mortgage void, where mortgagor can keep and sell property and apply proceeds to his own use.

Cited in notes in 31 A. R. 179, on chattel mortgagor's retention of possession as fraud; 18 L.R.A. 606, 613, on effect upon validity of mortgage of merchandise of provision or agreement giving mortgagor possession with power of sale.

3 COLO. 142, KANSAS P. R. CO. v. ROBERSON.

Term of contract of hiring.

Cited in *Bauer v. Goldman*, 45 Colo. 163, 100 Pac. 435, holding that telegram offering weekly salary and letter offering return of railroad

fare if addressee stays one season constitutes hiring by week; *Speeder Cycle Co. v. Teeter*, 18 Ind. App. 474, 48 N. E. 595, holding that hiring at fixed per diem until completion of factory and thereafter indefinitely at different per diem is indefinite hiring; *Grisham v. Lee*, 61 Kan. 533, 60 Pac. 312, holding that, in absence of proof of usage to contrary, indefinite hiring is not to be treated as yearly contract; *Booth v. National India Rubber Co.* 19 R. I. 696, 36 Atl. 714, holding that words, "so long as you do what is right by the company, we will employ you and pay you by the year," imports hiring for indefinite period.

3 COLO. 147, MURPHY v. PEOPLE.

3 COLO. 149, SANBORN v. CREE.

Availability of defect of title to assignee of lease.

Cited in *Norton v. Stroud State Bank*, 17 Okla. 295, 87 Pac. 848, holding that assignee of lease without warranty cannot set up defect of title as defense to note, consideration of assignment.

3 COLO. 152, LOUISVILLE PRIZE MIN. CO. v. SCUDDER.

3 COLO. 155, WINNE v. COLORADO SPRINGS CO.

Effect of pleading conclusion of law.

Cited in *Smith v. Stubbs*, 16 Colo. App. 130, 63 Pac. 955, holding allegation that agreement was valid, an unmixed legal conclusion which must be disregarded.

Discharge of surety.

Cited in *Brandt, Suretyship*, 3d ed. 716, on ground upon which sureties are discharged when tender is made and rejected.

Cited in note in 55 A. S. R. 875, on release of surety.

—By extension of time.

Cited in *Bank of British Columbia v. Jeffs*, 15 Wash. 230, 46 Pac. 247, holding that surety is not discharged by extension of time by agreement too indefinite to be enforceable; *Byers v. Hussey*, 4 Colo. 515, holding that extension of time to discharge surety must bind creditor and preclude him from pursuing his remedy against principal; *Bowling v. Chambers*, 20 Colo. App. 113, 77 Pac. 16; *Clark v. Gerstley*, 26 App. D. C. 205; *McCormick Harvesting Mach. Co. v. Rae*, 9 N. D. 482, 84 N. W. 346,—holding that extension to discharge surety must be upon sufficient consideration and to definite time.

Cited in *Sackett, Instruct. Jur.* (3d ed.) 1435, on release of surety on note by extension of time granted to principal; *Brandt, Suretyship*, 3d ed. 727, on nonrelease of surety unless time is extended for definite period; *Brandt, Suretyship*, 3d ed. 786, on sufficiency of allegation as to extension of time; *Brandt, Suretyship*, 3d ed. 723, on necessity of surety pleading and proving agreement to extend time.

Sufficiency of tender.

Cited in *Davis v. Holbrook*, 25 Colo. 493, 55 Pac. 730, holding that

offer by purchaser to borrow money to pay and dissuasion by vendor is not sufficient tender.

Remission of verdict exceeding ad damnum.

Cited in *Duncan v. Whedbee*, 4 Colo. 143; *Bissell v. Cushman*, 5 Colo. 76,—holding that amount of verdict in excess of ad damnum may be remitted and judgment entered for proper amount.

3 COLO. 163, VENINE v. ARCHIBALD.

Legislative restrictions on right to jury trial.

Cited in note in 98 A. S. R. 539, 540, on conditions and restrictions which legislature may impose on right of trial by jury.

Constitutionality of requirement for pre-payment of jury fee.

Cited in *Conneau v. Geis*, 73 Cal. 176, 2 Am. St. Rep. 785, 14 Pac. 580, holding that court rule requiring prepayment of jury fee is valid; *Williams v. Gottschalk*, 231 Ill. 175, 83 N. E. 141, 12 A. & E. Ann. Cas. 376; *Clayton v. Clark*, 55 N. J. L. 539, 26 Atl. 795; *State ex rel. Clark v. Neterer*, 33 Wash. 535, 74 Pac. 668,—holding that law requiring advance payment of jury fee is constitutional.

Distinguished in *Story v. Walker*, 71 N. J. L. 256, 58 Atl. 349, holding that party demanding jury trial in summary proceedings in justice's court need not pre-pay jury fee.

Instruction ignoring evidence of material fact.

Cited in *Weil v. Nevitt*, 18 Colo. 10, 31 Pac. 487, holding that instruction, ignoring evidence tending to prove material fact, which would change rights of parties, is erroneous.

3 COLO. 169, BROWN v. DENVER.

Relief from illegal tax.

Cited in *Gillette v. Denver*, 21 Fed. 822, holding that equity will not restrain collection of tax on ground of illegality.

Cited in *Cooley*, Tax. 3d ed. 1249, on burden upon person who denies that he receives benefit from special assessment for improvements.

Legislative annexation of territory to municipality.

Cited in note in 27 L.R.A. 745, on power of legislature to annex territory to municipalities.

3 COLO. 173, MOLANDIN v. COLORADO C. R. CO.

Source of jurisdiction of court.

Cited in *Harvey v. Travelers' Ins. Co.* 18 Colo. 354, 32 Pac. 935, holding that court is without jurisdiction to review judgment, if cause is not appealable by statute; *Player v. Bokenfohr*, 40 Fla. 415, 24 So. 472, holding that appellate court cannot recognize any case at law, unless brought to it by writ of error properly issued.

—Consent of parties.

Cited in *Ross v. Duggan*, 5 Colo. 85; *McKenzie v. Ballard*, 14 Colo. 426, 24 Pac. 1; *Kelley v. Union P. R. Co.* 16 Colo. 455, 27 Pac. 1058,—holding that appellate court cannot take cognizance, through stipula-

tion of counsel, of matters not in record; *Peabody v. Thatcher*, 3 Colo. 275; *Filley v. Cody*, 4 Colo. 109; *Whipple v. Stevenson*, 25 Colo. 447, 55 Pac. 188,—holding that jurisdiction over subject-matter of cause cannot be conferred by consent of parties; *Chamberlain v. Hedger*, 10 S. D. 290, 73 N. W. 75, holding that parties cannot, by stipulation, confer jurisdiction upon court of appeal.

Distinguished in *People ex rel. Robinson v. Boughton*, 5 Colo. 487, holding that court may take jurisdiction in agreed case.

3 COLO. 176, *WAGNER v. HALLACK*.

Jurisdiction of justice of peace.

Cited in *Otero County v. Hoffmire*, 9 Colo. App. 526, 49 Pac. 375, holding that jurisdiction of a justice is purely statutory and proceedings must conform to statute; *Denver, S. P. & P. R. Co. v. Roberts*, 6 Colo. 333; *Reynolds v. Larkins*, 10 Colo. 126, 14 Pac. 114,—on statute giving resident debtors a forum at their own doors; *Charles v. Amos*, 10 Colo. 272, 15 Pac. 417, holding statute, requiring suits before justices to be commenced in debtor's township, inapplicable to non-resident debtors.

What constitutes collateral undertaking.

Cited in *West v. Grainger*, 46 Fla. 257, 35 So. 91, holding that oral statement by one partner to employee of third person that his firm would see that he was paid is a collateral undertaking.

Cited in notes in 95 A. D. 253, 254, on oral promise to answer for debt of another; 15 L.R.A.(N.S.) 217, on contemporary promise to pay where benefit inures to another as within statute of frauds.

Passing of title by delivery to carrier.

Cited in note in 22 L.R.A. 426, on passing of title to property by delivery, to carrier for transportation to consignee or vendee.

Effect of shipment C. O. D.

Cited in *State v. American Exp. Co.* 118 Iowa, 447, 92 N. W. 66, holding that express company is agent of consignor, where liquor is shipped C. O. D.; *State v. McAdams*, 106 La. 720, 31 So. 187, holding that *jus disponendi* remains in vendor of goods C. O. D. until payment of price; *State v. Rosenberger*, 212 Mo. 648, 20 L.R.A.(N.S.) 284, 126 Am. St. Rep. 580, 111 S. W. 509, holding that sale C. O. D. is not complete until delivery, acceptance, and payment of price by person ordering goods.

Cited in note in 5 L.R.A.(N.S.) 630, on shipping liquor into another state C. O. D. without previous order as interstate commerce.

3 COLO. 187, *SMITH v. PIPE*.

Availability of equitable defense in ejectment.

Distinguished in *Cheney v. Crandell*, 28 Colo. 383, 65 Pac. 56, holding that equitable defense may be interposed to ejectment.

Conveyance of legal title by trustee.

Cited in *Filmore v. Reithman*, 6 Colo. 120; *Stephens v. Clay*, 17 Colo.

489, 31 Am. St. Rep. 328, 30 Pac. 43,—holding that trustee may divest himself of legal title without compliance with trust.

Purpose of town site acts.

Cited in *Martin v. Hoff*, 7 Ariz. 247, 64 Pac. 445; *Georgetown v. Glaze*, 3 Colo. 230; *Aspen v. Rucker*, 10 Colo. 184, 15 Pac. 791; *Aspen v. Aspen Town & Land Co.* 10 Colo. 191, 15 Pac. 794,—holding that purpose of town site statute is to confer estate upon corporate authorities in their official capacity and limit it to their successors in office until trust is exhausted.

Validity of deed of town site by probate judge.

Cited in *Hanlon v. Hobson*, 24 Colo. 284, 42 L.R.A. 502, 51 Pac. 433, on validity of deed by probate judge of town site; *Ming v. Foote*, 9 Mont. 201, 23 Pac. 515, holding no objection to deed from probate judge that he omitted from his signature county of which he was judge.

Impeachment of deed of town site.

Cited in *Larned v. Jenkins*, 113 Fed. 634, 22 Mor. Min. Rep. 94; *Colorado C. R. Co. v. Smith*, 5 Colo. 160; *Murray v. Hobson*, 10 Colo. 66, 13 Pac. 921; *Anderson v. Bartels*, 7 Colo. 256, 3 Pac. 225,—holding that regular deed of town site by proper authorities cannot be impeached in ejectment for failure to comply with preliminary requisites.

3 COLO. 199, MARTIN v. FORCE.

Power to review judgment upon evidence.

Cited in *Law v. Brinker*, 6 Colo. 555, holding that appellate court is precluded from reviewing judgment, where bill of exceptions does not contain all evidence; *Poire v. Rocky Mountain Transp. Co.* 7 Colo. 588, 4 Pac. 1179, holding that court has no power to review judgment upon evidence, where no exception was reserved to judgment.

Bill of exceptions as pleading.

Cited in *Hoagland v. Cole*, 18 Colo. 426, 33 Pac. 151; *Big Kanawha Co. v. Jones*, 45 Colo. 381, 102 Pac. 171,—holding that bill of exceptions is pleading of aggrieved party and must be construed most strongly against him.

Presumption of regularity of proceedings of lower court.

Cited in *Terry v. Wright*, 9 Colo. App. 11, 47 Pac. 905; *Hughes v. Cummings*, 7 Colo. 138, 2 Pac. 289,—holding that jurisdiction of court of general jurisdiction will be presumed unless contrary appears in record; *Pennington v. McNally*, 11 Colo. 557, 19 Pac. 503, holding that it will not be presumed that appellee had no notice of application to extend time for filing appeal bond; *Behymer v. Nordloh*, 12 Colo. 352, 21 Pac. 37, holding that it must be presumed that proof was sufficient to warrant finding and judgment; *Gomer v. Chaffe*, 5 Colo. 383; *Davis v. Peck*, 12 Colo. App. 259, 55 Pac. 192; *Carnahan v. Connolly*, 17 Colo. App. 98, 68 Pac. 836; *Slaughter v. Strouse*, 20 Colo. App. 484, 79 Pac. 972; *Andrews v. Carlile*, 20 Colo. 370, 38 Pac. 465,—holding that regularity of proceedings of lower court must be presumed until contrary appears in record; *McClelland v. Bullis*, 34 Colo. 69, 81 Pac. 771,

holding that to procure reversal of judgment, it must be shown that court below committed error.

Allowance of supplemental transcript.

Distinguished in *Joralmon v. McPhee*, 29 Colo. 135, 66 Pac. 882, allowing supplemental transcript to bring up order of lower court made after case was at issue on appeal, granting receiver compensation.

3 COLO. 201, LYON v. WASHBURN.

Waiver of objection to jurisdiction.

Cited in *Smith v. District Ct.* 4 Colo. 235; *Behymer v. Nordloh*, 12 Colo. 352, 21 Pac. 37; *Edwards v. Smith*, 16 Colo. 529, 27 Pac. 809; *Pueblo v. Dye*, 44 Colo. 35, 96 Pac. 969; *Washington County v. Murray*, 45 Colo. 115, 100 Pac. 588; *Hall v. Jones*, 45 Colo. 228, 100 Pac. 418,—holding that objection by appellant to jurisdiction after beginning of trial is too late, in case where appellate court could have exercised original jurisdiction.

Foundation for secondary evidence.

Cited in *Avery v. Stewart*, 134 N. C. 287, 46 S. E. 519, holding that statement by witness that letter is lost and cannot be found is insufficient foundation for secondary evidence of contents.

Right of tenant to attorn.

Cited in *Sheaff v. Husted*, 60 Kan. 770, 57 Pac. 976, holding that tenant may attorn to holder of tax deed regular on face.

Estoppel of tenant to deny landlord's title.

Cited in *Microsi v. Phillipi*, 91 Ala. 299, 8 So. 561; *Hodges v. Waters*, 124 Ga. 229, 1 L.R.A.(N.S.) 1181, 110 Am. St. Rep. 166, 52 S. E. 161, 4 A. & E. Ann. Cas. 106,—holding that tenant in possession, attorning to another, is estopped from denying latter's title; *Randall v. Lingwall*, 43 Or. 383, 73 Pac. 1, holding that tenant, attorning to third person, is estopped from denying title either of landlord or third person.

Cited in notes in 89 A. S. R. 103, on estoppel to deny landlord's title; 1 L.R.A.(N.S.) 1183, on right of tenant in possession before taking lease to dispute lessor's title.

3 COLO. 207, SMITH v. MAYER.

Discretion of court in admitting rebuttal evidence.

Cited in *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817, holding within court's discretion to admit in rebuttal evidence which should have been produced in chief.

Availability of breach of warranty to vendee retaining goods.

Cited in *Minnesota Thresher Mfg. Co. v. Hanson*, 3 N. D. 81, 54 N. W. 311, holding that use of machinery purchased under warranty after knowledge of defects will not destroy buyer's right to plead breach of warranty to defeat recovery of price.

3 COLO. 211, PACKARD v. KING.

Adjustment of equities in partition.

Cited in *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691, 77

N. W. 80, holding that in partition co-tenant is entitled to reimbursement for purchase of outstanding tax titles and for improvements. Limitation of time for redemption from judicial sale.

Distinguished in *Nippel v. Hammond*, 4 Colo. 211; *Denver Brick & Mfg. Co. v. McAllister*, 6 Colo. 261,—holding that court may limit to very short period time for redemption from sale under trust deed.

3 COLO. 216, DENVER v. LOBENSTEIN.

Res judicata.

Cited in *Breeze v. Haley*, 11 Colo. 351, 18 Pac. 551, holding that adjudication in prior suit between same parties of validity of taxes is complete defense to action to enjoin their collection.

3 COLO. 221, FILLEY v. CODY.

Requirement of cost bond before suit by nonresident.

Cited in *Sutro v. Simpson*, 14 Fed. 370; *Edgar Gold & S. Min. Co. v. Taylor*, 10 Colo. 110, 14 Pac. 113,—holding that non-resident must file cost bond before commencing suit.

Writ of error as new suit.

Cited in *Willoughby v. George*, 4 Colo. 22; *Connor v. Connor*, 4 Colo. 74; *Ohio-Colorado Min. & Mill. Co. v. Elder*, 47 Colo. 63, 99 Pac. 42,—holding that writ of error is new suit.

3 COLO. 222, LAS ANIMAS COUNTY v. BOND.

3 COLO. 224, ATLANTIC INS. CO. v. MANNING.

Effect on insurance of tenant's breach of condition.

Cited in note in 12 L.R.A.(N.S.) 485, on effect upon insurance of tenant's breach of condition.

Construction of ambiguous' policy.

Cited in *Strauss v. Phenix Ins. Co.* 9 Colo. App. 386, 48 Pac. 822; *Preferred Acci. Ins. Co. v. Fielding*, 35 Colo. 19, 83 Pac. 1013, 9 A. & E. Ann. Cas. 916,—holding that policy, capable of two constructions, must be construed most favorably to insured.

Permission to introduce evidence after motion for nonsuit.

Cited in *Kelly v. E. F. Hallack Lumber & Mfg. Co.* 22 Colo. 221, 43 Pac. 1003, holding that permission to plaintiff to introduce further evidence after motion for nonsuit is discretionary and not reviewable.

Waiver by objections upon other grounds.

Cited in *Montelius v. Atherton*, 6 Colo. 224, holding that objections for want of notice or of tender are waived by defendant placing his refusal to act upon other grounds.

— *Of objection as to proofs of loss.*

Cited in *Lampkin v. Travelers' Ins. Co.* 11 Colo. App. 249, 52 Pac. 1040, holding that refusal to pay accident policy on ground of misrepresentation in application waives requirement for proofs of injury; *California Ins. Co. v. Gracey*, 15 Colo. 70, 22 Am. St. Rep. 376, 24 Pac. 577, hold-

ing that absolute refusal to pay loss in any event is waiver of requirement of proofs of loss; *National Mut. F. Ins. Co. v. Sprague*, 40 Colo. 344, 92 Pac. 227, holding that right to demand proof of loss is waived by refusal to pay loss on ground of no delivery of policy or payment of premium; *Hartford F. Ins. Co. v. Hammond*, 41 Colo. 323, 92 Pac. 686, holding that failure to file proofs of loss is waived by refusal to pay loss because insured overestimated loss.

Cited in *Sutherland, Dam.* 3d ed. 2449, on waiver of proofs by insurer as compliance with condition in policy that preliminary proofs should be made.

Proof of genuineness of reply letter.

Cited in note in 17 L.R.A.(N.S.) 229, on necessity for proof of genuineness of reply letter.

Variance between pleading and proof.

Distinguished in *Bishop v. Griffith*, 4 Colo. 68, holding that allegation of performance of contract cannot be supported by proof of performance of substituted contract.

Competency of witness as to handwriting.

Cited in *State v. McBride*, 30 Utah, 422, 7 L.R.A.(N.S.) 557, 85 Pac. 440, 8 A. & E. Ann. Cas. 1030, holding that witness, who has not seen genuine specimen of defendant's writing, nor seen him write, is incompetent to testify that letters received were written by him.

Cited in *Abbott's Facts*, 2d ed. 380, on competency of person who has received letters from party as witness as to handwriting.

3 COLO. 229, STERLING CITY GOLD & S. MIN. CO. v. HUGHES.

Maintenance of action against sureties in first instance.

Distinguished in *Newman v. People*, 4 Colo. App. 46, 34 Pac. 1006, holding that action can be brought against sureties on constable's bond before suit against constable.

3 COLO. 230, GEORGETOWN v. GLAZE.

Purpose of town site acts.

Cited in *Martin v. Hoff*, 7 Ariz. 247, 64 Pac. 445; *Aspen v. Rucker*, 10 Colo. 184, 15 Pac. 791,—holding that purpose of town site acts was to vest trust powers, not in corporation, but in corporate officials in their politic capacity.

3 COLO. 235, DENVER v. CAPELLI.

Requisites of bill of exceptions.

Cited in *Williams v. People*, 25 Colo. 251, 53 Pac. 509, holding that bill of exceptions must be signed and sealed by trial judge in time fixed by order of court; *Big Kanawha Co. v. Jones*, 45 Colo. 381, 102 Pac. 171; *Maher v. Renshaw*, 45 Colo. 567, 102 Pac. 1074,—holding that bill of exceptions must bear seal of judge who presided at trial.

Waiver by stipulation of requirement of seal to bill of exceptions.

Cited in *Marshall Silver Min. Co. v. Kirtley*, 8 Colo. 108, 5 Pac. 649,

holding that statute requiring judge's seal to be attached to bill of exceptions is mandatory and cannot be waived by stipulation of parties. Review of matters not properly in record.

Cited in *McKenzie v. Ballard*, 14 Colo. 426, 24 Pac. 1; *Ross v. Dugan*, 5 Colo. 85,—holding that appellate court cannot consider matters of evidence upon stipulation merely and not properly brought up by record; *State Bank v. Plummer*, 46 Colo. 71, 102 Pac. 1082, holding that authentication of copy of record of judgment as required by law is essential to jurisdiction of appellate court.

3 COLO. 236, DENVER v. CAPELLI.

Effect of failure of judge to sign bill of exceptions in time.

Cited in *Widner v. Walsh*, 3 Colo. 418; *Swem v. Green*, 9 Colo. 358, 12 Pac. 202; *Williams v. People*, 25 Colo. 251, 53 Pac. 509,—holding that party, tendering bill of exceptions in time, will not be prejudiced by failure of judge to sign bill within prescribed time.

3 COLO. 238, MUNRO v. KING, 12 MOR. MIN. REP. 160.

Contemporaneous agreement as part of note.

Cited in *Frost v. Fisher*, 13 Colo. App. 322, 53 Pac. 872, holding that contemporaneous agreement becomes part of note.

What admissible in evidence under general issue.

Cited in *Heaton v. Myers*, 4 Colo. 59, holding that subsequent written agreement, showing contingency on which payment of note depends, is admissible under general issue.

Pleading of defenses to note.

Cited in *Fairbanks v. Irwin*, 15 Colo. 366, 25 Pac. 701, holding that failure of consideration must be specially pleaded in action on note.

Distinguished in *Watson v. Lemen*, 9 Colo. 200, 11 Pac. 88, holding that defense that note is not due must be specially pleaded.

Condition precedent to enforcement of promise to pay.

Cited in *Rollins v. Denver Club*, 43 Colo. 345, 18 L.R.A.(N.S.) 733, 96 Pac. 188, holding that before promise to pay depending on contingency can be enforced, it must be averred and found that contingency has happened.

3 COLO. 240, VANCE v. ROCKWELL.

When writ of error lies in special proceeding.

Cited in *Pilgrim Consol. Min. Co. v. Teller County*, 20 Colo. App. 311, 78 Pac. 617, holding that writ of error will not lie from court of appeals to judgment of district court in special proceeding for relief from unjust tax; *Sloan v. Strickler*, 12 Colo. 179, 20 Pac. 611, holding that writ of error will lie to decree of probate court for sale of decedent's land for debts.

Grounds for dismissal of writ of error.

Cited in *Bean v. People*, 6 Colo. 98, holding that what is sufficient to reverse judgment can never be cause to quash writ of error.

3 COLO. 248, WEBBER v. EMMERSON.

Sufficiency of exceptions to charge.

Cited in *Bradbury v. Allen*, 13 Colo. App. 208, 57 Pac. 490, holding that exception to each separate numbered instruction is sufficient without stating grounds of objection; *Schollay v. Moffitt-West Drug Co.* 17 Colo. App. 126, 67 Pac. 182, holding that general exception to charge embracing distinct legal propositions is not available, if any one proposition is sound; *Schmidt v. Stecker*, 3 Colo. 273; *Wilson v. People*, 3 Colo. 325; *Coon v. Rigden*, 4 Colo. 275; *Wooton v. Seigel*, 5 Colo. 424,—holding that exceptions taken to instructions en masse are insufficient to bring up errors for review; *Gibbs v. Wall*, 10 Colo. 153, 14 Pac. 216, holding that exception to each of instructions given on request of defendants is sufficient; *Keith v. Wells*, 14 Colo. 321, 23 Pac. 991, holding that exception to giving of charge and each several proposition of law therein contained is insufficient; *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076, holding that exceptions to general charge to be available on appeal must point out particular errors; *Portland Gold Min. Co. v. O'Hara*, 45 Colo. 416, 101 Pac. 773, holding that general exception to refusal of whole series of instructions, some of which are improper, will not be considered; *Buck v. Territory*, 1 Okla. Crim. Rep. 517, 98 Pac. 1017, holding that practice of taking exceptions to each and every instruction given to jury, while permissible, is not to be commended.

Distinguished in *Kansas P. R. Co. v. Ward*, 4 Colo. 30, holding that exception to refusal to give instructions, consisting of separate and independent propositions of law, and each of them is sufficient.

Construction of bill of exceptions.

Cited in *Rice v. Ross*, 9 Colo. App. 552, 49 Pac. 368, holding that bill of exceptions must be taken most strongly against party excepting and no intendments can be made in his favor.

Sufficiency of general objection to evidence.

Cited in *Davis v. Hopkins*, 18 Colo. 153, 32 Pac. 70, holding that general motion to strike out all of evidence, partly material, of witness will be denied; *Percy Consol. Min. Co. v. Hallam*, 22 Colo. 233, 44 Pac. 509, holding that general objection that contracts, as introduced in evidence, were not contracts declared upon in complaint, will not be considered on appeal.

Liability of mortgagee in possession of property.

Cited in *First Nat. Bank v. Wilbur*, 16 Colo. 316, 26 Pac. 777, holding that mortgagee in possession after condition broken is bound to account for any surplus after payment of his debt.

Cited in note in 16 A. S. R. 499, on rights and remedies of chattel mortgagor on wrongful sale of property.

3 COLO. 255, MELLOR v. VALENTINE.

Estoppel to claim ownership of land.

Cited in *Wadge v. Kittleson*, 12 N. D. 452, 97 N. W. 856, holding

that vendor, telling his mortgagee, in vendee's presence of his sale to latter who pays mortgage, is estopped from claiming ownership of land.

With whom contract to be made to establish lien.

Cited in *Johnston v. Bennett*, 6 Colo. App. 362, 40 Pac. 847, holding that contract for work or materials must be made with owner, his agent or trustee, to establish lien; *Folsom v. Cragen*, 11 Colo. 205, 17 Pac. 515, holding that laborers contracting with husband are not entitled to lien against wife; *Rico Reduction & Min. Co. v. Musgrave*, 14 Colo. 79, 23 Pac. 458, holding that it is sufficient to give lien, if contract was made with authorized agent of owner; *National Bank v. Williams*, 38 Fla. 305, 20 So. 931, holding that interest of owner is not subject to lien by laborers for persons operating mill in their own name under contract to purchase; *Fletcher v. Stedman*, 159 Mass. 124, 34 N. E. 169, holding that order for materials by partner in behalf of firm is sufficient to give lien.

Date of attachment of lien.

Cited in *Keystone Min. Co. v. Gallagher*, 5 Colo. 23; *Morrison v. Carey-Lombard Co.* 9 Utah, 70, 33 Pac. 238,—holding that mechanic's lien attaches on date of commencement to work or furnish materials.

Cited in notes in 14 L.R.A. 307, as to when mechanics' liens are superior to earlier mortgages; 16 L.R.A. 336, on relation back of sub-contractor's lien to date of original contractor's.

What constitutes continuous agreement for materials.

Cited in *Albright v. Smith*, 2 S. D. 577, 51 N. W. 590, holding that agreement to furnish lumber and subsequent agreement on same day to furnish glass for same building is one continuous agreement.

§ COLO. 260, MELLOR v. VALENTINE.

Right of cotenant to subject land to lien.

Cited in *Robert Garrett Lumber Co. v. Loftus*, 82 Kan. 556, 109 Pac. 179, holding that tenant cannot subject interests of his cotenants to mechanic's lien.

Effect on lien of description of too much land.

Cited in *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744, holding that description of too large a tract of land will not defeat mechanic's lien.

§ COLO. 265, PATTON v. COEN & T. B. CARRIAGE MFG. CO.

When evidence is reviewable.

Cited in *Barker v. Hamilton*, 3 Colo. 291, holding that admission of improper evidence, duly excepted to, may be reviewed; *Hoppie v. Best*, 4 Colo. 555; *Colorado Springs Co. v. Hopkins*, 5 Colo. 206; *Law v. Brinker*, 6 Colo. 555; *Whitehead v. Jessup*, 7 Colo. App. 460, 43 Pac. 1042; *Nelson v. First Nat. Bank*, 8 Colo. App. 531, 46 Pac. 879; *Jerome v. Bohm*, 21 Colo. 322, 40 Pac. 570,—holding that in absence of excep-

tion to final judgment, sufficiency of evidence cannot be reviewed, but other assignments of error may be considered.

Distinguished in *Bradbury v. Alden*, 13 Colo. App. 208, 57 Pac. 490, holding that rule that sufficiency of evidence will not be reviewed in absence of exception to judgment is inapplicable to judgment upon verdict of jury.

Property assignable.

Cited in *Chamberlin v. Gilman*, 10 Colo. 94, 14 Pac. 107, holding that assignment can be made by keeper of boarding-house for railroad employees of boarding dues which railroad agreed to deduct from employees' pay.

Necessity of allegation and proof of use.

Cited in *County Comrs. v. Sloan*, 5 Colo. 38, holding it unnecessary to allege or prove use, in action brought by one for use of another.

3 COLO. 273, SCHMIDT v. STECKER.

3 COLO. 275, PEABODY v. THATCHER.

Appealability of judgment for costs.

Cited in *County Comrs. v. Sloan*, 4 Colo. 128; *McClaskey v. Lake View Min. & T. Co.* 18 Colo. 65, 31 Pac. 333,—holding that judgment for costs only is not appealable.

Acquisition of jurisdiction by consent.

Cited in *Francis v. Wells*, 4 Colo. 274, holding that parties cannot confer jurisdiction by consent.

— On appeal.

Cited in *Thorne v. Ornauer*, 6 Colo. 39; *Hall v. Pay Rock Consol. Min. Co.* 6 Colo. 81; *Crane v. Farmer*, 14 Colo. 294, 23 Pac. 455; *Harvey v. Travelers' Ins. Co.* 18 Colo. 354, 32 Pac. 935,—holding that joinder in error does not cure want of jurisdiction.

Compliance with statute as basis of appeal.

Cited in *Haley v. Elliott*, 20 Colo. 199, 37 Pac. 27, holding that appellate court does not acquire jurisdiction, where statute providing for appeal has not been complied with.

3 COLO. 275, COLORADO SPRINGS CO. v. HEWITT.

3 COLO. 279, BARTELS v. HOEY.

Costs on dismissal for want of jurisdiction.

Cited in *Dever v. Mortragon*, 4 Colo. 255, holding that dismissal of appeal from justice's judgment for want of jurisdiction must be without costs; *Thurston County v. Scammell*, 7 Wash. 94, 34 Pac. 470, holding that neither party can be awarded costs, when statutory action is dismissed because of repeal of statute during its pendency.

Distinguished in *Clendenning v. Guise*, 8 Wyo. 91, 55 Pac. 447, holding that district court, on reversing justice's judgment for want of jurisdiction may award costs in both courts.

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Disapproved in *Kinnear v. Flanders*, 17 Colo. 11, 28 Pac. 327, holding that costs should be taxed against intervenor, on dismissal of judgment for want of jurisdiction in intervention proceedings; *Kent v. Labette County*, 42 Kan. 534, 22 Pac. 610; *State v. Thompson*, 81 Mo. 163,—holding that, on dismissal of appeal for want of jurisdiction, court may award judgment against appellant for costs.

Statute as basis of jurisdiction on appeal.

Cited in *Harvey v. Travelers' Ins. Co.* 18 Colo. 354, 32 Pac. 935, holding that court is without jurisdiction to review judgment, if cause is not appealable by terms of statute.

3 COLO. 280, MERCHANTS' DISPATCH & TRANSP. CO. v. CORNFORTH, 25 AM. REP. 757.

Who are common carriers.

Cited in *Merchants' Despatch Transp. Co. v. Bloch Bros.* 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881, holding that transportation company transporting goods through agency and over lines of other carriers is common carrier.

Cited in *Hutchinson*, Car. 3d ed. 80, on "dispatch companies" as governed by same rules of responsibility as common carriers.

Liability of carriers.

Cited in *Hutchinson*, Car. 3d ed. 550, on liability of railroad for loss by fire caused by using defective cars.

Stipulation against negligence—By bailee.

Cited in *Denver Public Warehouse Co. v. Munger*, 20 Colo. App. 56, 77 Pac. 5, on right of warehouseman to stipulate against liability for negligence.

—By carrier.

Cited in *Milton v. Denver & R. G. R. Co.* 1 Colo. App. 307, 29 Pac. 22; *Union P. R. Co. v. Rainey*, 19 Colo. 225, 34 Pac. 986,—holding that carrier cannot divest himself of liability, either by special contract or notice, for negligence; *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 640, holding that carrier cannot by contract limit its liability for injuries to passenger, traveling on pass, from negligence.

Cited in notes in 32 Am. Dec. 497, 500, on limitation of carrier's liability; 5 Eng. Rul. Cas. 348, on special limitations of liability of carrier; 57 A. R. 398, on right of carrier to limit liability for injury due to negligence; 13 A. S. R. 783, on extortion of unauthorized stipulations from shippers and their effect; 4 Eng. Rul. Cas. 695, on exemption of carrier from liability for negligence by exceptions contained in bill of lading.

Duty of carrier as to perishable goods.

Cited in *Beard v. Illinois C. R. Co.* 79 Iowa, 518, 7 L.R.A. 280, 18 Am. St. Rep. 381, 44 N. W. 800; *Brennisen v. Pennsylvania R. Co.* 100 Minn. 102, 110 N. W. 362, 10 A. & E. Ann. Cas. 169; *Baker v. Boston & M. R. Co.* 74 N. H. 100, 124 Am. St. Rep. 937, 65 Atl. 386,

12 A. & E. Ann. Cas. 1072,—holding that carrier of milk, fruit and butter must furnish cars with icing facilities.

Cited in Sackett, *Instruct. Jur.* (3d ed.) 1119, on liability of carrier for loss of perishable property as question for jury.

Cited in notes in 18 L.R.A.(N.S.) 509, on duty of carrier to furnish car adapted to subject of shipment; 90 A. S. R. 301, on cold storage; 15 L.R.A.(N.S.) 801, on liability of carrier for failure to adjust ventilators; 31 A. R. 567, on carrier's liability for decay of goods during transportation.

Distinguished in *Carr v. Schafer*, 15 Colo. 48, 24 Pac. 873, holding that carrier is not liable for injury to perishable goods from frost because of unsuitableness of vehicles selected by shipper.

3 COLO. 284, TUCKER v. McCOY, Later appeal in 8 Colo. 368, 8 Pac. 667.

Necessity for cross-bill to obtain affirmative relief.

Cited in *Abbott v. Monti*, 3 Colo. 561; *Monti v. Bishop*, 3 Colo. 605; *Mills v. Buttrick*, 4 Colo. 123; *San Juan & St. L. Min. & S. Co. v. Finch*, 6 Colo. 214; *Bessemer Irrig. Ditch. Co. v. Woolley*, 32 Colo. 437, 105 Am. St. Rep. 91, 76 Pac. 1053,—holding that defendant in chancery suit must seek affirmative relief by cross-bill and state grounds with same strictness required of plaintiff in original bill.

3 COLO. 287, SEARS v. SMITH.

Continuation of lease by holding over.

Cited in *Zippar v. Reppy*, 15 Colo. 260, 25 Pac. 164; *Burkhard v. Mitchell*, 16 Colo. 376, 26 Pac. 657,—holding that tenant under lease for year, holding over, becomes tenant for another year on same terms; *Houck v. Williams*, 34 Colo. 138, 81 Pac. 800, holding that new lease upon same terms is not implied from holding over by tenant, when new agreement has been made.

Validity of oral lease for year.

Cited in *Hayes v. Arrington*, 108 Tenn. 494, 68 S. W. 44; *Bateman v. Maddox*, 86 Tex. 546, 26 S. W. 51; *Baumgarten v. Cohn*, 141 Wis. 315, 124 N. W. 288,—holding oral lease for year to begin in future, valid.

3 COLO. 291, BARKER v. HAMILTON.

Power of infant to affect other's rights.

Cited in *Richey v. Brown*, 58 Mich. 435, 25 N. W. 886, holding that minor cotenant cannot give valid license to remove timber.

3 COLO. 293, VANCE v. MARONEY.

In what court creditor of estate may sue.

Cited in *Jones v. Perot*, 19 Colo. 141, 34 Pac. 728, holding that creditor of estate in course of administration in probate court may, at his option, bring suit in district court.

What reviewable on writ of error.

Cited in *Sloan v. Strickler*, 12 Colo. 179, 20 Pac. 611, as to what is reviewable on writ of error for purpose of testing validity of decree of sale of decedent's realty for debts.

3 COLO. 296, WOLFLEY v. LEBANON MIN. CO.**Power of court to amend record.**

Cited in *Breene v. Booth*, 3 Colo. App. 470, 33 Pac. 1007; *Pleyte v. Pleyte*, 15 Colo. 44, 24 Pac. 579,—holding that courts have inherent power to correct clerical misprisions of their clerks; *Seeley v. Taylor*, 17 Colo. 70, 28 Pac. 461, holding that record may be amended upon proper notice so as to show personal service of summons.

Practice on amendment of record.

Cited in *Knox v. McFerran*, 4 Colo. 348, on granting of opportunity to appellee to apply to court below to amend bill of exceptions; *Pleyte v. Pleyte*, 14 Colo. 593, 23 Pac. 1007, on practice to secure correction by court below of misprisions of clerk in making certain record entry; *Maher v. Renshaw*, 45 Colo. 567, 102 Pac. 1074, on necessity of notice of motion for amendment of record.

Nunc pro tunc entry of judgment.

Cited in note in 4 A. S. R. 828, on nunc pro tunc entry of judgments.

3 COLO. 298, LILLEY v. RANDALL.**Remedies of vendee for fraud.**

Cited in *Herfort v. Cramer*, 7 Colo. 483, 4 Pac. 896, holding that, on discovery of fraud, vendee may rescind sale or retain property and recover damages for fraud; *Collins v. Townsend*, 58 Cal. 608; *History Co. v. Flint*, 4 Tex. App. Civ. Cas. (Willson) 364, 15 S. W. 912,—holding that affirmance of contract by vendee after discovery of fraud merely extinguishes his right to rescind, but his other remedies remain unimpaired.

Measure of damages for fraud.

Cited in *Pike's Peak Paint Co. v. Masury*, 19 Colo. App. 286, 74 Pac. 796, holding that measure of damages for fraud is difference between value of goods sold and value if as represented.

3 COLO. 304, HITTSON v. BROWNE.**Recovery of compensation for unlawful acts.**

Cited in *Garst v. Love*, 6 Okla. 46, 55 Pac. 19, holding that person, unlawfully fencing in government land, cannot recover compensation from others for pasturage of their cattle.

Cited in notes in 117 A. S. R. 507, on contract, consideration for which has partly failed or is partly illegal; 2 L.R.A.(N.S.) 394, on right of unlicensed to recover for services rendered by licensed person; 12 L.R.A.(N.S.) 578, 579, 614, on validity of contracts in business which it is misdemeanor to transact.

—By unlicensed attorneys.

Cited in *Bachman v. O'Reilly*, 14 Colo. 433, 24 Pac. 546, holding that unlicensed person cannot recover compensation for legal services.

Distinguished in *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063, holding that person, though not attorney, can recover for services performed before U. S. land department.

Joint action by licensed and nonlicensed persons.

Cited in *Hall v. Allen*, 46 Colo. 355, 104 Pac. 489, holding that action for medical services by licensed physician in connection with one not a physician will not lie in partnership name.

Distinguished in *Leichsenring v. Allen*, 12 Colo. 168, 20 Pac. 332, holding that attorney and accountant can maintain joint action for advice to person as to sale of mine.

3 COLO. 313, MOFFAT v. DICKSON.

Construction of term "forthwith."

Cited in *Anderson v. Goff*, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; *Calvert v. Calvert*, 15 Colo. 390, 24 Pac. 1043,—holding that "forthwith" in order of publication as to deposit of summons in postoffice means on same day; *Gunn v. Lauder*, 10 N. D. 389, 87 N. W. 999, holding that term "forthwith" in statutes regulating official duties means promptly and with all convenient dispatch; *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113, holding that word "forthwith" in statutory requirement of deposit by sheriff of copy of appraisalment in office of clerk of court means immediately; *Baker v. Smelser*, 88 Tex. 26, 23 L.R.A. 163, 29 S. W. 377, holding that word "forthwith" in statute as to filing chattel mortgage means with all reasonable diligence and dispatch.

3 COLO. 315, CHAPIN v. WHITSETT.

Optional power in mortgage as to default.

Cited in *Barbee v. Scoggins*, 121 N. C. 135, 28 S. E. 259, holding that exercise of power in mortgage to declare deferred payments due is optional.

Duty of mortgagee to take possession of chattels on default.

Cited in *Dole v. Bank of Akron*, 8 Colo. App. 127, 45 Pac. 226, holding that, if mortgagee fails to take possession of chattels upon default, mortgage is void as to purchasers or creditors; *Allen v. Steiger*, 17 Colo. 552, 31 Pac. 226, holding that mortgagee must take possession of property within reasonable time after maturity of debt.

Cited in note in 96 A. S. R. 688, on title and rights of holder of chattel mortgage after condition broker.

Defects in certificate of acknowledgment.

Cited in note in 108 A. S. R. 531, as to when defects in certificates of acknowledgment are fatal.

3 COLO. 318, COOPER v. AMERICAN CENT. INS. CO.

Continuance of term after term in another county.

Distinguished in *Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. 1032, holding that term of district court in one county may be lawfully adjourned to day succeeding intervening term in another county.

Validity of judgment at unauthorized place or time.

Cited in *Williams v. Reutzel*, 60 Ark. 155, 29 S. W. 374, holding that judgment of court held at unauthorized place is void; *Filley v. Cody*, 4 Colo. 109; *People ex rel. Montrose County v. Hebel*, 19 Colo. App. 523, 76 Pac. 550; *Francis v. Wells*, 4 Colo. 274,—holding that judgment rendered in vacation at chambers is void; *O'Brophy v. Era Gold Min. Co.* 36 Colo. 247, 85 Pac. 679, holding that judge has no authority to render judgment when not present in court.

Cited in notes in 33 L.R.A. 88, on power of officials to act, as determined by place of performance; 41 L.R.A. 563, 564, on validity of proceedings in course of a trial outside of courtroom.

Distinguished in *Terpening v. Holton*, 9 Colo. 306, 12 Pac. 189, holding that clerk may enter valid judgment upon referee's report in vacation.

Definition of judgment.

Cited in *Martin v. Simpkins*, 20 Colo. 438, 38 Pac. 1092, holding that judgment is decision, by regularly constituted court, in proceedings within its jurisdiction, upon evidence, affecting rights of parties; *McKnight v. Ballif*, 45 Colo. 138, 100 Pac. 433, holding that judgment is judicial act.

Appealability of void judgment.

Cited in *Bean v. People*, 6 Colo. 98, holding that writ of error lies to review writ of mandamus issued by judge at chambers; *Parker v. Dekle*, 46 Fla. 462, 35 So. 4, holding that appeal will lie, where jurisdictional or fundamental error appears on face of record; *Jarmine v. Swanson*, 83 Neb. 751, 120 N. W. 437, holding that judgment void in part is appealable.

3 COLO. 321, GOLDEN PAPER CO. v. CLARK.

Leave to sheriff to amend return.

Cited in *McClure v. Smith*, 14 Colo. 297, 23 Pac. 786, holding no error to allow sheriff to amend return by correcting misdescription of realty attached.

Distinguished in *Stubbs v. McGillis*, 44 Colo. 138, 18 L.R.A.(N.S.) 405, 130 Am. St. Rep. 116, 96 Pac. 1005, holding that denial of motion by sheriff to amend return as to name of person served with summons is no abuse of court's discretion.

3 COLO. 324, HOLLIDAY v. KIRK.**3 COLO. 325, WILSON v. PEOPLE.**

Summoning of grand jury as at common law.

Cited in *Imboden v. People*, 40 Colo. 142, 90 Pac. 608, holding that

court may direct that grand jury be summoned by open venire as at common law.

Presumption of regularity in impaneling grand jury.

Cited in *Parker v. People*, 13 Colo. 155, 4 L.R.A. 803, 21 Pac. 1120, holding that it will be presumed, in silence of record, that preliminary proceedings relative to impaneling of grand jury were regular.

Cited in note in 27 L.R.A. 778, 788, on organization of grand jury.

Availability of objection to grand jury.

Cited in *Hagenow v. People*, 188 Ill. 545, 59 N. E. 242, holding that alleged irregularity in drawing grand jury is not available after accused has pleaded to indictment and been convicted.

Number of grand jurors.

Cited in note in 27 L.R.A. 846, on number of grand jurors necessary or proper to act.

Examination of witnesses without notice prior to arraignment.

Cited in *Minich v. People*, 8 Colo. 440, 9 Pac. 4, 5 Am. Crim. Rep. 20, holding no error to permit examination of witnesses in chief whose names were not furnished to accused prior to arraignment, no objection being made; *Kelly v. People*, 17 Colo. 130, 29 Pac. 805, holding that, where notice was given before jury was sworn that person would be called as witness for prosecution, defendant, not moving for further time, cannot object to testimony.

Continuation of proceeding after statehood.

Cited in *Higgins v. Brown*, 20 Okla. 355, 1 Okla. Crim. Rep. 33, 94 Pac. 703; *Ex parte Bailey*, 20 Okla. 497, 94 Pac. 553, 1 Okla. Crim. Rep. 115,—holding that indictment for murder committed prior to statehood is cognizable in district court of state.

Sufficiency of general exception to instructions.

Cited in *Buck v. Territory*, 1 Okla. Crim. Rep. 517, 98 Pac. 1017, holding that practice of taking exceptions to each and all instructions, while permissible, is not to be commended.

3 COLO. 332, GREGORY v. GERMAN BANK, 25 AM. REP. 760.

Liability of directors for failure to file annual report.

Cited in *Clough v. Rocky Mountain Oil Co.* 25 Colo. 520, 55 Pac. 809, holding that directors, failing to file annual report, are liable to amount of debts of preceding year.

Cited in note in 53 A. D. 651, on liability of corporate directors.

What statutes are penal.

Cited in *Patterson v. Thompson*, 86 Fed. 85; *Patterson v. Wade*, 115 Fed. 770.—holding that statute, making directors of insolvent corporation, declaring dividends, liable for debts, is penal; *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821; *Larsen v. James*, 1 Colo. App. 313, 29 Pac. 183; *Jenet v. Albers*, 7 Colo. App. 271, 43 Pac. 452,—holding that statutes requiring filing or posting of monthly balance sheets, of annual report, by directors are penal; *Denver & R. G. R. Co. v. Crawford*, 11

Colo. 598, 19 Pac. 673, holding that statute, requiring railroad to file notice of location of book of description of animals killed under penalty of double damages for stock killed, is penal.

Cited in note in 96 A. S. R. 989, on penal liability of corporate officers for failure to perform statutory duties.

Distinguished in *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224, holding that statute, making officers, who record false certificate of amount of capital stock, liable for debts, is not penal in international sense.

Effect of repeal of statute on inchoate rights.

Cited in *Royston v. Miller*, 76 Fed. 50, 18 Mor. Min. Rep. 418, holding that co-owner of mine, doing necessary work, has no vested right which cannot be affected by act suspending for year statute as to labor on mining claim; *Globe Pub. Co. v. State Bank*, 41 Neb. 175, 27 L.R.A. 854, 59 N. W. 683, holding that suit pending to enforce statutory penalty is abated by unconditional repeal of statute before judgment; *Cleveland, C. C. & St. L. R. Co. v. Wells*, 65 Ohio St. 313, 58 L.R.A. 651, 62 N. E. 332, holding that plaintiff in pending action for statutory penalties has no vested right before recovery of judgment to be impaired by repeal of statute.

Cited in *Cook, Corp.* 6th ed. 1309, on constitutionality of repeal of penal statute, so as to affect existing debts, before corporate creditor obtains judgment.

Cited in note in 94 A. D. 218, on effect of repeal of criminal statute. Constitutionality of repeal of statutes as to inchoate rights.

Cited in *Day v. Madden*, 9 Colo. App. 464, 48 Pac. 1053, holding that repeal of provision allowing attachment though construed to affect attachments levied, is not invalid.

3 COLO. 337, PARLIN v. AUSTIN.

Proper practice for restoration of property replevied.

Cited in *Robinson v. Austin*, 3 Colo. 375; *Wyatt v. Freeman*, 4 Colo. 14,—holding that, where officer, seizing property in replevin, turns it over immediately to plaintiff, defendant should move that it be restored to him, upon executing statutory bond.

3 COLO. 339, FOOTE v. WALKER.

3 COLO. 342, HOLLIDAY v. UNION BAG & PAPER CO.

Construction of "contribution" to limited partnership.

Cited in *Crouch v. First Nat. Bank*, 156 Ill. 342, 40 N. E. 974, holding that statement, in affidavit, of contribution by special partner, means contribution in cash.

3 COLO. 346, LEHOW v. SIMONTON.

Validity of contract for benefit of third party.

Cited in *Teller v. Ferguson*, 24 Colo. 432, 51 Pac. 429, holding that

contract may be made for benefit of third party, with or without his consent.

Cited in notes in 39 A. S. R. 533, on promise for benefit of third person; 9 L.R.A.(N.S.) 97, on assumption of debts on dissolution of partnership.

Right of third party to enforce contract for his benefit.

Cited in *Wilson v. Lunt*, 11 Colo. App. 56, 52 Pac. 296, holding that lessor can sue assignee of lessee for rent; *Hexter v. Clifford*, 5 Colo. 168, holding that cestui que trust can sue purchaser of his property from trustee for balance of price due to trustee; *Boettcher v. Colorado Nat. Bank*, 15 Colo. 16, 24 Pac. 582 (dissenting opinion), on right of third person, for benefit of whom contract is made, to maintain action for breach thereof; *Moore v. First Nat. Bank*, 38 Colo. 336, 10 L.R.A.(N.S.) 260, 120 Am. St. Rep. 120, 88 Pac. 885, 12 A. & E. Ann. Cas. 268, holding that indorsee of note indorsed by bank can maintain action against persons agreeing to pay its liabilities on assignment to them of its assets; *Wood v. Moriarty*, 15 R. I. 518, 9 Atl. 427, holding that A. may sue C., where B. contracted with C. to build houses and A. furnished material to B. and B. transferred contract to C.

Cited in notes in 71 A. S. R. 182; 25 L.R.A. 266,—on right of third party to sue upon contract made for his benefit.

Distinguished in *International Trust Co. v. Keefe Mfg. & Invest. Co.* 40 Colo. 440, 18 L.R.A.(N.S.) 455, 91 Pac. 915, holding that one, furnishing material to builder, without knowledge of bond by surety company to insure payment for material by builder, cannot enforce it.

By way of set-off.

Cited in *Green v. Richardson*, 4 Colo. 584; *Green v. Morrison*, 5 Colo. 18,—holding that third party for whose benefit simple contract is made may plead it by way of set-off.

3 COLO. 349, ARAPAHOE COUNTY v. CUTTER.

Situs for taxation of notes, mortgages, etc.

Cited in *Territory v. Delinquent Tax List*, 3 Ariz. 179, 24 Pac. 182, holding that situs of note for purpose of taxation is place of residence of owner; *Re Fair*, 128 Cal. 607, 61 Pac. 184, holding that railroad bonds deposited without state, are taxable in this state as domicile of owner; *Hathaway v. Choury*, 14 Colo. App. 478, 60 Pac. 574, holding that notes, mortgages and deeds of trust due from residents to non-residents are not subject to taxation; *Holland v. Silver Bow County*, 15 Mont. 460, 27 L.R.A. 797, 39 Pac. 575, holding that mortgage, owned by non-resident, is not property in state, subject to taxation.

Cited in *Parmelee's Whart. Confl. L.* 3d ed. 173, on inability to tax debt at domicile of debtor if creditor is domiciled elsewhere, where debt secured by mortgage on realty at debtor's domicile

Cited in notes in 56 A. D. 529, on place for taxation of property; 74 A. D. 95, on taxation of credits; 16 L.R.A. 730, on situs for purpose

of taxation of debts evidenced by notes and mortgages; 9 L.R.A.(N.S.) 1104, on debt due nonresident secured upon land within state as subject of inheritance tax.

Distinguished in *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392, holding that statute, taxing non-resident mortgagees upon mortgages in county where mortgaged property lies, is constitutional; *Comptoir National D'Escompte v. Board of Assessors*, 52 La. Ann. 1319, 27 So. 801, holding that non-negotiable notes, representing loans in state, by agent of corporation doing business therein, kept by agent within state, are taxable; *Detroit v. Lewis*, 109 Mich. 155, 32 L.R.A. 439, 66 N. W. 958, holding that legislature may impose tax on credits legal title to which is vested in resident trustees; *Mumford v. Sewall*, 11 Or. 67, 50 Am. Rep. 462, 4 Pac. 585, holding that state has power to tax mortgage in county where recorded, irrespective of residence of owner of mortgage.

Necessity for demand before suit against county.

Cited in *Cooley*, Tax. 3d ed. 1509, on necessity for demand before bringing suit for illegal taxes collected.

Distinguished in *Gregg v. Lake County*, 32 Colo. 357, 76 Pac. 376, holding that presentment of claim to county is necessary before suit to recover back fees paid into treasury.

Recovery back of involuntary payments.

Cited in *Walsh v. Denver*, 11 Colo. App. 523, 53 Pac. 458, holding that license fee under void ordinance, paid under protest, may be recovered back, as payment was involuntary.

Cited in notes in 94 A. S. R. 444, on recovery back of voluntary payment; 45 Am. Dec. 164, on compulsory payments and right to recover them back.

3 COLO. 351, GILLETT v. GAFFNEY.

Title by occupancy as interest in realty.

Cited in *Aspen Min. & Smelting Co. v. Rucker*, 28 Fed. 220; *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744; *Sears v. Taylor*, 4 Colo. 38, 5 Mor. Min. Rep. 318,—holding that title by occupancy is under statute of Colorado interest in realty; *Cooper v. Hunter*, 8 Colo. App. 101, 44 Pac. 944; *Filmore v. Reithman*, 6 Colo. 120,—holding that title by occupancy of land subject to entry under acts of congress, as town sites, is descendible and transferable; *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.* 15 Colo. 29, 22 Am. St. Rep. 373, 24 Pac. 920, 16 Mor. Min. Rep. 93, holding that interest possessed by locator of mining claim on public lands is interest in realty.

Rights in partnership realty.

Cited in notes in 27 L.R.A. 351, on rights of tenants in dower and by the curtesy, and of heirs etc., of deceased partner, in partnership realty; 27 L.R.A. 468, as to when real estate will be considered partnership property; 28 L.R.A. 130, on position of surviving partners in partnership realty.

Partner as trustee.

Cited in *Salsburg v. Ellison*, 7 Colo. 167, 49 Am. Rep. 347, 2 Pac. 906, holding that surviving partner cannot make assignment of firm effects, and give preference to certain creditors; *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 777, holding that purchase of outstanding title by partner will inure to benefit of firm; *Tennant v. Dunlop*, 97 Va. 234, 33 S. E. 620, holding that surviving partner in purchasing interest of deceased partner must acquaint representative of deceased with all facts.

Distinguished in *Blachley v. Coles*, 6 Colo. 349, holding that surviving partner, acquiring fee to land to which firm purchased mere possessory right, does not hold title in trust.

Cotenancy in mines.

Cited in note in 91 A. S. R. 854, 858, 863, 865, 881, on cotenants in mines.

Record of deed as notice.

Cited in *Rose v. Dunklee*, 12 Colo. App. 403, 56 Pac. 342, holding that recording of voluntary conveyance is not constructive notice to creditors of insolvency of grantor; *Smith v. Russell*, 20 Colo. App. 554, 80 Pac. 474, holding that recording of deed to another party within time limited by option is not notice to holder of option of its revocation by grantor; *Judd v. Robinson*, 41 Colo. 222, 124 Am. St. Rep. 128, 92 Pac. 724, 14 A. & E. Ann. Cas. 1018, holding that grantee is not, by record title of deeds of adjacent lots, charged with constructive knowledge of general restriction plan.

Cited in *Warvelle*, Abstr. 3d ed. 79, as to constructive notice afforded by record of deed applying only to those who are bound to search for it.

Cited in note in 23 L.R.A. 565, on conveyance recorded before grantor obtained title, as notice.

3 COLO. 367, MOYNAHAN v. PEOPLE.**Variance in names.**

Cited in *Sullivan v. People*, 6 Colo. App. 458, 41 Pac. 840, holding variance fatal, where name of owner of stolen property is Michael Johnson in information, and Mike Johnson in proof.

Cited in *Bowlby's Homicide*, 3d ed. 861, on necessity of indictment for homicide averring name of victim if it is known; *Bowlby's Homicide*, 3d ed. 861, on fatal effect of mistake in name of deceased in homicide indictment, where it makes entirely different name of it.

Cited in notes in 28 A. R. 439; 100 A. S. R. 351,—on *idem sonans*.

3 COLO. 374, RHOADES v. DRUMMOND.**When trover maintainable.**

Cited in *Sackett*, Instruct. Jur. (3d ed.) 1464, on necessity for demand before action of replevin where taking is wrongful.

Cited in note in 24 A. S. R. 808, on conversion of personalty sufficient to sustain trover.

Signing of bill of exceptions out of term.

Cited in *Jordan v. Finley*, 4 Colo. 189, holding that, in absence of stipulation of parties, or order of court, bill of exceptions cannot be signed out of term.

Distinguished in *Crowe v. Charlestown*, 62 W. Va. 91, 57 S. E. 330, 13 A. & E. Ann. Cas. 1110, holding that bill of exceptions cannot be signed after term, even though so stipulated by parties.

3 COLO. 375, ROBINSON v. AUSTIN.**Motion for restoration of replevied property.**

Cited in *Wyatt v. Freeman*, 4 Colo. 14, holding that defendant, not given opportunity to execute statutory bond and retain possession of property replevied, may move that property be restored to him.

3 COLO. 377, FREAS v. ENGELBRECHT.**Waiver of objections to overruling of demurrer.**

Cited in *Stanbury v. Kerr*, 6 Colo. 28, holding that by answering over, after demurrer overruled, error cannot be assigned on overruling demurrer.

Dismissal of appeal as affirmance of judgment.

Cited in *Monti v. Bishop*, 3 Colo. 605, holding that mere dismissal of writ of error operates as nonsuit and not as technical affirmance of decree.

Distinguished in *McMichael v. Groves*, 14 Colo. 540, 23 Pac. 1006, holding that, unless dismissal of appeal reserves right, judgment stands affirmed and writ of error will not lie; *Caviness v. People*, 27 Colo. 283, 60 Pac. 565, holding that appellant, where writ of error is dismissed for want of prosecution, is not entitled as matter of right to second writ; *State v. Biesman*, 12 Mont. 11, 29 Pac. 534, holding that dismissal of appeal from judgment for fine and costs in justice's court constitutes affirmance of judgment.

Dismissal of action as bar.

Cited in *Martin v. McCarthy*, 3 Colo. App. 37, 32 Pac. 551, holding that voluntary dismissal of intervention without circumstances showing that it was final is no bar to another action by intervenor; *Vigil v. Garcia*, 36 Colo. 430, 87 Pac. 543, holding that dismissal of election contest by contestant over objection of contestee, after answer and replication, is no bar to another contest.

Appeal as stay.

Cited in *Dye v. Dye*, 12 Colo. App. 206, 55 Pac. 205, holding that appeal when perfected by its own force stays execution of judgment.

Appeal as cumulative to writ of error.

Cited in *State v. Preston*, 30 Nev. 301, 97 Pac. 388, holding that appeal is merely cumulative to common law process of writ of error. Adoption of construction of borrowed statute.

Cited in *Atchison, T. & S. F. R. Co. v. Farron*, 6 Colo. 498, holding that courts are not bound to adopt construction of borrowed statute

in state from which it is taken, if such construction is clearly wrong, harsh and oppressive.

3 COLO. 386, COOK v. HAGER.

Validity of chattel mortgage by foreign corporation.

Cited in *Watson v. Thompson Lumber Co.* 49 Ark. 83, 4 S. W. 62, holding that chattel mortgage by foreign corporation is invalid.

Residence of corporation.

Cited in *Barbour v. Paige Hotel Co.* 2 App. D. C. 174, holding that foreign corporation, though exclusively engaged in business here, having been organized for that purpose only, is non-resident.

Cited in *Cook, Corp.* 6th ed. 91, on foreign corporations as "non-residents" within chattel mortgage act.

3 COLO. 390, THOMAS v. MACKEY.

Sufficiency of allegation of fraud.

Cited in *Fox v. Lipe*, 14 Colo. App. 258, 59 Pac. 850; *Burdsall v. Waggoner*, 4 Colo. 256,—holding that bill to set aside fraudulent conveyance, failing to allege insolvency or lack of other property to pay judgment, is insufficient; *Kindel v. Le Bert*, 23 Colo. 385, 58 Am. St. Rep. 234, 48 Pac. 641, holding that mere charge of fraud without setting out ultimate facts constituting fraud is not such allegation as calls for denial.

Fraudulent voluntary conveyances.

Cited in *Gwynn v. Butler*, 17 Colo. 114, 28 Pac. 466, holding that voluntary conveyance by insolvent husband to wife is fraudulent; *Wells v. Schuster-Hax Nat. Bank*, 23 Colo. 534, 48 Pac. 809, holding that voluntary conveyance from father to daughter is not fraudulent per se, but question of fraud is one of fact; *Foster v. Barrier*, 39 Colo. 398, 89 Pac. 787, holding that bond for deed made in wife's name, consideration being paid by husband, to provide home for her, is valid gift.

Validity of contracts between husband and wife.

Cited in note in 88 A. D. 55, on direct conveyance to wife.

Distinguished in *O'Connell v. Taney*, 16 Colo. 353, 25 Am. St. Rep. 275, 27 Pac. 888, holding that, in absence of fraud, contracts between husband and wife in relation to realty are valid.

Judgment secundum probata, but not secundum allegata.

Cited in *Emery v. Yount*, 7 Colo. 107, 1 Pac. 686; *Gibbs v. Wall*, 10 Colo. 153, 14 Pac. 216,—holding that judgment should not be pronounced secundum probata, but not secundum allegata, without at least amendment of pleadings.

3 COLO. 394, CHRIST v. PEOPLE.

Necessity for allegation of facts for change of venue.

Cited in *Hughes v. People*, 5 Colo. 436; *Thomas v. People*, 14 Colo. 254, 9 L.R.A. 569, 23 Pac. 326,—holding that facts upon which allega-

tion of prejudice of judge is predicated must be set forth in detail in petition for change of venue.

Necessity for presence of accused.

Cited in *State v. Woolsey*, 19 Utah, 486, 57 Pac. 426, holding it unessential that accused be present at filing and trial of motions and pleas not involving question of guilt on merits.

New trial for newly discovered evidence.

Cited in *Fist v. Fist*, 3 Colo. App. 273, 32 Pac. 719, holding that newly discovered evidence going only to impeach witness is insufficient ground for new trial.

3 COLO. 397, GREATHOUSE v. JAMESON.

Jurisdiction to grant mandamus.

Cited in note in 58 L.R.A. 836, on original jurisdiction of court of last resort in mandamus.

3 COLO. 398, WASSON v. DYER.

Review in absence of exception or evidence in record.

Cited in *Aitman v. Hoffman*, 18 Colo. App. 283, 71 Pac. 395; *Hopple v. Best*, 4 Colo. 555,—holding that assignments of error not based on exceptions duly taken and reserved will not be reviewed; *Piela v. People*, 6 Colo. 343, holding that defendant, by failing to interpose objections to illegal testimony offered on trial, waives same; *Packer v. People*, 26 Colo. 306, 57 Pac. 1087, holding that evidence will be presumed sufficient, where it is not preserved in record on appeal from conviction of crime.

3 COLO. 399, TAYLOR v. RANDALL.

Construction of bill of exceptions.

Cited in *Big Kanawha Co. v. Jones*, 45 Colo. 381, 102 Pac. 171, holding that bill of exceptions must be construed most strongly against party who prepared it.

Disturbance of verdict on conflicting evidence.

Cited in *Kansas P. R. Co. v. Ward*, 4 Colo. 30; *Barker v. Hawley*, 4 Colo. 316; *Spaulding v. Saltiel*, 18 Colo. 86, 31 Pac. 486,—holding that verdict will not be disturbed when it is not manifestly against weight of conflicting evidence.

Necessity for exceptions.

Cited in note in 99 A. D. 134, on necessity for exception at the trial to instructions or omission to instruct.

3 COLO. 402, HUSTON v. PLATO.

What covered by warranty.

Cited in notes in 53 A. D. 179, on defects amounting to breach of warranty of soundness; 12 L.R.A.(N.S.) 85, on warranty as extending to obvious defects in animal.

3 COLO. 408, GOODRICH v. TREAT.**Construction of policy of insurance.**

Cited in *Jennings v. Brotherhood Acci. Co.* 44 Colo. 68, 18 L.R.A. (N.S.) 109, 130 Am. St. Rep. 109, 96 Pac. 982, holding that insurance policies are to be construed so as to carry out intention of parties.

Cited in note in 132 A. S. R. 438, on construction of insurance policies.
Right to insure one's life for benefit of another.

Cited in *Hendrie & B. Mfg. Co. v. Platt*, 13 Colo. App. 15, 56 Pac. 209, holding that provision by husband for insurance for benefit of wife and family is of most meritorious character; *Taylor v. Travelers' Ins. Co.* 15 Tex. Civ. App. 254, 39 S. W. 185, holding that man has right to insure his life and make policy payable to whomsoever he chooses.

Cited in note in 33 A. S. R. 666, on exemption of insurance in favor of family.

Nature of interest of wife in policy.

Distinguished in *Mutual L. Ins. Co. v. Hagerman*, 19 Colo. App. 33, 72 Pac. 889, holding that policy payable to wife, if she survive insured, otherwise to children, vests in wife only contingent interest.

Who may administer estate.

Cited in notes in 54 A. D. 522, on who may be executors or administrators; 2 Eng. Rul. Cas. 102, on right of surviving husband or wife to letters of administration.

3 COLO. 411, LAS ANAMAS COUNTY v. BOND.**Exemption of municipality from garnishment.**

Cited in *Stermer v. La Plata County*, 5 Colo. App. 379, 38 Pac. 839; *Duval County v. Charleston Lumber & Mfg. Co.* 45 Fla. 256, 60 L.R.A. 549, 33 So. 531, 3 A. & E. Ann. Cas. 174,—holding that county is not subject to garnishment.

Cited in notes in 51 A. S. R. 117, on garnishment of municipalities; 96 A. S. R. 452, on subjecting officers' salaries to payment of their debts; 37 L.R.A. 207, on liability of county to garnishment.

Distinguished in *Lewis v. Denver*, 9 Colo. App. 328, 48 Pac. 317; *Denver v. Brown*, 11 Colo. 337, 18 Pac. 214,—holding that city is liable to garnishment.

— Waiver of.

Cited in *Baird v. Rogers*, 95 Tenn. 492, 32 S. W. 630, holding that municipality may waive its exemption from garnishment.

3 COLO. 413, CLAFLIN v. DOGGETT.**Right of attaching creditors to share pro rata.**

Cited in *Rawles v. People*, 2 Colo. App. 501, 31 Pac. 941, holding that attaching creditors at same term of court are entitled to pro rata distribution of property, independent of order of return of executions.

3 COLO. 417, COLORADO C. R. CO. v. BLAKE.

Reversal for error in sustaining demurrer.

Cited in *Colorado C. R. Co. v. Mollandin*, 4 Colo. 154, holding that error in sustaining demurrer to special plea is no ground for reversal, when same defense is available under another plea.

3 COLO. 418, WIDNER v. WALSH.

Scroll as private seal.

Cited in *Morgenson v. Middlesex Min. & Mill. Co.* 11 Colo. 176, 17 Pac. 513, holding that scroll affixed to any writing, by way of seal, constitutes private seal.

3 COLO. 419, CHARLES v. PEOPLE'S INS. CO.

Dismissal of action as bar.

Cited in *Denver & R. G. R. Co. v. Iles*, 25 Colo. 19, 53 Pac. 222, holding that nonsuit at close of plaintiff's testimony is no bar to another action; *Vigil v. Garcia*, 36 Colo. 430, 87 Pac. 543, holding that dismissal of election contest by contestant, over objection of contestee, after answer and replication, is no bar to another contest.

3 COLO. 422, HARTFORD F. INS. CO. v. SMITH.

What constitutes vacancy within policy.

Cited in *Bellevue Roller Mill Co. v. London & L. F. Ins. Co.* 4 Idaho, 307, 39 Pac. 196, holding that mill, temporarily suspending business, in charge of president who frequently went through it, is not vacant or unoccupied within policy; *German-American Ins. Co. v. Evans*, 25 Tex. Civ. App. 300, 61 S. W. 536, as to whether temporary absence of family from house, leaving servant in charge, is vacancy within policy. **Objection on one ground as waiver of other grounds.**

Cited in *United States Casualty Co. v. Hanson*, 20 Colo. App. 393, 79 Pac. 176, holding that denial of all liability is waiver of provision that suit should not be brought for permanent disability within two years.

— As waiver of proofs of loss.

Cited in *Lampkin v. Travelers' Ins. Co.* 11 Colo. App. 249, 52 Pac. 1040, holding that refusal to pay on ground of misrepresentation in application waives requirement for proofs of injury; *California Ins. Co. v. Gracey*, 15 Colo. 70, 22 Am. St. Rep. 376, 24 Pac. 577, holding that denial of any liability is waiver of requirement of proofs of loss; *Supreme Lodge, K. H. v. Davis*, 26 Colo. 252, 58 Pac. 595, holding that insurer cannot defend on ground of failure to furnish proofs of death, when it had repudiated all liability prior to insured's death; *National Mut. F. Ins. Co. v. Sprague*, 40 Colo. 344, 92 Pac. 227, holding that refusal to pay loss on ground of no delivery of policy and no payment of premium waives right to demand proof of loss; *Hartford F. Ins. Co. v. Hammond*, 41 Colo. 323, 92 Pac. 686, holding that refusal to pay loss

because insured overestimated amount waives his failure to file proofs of loss.

Proofs of loss as condition precedent to action.

Cited in *Bishop v. Griffith*, 4 Colo. 68, holding that requirement of proofs of loss is formal condition precedent to right of action of insured.

Vacation of verdict for incompetent evidence.

Cited in *Crane v. Andrews*, 6 Colo. 353, holding that verdict will be set aside, when incompetent evidence is permitted to go to jury.

3 COLO. 428, PEOPLE EX REL. CRAWFORD v. LOTHROP.

Inconsistent defenses.

Cited in *Hummel v. Moore*, 25 Fed. 380; *Tucker v. Edwards*, 7 Colo. 209, 3 Pac. 233; *Conrey v. Nichols*, 35 Colo. 473, 84 Pac. 470,—holding that inconsistent defenses are permissible.

Cited in note in 48 L.R.A. 177, 185, on right to plead inconsistent defenses.

Construction of demurrer.

Cited in *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874, holding that demurrer chiefly and specifically attacking particular cause of action, may be treated as confined to that cause of action.

Application of rules of pleading to mandamus.

Cited in *Gillett v. People*, 13 Colo. App. 553, 59 Pac. 72; *Nance v. People*, 25 Colo. 252, 54 Pac. 631,—holding that rules of pleading prescribed by code are applicable to proceedings in mandamus, except where different or special rule is provided.

Validity of action by majority of board.

Cited in *People ex rel. Funk v. Wright*, 30 Colo. 439, 71 Pac. 365, holding that election of alderman by majority of members of board then in office is valid; *Carroll v. Alsup*, 107 Tenn. 257, 64 S. W. 193, holding that action of majority of state board of equalization is valid.

Cited in *Cooley*, Tax. 3d ed. 774, on validity of acts of two members of board of equalization.

Nature of tax.

Cited in *Cooley*, Tax. 3d ed. 1, on taxes as enforced contributions from persons and property for support of government and public needs.

Duties and powers of state board of equalization.

Cited in *Ames v. People*, 26 Colo. 83, 56 Pac. 656, on constitutionality of law providing for assessment of railroad and other property by state board of equalization; *People v. Ames*, 27 Colo. 126, 60 Pac. 346, holding that state board of equalization has no power to equalize valuations between classes of property in respective counties; *Campbell v. Minnehaha Nat. Bank*, 11 S. D. 133, 76 N. W. 10, holding that state board of equalization has no power to divide property classified as "total value of stock and shares" and raise valuation of bank stock only; *Hacker v. Howe*, 72 Neb. 385, 101 N. W. 255, holding that it is duty of Colo. Ann.—8.

state board of equalization to adjust valuation of property so as to apportion equitably burden of state government among counties.

— To raise or lower aggregate valuation.

Cited in *Re Assessment of Property*, 25 Colo. 296, 53 Pac. 1056; *State ex rel. Wallace v. Board of Equalization*, 18 Mont. 473, 46 Pac. 266; *State ex rel. State Board v. Fortune*, 24 Mont. 154, 60 Pac. 1086; *Gray v. Stiles*, 6 Okla. 455, 49 Pac. 1083,—holding that state board of equalization cannot lower or raise aggregate valuation of property of state; *Wallace v. Bullen*, 9 Okla. 1, 58 Pac. 949 (dissenting opinion), on power of state board of equalization to increase aggregate valuation of property of state.

Distinguished in *Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization*, 206 U. S. 474, 51 L. ed. 1143, 27 Sup. Ct. Rep. 695 (affirming 9 Ariz. 383, 84 Pac. 511); *Wallace v. Bullen*, 6 Okla. 17, 52 Pac. 954; *State ex rel. Cunningham v. Thomas*, 16 Utah, 86, 50 Pac. 615; *State ex rel. Thompson v. Nichols*, 29 Wash. 159, 69 Pac. 771,—holding that state board of equalization has power to raise valuation of certain classes of property in certain counties, though increasing aggregate valuation of property of state.

Powers of county board of equalization.

Cited in *Price v. Kramer*, 4 Colo. 546; *Breeze v. Haley*, 10 Colo. 5,—holding that board of county commissioners, sitting as board of equalization, can correct any errors in enlistment and assessment of property.

Requirement of equality in burden of taxation.

Cited in *Leonard v. Reed*, 46 Colo. 307, 133 Am. St. Rep. 77, 104 Pac. 410, holding that tax upon goods offered for sale only violates requirement of equality in burden of taxation.

Judgment on pleadings when denial is pleaded.

Cited in *Gartley v. People*, 24 Colo. 155, 49 Pac. 272, on error in granting judgment on pleadings, when material allegation of complaint is denied in answer.

3 COLO. 470, BREED v. FIRST NAT. BANK.

Requirement of filing certified transcript of record on appeal.

Cited in *Eicholtz v. Wilbur*, 4 Colo. 434, holding that appellant is not required to file certified transcript of record before third day of term when appeal was not made thirty days before next term.

3 COLO. 472, DENVER v. CLEMENTS.

What constitutes dedication of highway.

Cited in *Ward v. Farwell*, 6 Colo. 66, holding that deed, describing lot as lying south of road, does not show unequivocal intent to dedicate it to public use; *Starr v. People*, 17 Colo. 458, 30 Pac. 64, holding that common law dedication may be implied from proof of owners' intent to set apart land as public highway, and acceptance by public; *Denver v. Jacobson*, 17 Colo. 497, 30 Pac. 246, holding that common law

dedication of street operates by way of estoppel in pais; *John Mouat Lumber Co. v. Denver*, 21 Colo. 1, 40 Pac. 237, holding that statutory dedication cannot be based on statute, not going into effect until after filing of plat; *Leadville v. Coronado Min. Co.* 37 Colo. 234, 36 Pac. 1034, holding that, to constitute statutory dedication, requirements of statute must be complied with; *McCague v. Miller*, 55 Neb. 762, 76 N. W. 422, holding that recorded plat, showing street which public authorities had previously undertaken to establish constitutes dedication thereof; *Nodine v. Union*, 42 Or. 613, 72 Pac. 582, holding that recording unacknowledged plat of land does not constitute statutory dedication of streets.

Cited in note in 27 Am. Dec. 560, 564, 568, on dedication to public use.

Distinguished in *Pueblo v. Budd*, 19 Colo. 579, 36 Pac. 59, holding that trustee has no authority to dedicate land of beneficiary as street.
— **Necessity for acceptance.**

Cited *Manitou v. International Trust Co.* 30 Colo. 467, 70 Pac. 757, holding that acceptance by town is necessary of offer to dedicate by owner selling lots by reference to plat; *Bothwell v. Denver Union Stockyards Co.* 39 Colo. 221, 90 Pac. 1127, holding that statutory dedication divests original grantor of title without acceptance by town; *Burroughs v. Cherokee*, 134 Iowa, 429, 109 N. W. 876, holding that acceptance of dedication is necessary before city is charged with burden of care and safety of street.

Rights of dedicator after dedication.

Cited in *Olin v. Denver & R. G. R. Co.* 25 Colo. 177, 53 Pac. 454, holding that title to street does not revert to dedicator, but to abutting lot owners; *Bounty v. Seattle*, 46 Wash. 141, 89 Pac. 480, holding that owner, after dedication and acceptance of plat, cannot show contrary intention or alter dedication by filing supplemental plat.

Right of abutting owners to have street kept open.

Cited in *Porter v. Carpenter*, 39 Fla. 14, 21 So. 788, holding that purchasers of lots with reference to plat have right to insist on streets being kept open.

Cited in *Sackett*, *Instruct. Jur.* 3d ed. 767 on right of purchaser of lot bounded on street to have street remain open.

Appurtenances.

Cited in note in 81 A. S. R. 766, on appurtenances.

Title of municipality to dedicate streets.

Cited in *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247, 17 Pac. 777, holding that fee to streets in Denver, covered by statutory dedications, is vested in city in trust for use of public.

Presumption of conveyance of highest estate.

Cited in *Overland Mach. Co. v. Alpenfels*, 30 Colo. 163, 69 Pac. 574, holding that one is presumed to convey highest estate he owns, unless smaller estate is described.

Map as part of description.

Cited in *Wilson v. Chicago Lumber & Timber Co.* 143 Fed. 705, hold-

ing that recorded map referred to in description in deeds is material part of deed and conclusive upon parties.

3 COLO. 484, DENVER v. CLEMENTS.

What constitutes dedication of highway.

Cited in *Rhodes v. Brightwood*, 145 Ind. 21, 43 N. E. 942, holding that dedication is effected by designating land on map as park and selling lots with reference thereto; *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749; *Miller v. Indianapolis*, 123 Ind. 196, 24 N. E. 228; *Hitchcock v. Oberlin*, 46 Kan. 90, 26 Pac. 466,—holding that recording of plat and selling of lots with reference thereto constitutes dedication of streets thereon.

Interest of city in dedicated streets.

Cited in *Leadville v. Bohn Min. Co.* 37 Colo. 248, 8 L.R.A.(N.S.) 422, 86 Pac. 1038, 11 A. & E. Ann. Cas. 443, holding that city has no interest in ores under dedicated streets.

3 COLO. 487, WELLS v. CAYWOOD.

Wife as feme sole.

Cited in *Scott v. Mills*, 7 Colo. App. 155, 42 Pac. 1021, holding that statutory exemptions are available to wife, though husband also has them; *Campbell v. Thompson*, 18 Colo. App. 93, 70 Pac. 161, holding that property or proceeds of enterprise of wife is not subject to husband's debts; *Rachofsky v. Benson*, 19 Colo. App. 173, 74 Pac. 655, holding that, in action of replevin by wife, same evidence of title is sufficient as where coverture is not involved; *Coon v. Rigden*, 4 Colo. 275, holding that care of wife's property by husband will not defeat her right as against his creditors; *Plamer v. Hanna*, 6 Colo. 55, holding that fact that husband furnished price does not affect title of wife to property deeded to her; *Colorado C. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605, holding that married woman may voluntarily accept amount awarded for her property in void condemnation proceedings; *De Votie v. McGerr*, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. 923, holding that wife's separate property may become subject to husband's debts, where she permits him to obtain credit thereon; *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493, holding that plea of coverture, without more, is no defense to action on contract against married woman; *Knight v. Lawrence*, 19 Colo. 425, 36 Pac. 242, holding deed by married woman valid; *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614, holding that wife may maintain action for alienation of husband's affections; *Schuler v. Henry*, 42 Colo. 367, 14 L.R.A.(N.S.) 1009, 94 Pac. 360, holding husband not liable for wife's torts, because their common law unity has been severed by statute.

Validity of contracts between husband and wife.

Cited in *Daniels v. Benedict*, 38 C. C. A. 592, 97 Fed. 367, holding that agreement of separation between husband and wife is presumptively valid; *Loveland v. Kearney*, 14 Colo. App. 463, 60 Pac. 584, hold-

ing that wife may become purchaser at foreclosure sale of trust deed of husband.

Cited in note in 20 L.R.A. 703, on validity of deed from wife to husband.

Distinguished in *Rico v. Brandenstein*, 98 Cal. 465, 20 L.R.A. 702, 35 Am. St. Rep. 192, 33 Pac. 480, holding that wife cannot convey her property in trust to husband; *Haggett v. Hurley*, 91 Me. 542, 41 L.R.A. 362, 40 Atl. 561; *Board of Trade v. Hayden*, 4 Wash. 263, 16 L.R.A. 530, 31 Am. St. Rep. 919, 30 Pac. 87,—holding that wife cannot make contract of partnership with husband.

Who may maintain ejectment.

Distinguished in *Lewis v. Hamilton*, 26 Colo. 263, 58 Pac. 196, holding that mortgagor may maintain ejectment against purchaser at void foreclosure sale, though latter has legal title.

Conveyance of legal title by trustee.

Cited in *Stephens v. Clay*, 17 Colo. 489, 31 Am. St. Rep. 328, 30 Pac. 43, holding that deed by trustee without compliance with conditions of trust passes legal title.

Interposition of equitable defense to ejectment.

Distinguished in *Cheney v. Crandell*, 28 Colo. 383, 65 Pac. 56, holding that equitable defense may be interposed to action of ejectment. Time of taking effect of entry of "homestead" on record.

Cited in *Re Youngstorm*, 82 C. C. A. 232, 153 Fed. 98, holding that entry of word "homestead" on margin of recorded title is effective only from time of such entry.

Liability for torts of married woman.

Cited in *Schuler v. Henry*, 42 Colo. 367, 14 L.R.A.(N.S.) 1009, 94 Pac. 360 (dissenting opinion), on liability for torts of wife.

Cited in note in 131 A. S. R. 145, 154, on liability of married women for torts.

3 COLO. 499, COLORADO C. R. CO. v. OGDEN.

Who are fellow servants.

Cited in *Denver, S. P. & P. R. Co. v. Driscoll*, 12 Colo. 520, 13 Am. St. Rep. 243, 21 Pac. 708; *Colorado Midland R. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701; *Colorado Midland R. Co. v. Naylor*, 17 Colo. 501, 31 Am. St. Rep. 335, 30 Pac. 249,—holding that boss in charge of track laying is vice-principal and not fellow servant of laborer; *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408, holding that section boss and engineer are not coemployees.

Cited in notes in 67 A. D. 589, 590, on who are fellow servants; 75 A. S. R. 601, on who is a vice principal; 54 L.R.A. 75, on vice principalship as determined with reference to character of act causing injury.

Risks assumed by employee.

Cited in *St. Louis, I. M. & S. R. Co. v. Davis*, 54 Ark. 389, 26 Am. St. Rep. 48, 15 S. W. 895, holding that brakeman assumes risk from use

of unblocked frogs; *Denver & R. G. R. Co. v. McComas*, 7 Colo. App. 121, 42 Pac. 676, holding that brakeman assumes risk from falling of rock on track in cañon; *Atchison, T. & S. F. R. Co. v. Farrow*, 6 Colo. 498, holding that servant assumes risks from negligence of fellow-servants; *Denver & R. G. R. Co. v. Warring*, 37 Colo. 122, 86 Pac. 305, holding that brakeman does not assume risks from railroad's negligence in inspecting track.

Cited in note in 17 Eng. Rul. Cas. 239, on assumption of risks by employee.

— By continuing work with knowledge of defects.

Cited in *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770, holding that baggage master assumes increased risk from insufficient bridge, if he has notice of its dangerous character; *Huhn v. Missouri P. R. Co.* 92 Mo. 440, 4 S. W. 937; *Hamilton v. Rich Hill Coal Min. Co.* 108 Mo. 364, 18 S. W. 977,—holding that car coupler, knowing that rails are unblocked, does not assume risks; *Graham v. Newburg Orrel Coal & Coke Co.* 38 W. Va. 273, 18 S. E. 584, holding that miner does not assume risk of explosion of gas by continuing work with knowledge of gas and open brattices.

— By continuing work after promise to remedy defect.

Cited in *Nixon v. Harmon*, 17 Colo. 276, 29 Pac. 808, holding that laborer assumes risk of defective rod in hand-car, unless he notified foreman and continued working under promise of remedy; *Monarch Min. & Development Co. v. De Voe*, 36 Colo. 270, 85 Pac. 633, holding that miner does not assume risks by continuing to work after promise by superintendent to timber shaft.

— By obedience to master's order.

Cited in *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741, holding that servant, obeying order requiring use of apparently unprotected mine shaft, does not assume risk; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860; *Dehning v. Detroit Bridge & Iron Works*, 46 Neb. 556, 65 N. W. 186,—holding that servant does not assume risk, where, at master's command, he uses dangerous machinery, which may be safely used by extraordinary skill.

Contributory negligence in not avoiding danger.

Cited in *Portland Gold Min. Co. v. O'Hara*, 45 Colo. 416, 101 Pac. 773, holding that servant is not negligent because not avoiding injury by going long way around, when duty required prompt action and he was ignorant of apparent defect; *Louisville, N. A. & C. R. Co. v. Hobbs*, 3 Ind. App. 445, 29 N. E. 934, holding that servant voluntarily incurring danger is not necessarily negligent, if man of ordinary prudence would encounter it in performance of duty.

Cited in note in 49 L.R.A. 45, on contributory negligence in entering or remaining in an employment.

Duty of master as to safe machinery and appliances.

Cited in *Maydole v. Denver & R. G. R. Co.* 15 Colo. App. 449, 62 Pac.

964, holding railroad bound to inspect track with sufficient frequency to assure its safety; *Wilson v. Denver, S. P. & P. R. Co.* 7 Colo. 101, 2 Pac. 1, holding railroad bound to keep track free from obstructions; *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50, holding that master is bound to use ordinary care proportioned to dangers, in furnishing safe machinery and appliance; *Last Chance Min. & Mill. Co. v. Ames*, 23 Colo. 167, 47 Pac. 382, holding that instruction, that employer should exercise care that ordinarily prudent person would exercise, having reference to his own safety and that of those dearest to him, is erroneous; *Brunell v. Southern P. Co.* 34 Or. 256, 56 Pac. 129, holding that railroad is not bound to keep signal to warn workmen on hand car of situation of section men at work on track.

Duty of master to warn servant.

Cited in note in 1 A. S. R. 548, on duty to warn and instruct servant employed in dangerous work.

3 COLO. 510, *DUNN v. DUNN*.

3 COLO. 514, *McCLURE v. SANFORD*.

Right to appeal from probate to district court.

Cited in *Russell v. Daniels*, 5 Colo. App. 224, 37 Pac. 726, holding that party against whom judgment was rendered by territorial probate court in 1874 had right to appeal to district court.

Discretion of court in matters of non-statutory practice.

Cited in *San Miguel Consol. Gold Min. Co. v. Bonner*, 33 Colo. 207, 79 Pac. 1025, holding no error for court to refuse to allow plaintiff's counsel in opening to jury to state his theory of law applicable to case; *Cone v. Jackson*, 12 Colo. App. 461, 55 Pac. 940, holding that district courts are presumed to have complied with their own rules of practice, unless contrary is shown.

3 COLO. 518, *HAMILL v. THOMPSON*, 14 MOR. MIN. REP. 696.

Necessity for restoration by vendor to avoid deed.

Cited in *Rubie Combination Gold Min. Co. v. Princess Alice Gold Min. Co.* 31 Colo. 158, 71 Pac. 1121, 22 Mor. Min. Rep. 569, holding that vendor, in action to cancel deed in escrow, delivered without authority must offer to return money received.

Effect of violation of conditions of escrow.

Cited in *Knapp v. Nelson*, 41 Colo. 447, 92 Pac. 912, holding that recording of deed contrary to conditions of escrow, passes no estate.

Cited in note in 130 A. S. R. 943, 970, 972, on escrows.

Validation of undelivered deed.

Cited in note in 9 L.R.A.(N.S.) 946, on validation of undelivered deed by ratification or estoppel.

3 COLO. 535, CORNING v. RYAN.

Appealability of decision of probate court upon claim.

Cited in *Squires v. Ryan*, 3 Colo. 532, holding that refusal of probate court to allow definite claim against estate is final decision from which appeal lies to district court.

—Necessity for formal entry of judgment.

Cited in *Re Currier*, 19 Colo. App. 245, 74 Pac. 840, holding that formal entry of judgment, where probate court allows claim against estate, is not required, before appeal will lie.

Manner of presentation of claim against estate.

Cited in *Morse v. Clark*, 10 Colo. 216, 14 Pac. 327, holding that filing of claim against estate in probate court and withdrawal thereof does not constitute commencement of action.

3 COLO. 532, SQUIRES v. RYAN.**3 COLO. 533, PATTERSON v. HITCHCOCK, 5 MOR. MIN. REP. 542.**

What constitutes estoppel by conduct.

Cited in *Ayer v. Younker*, 10 Colo. App. 27, 50 Pac. 218, holding that maker of note, consenting that payee hypothecate it, which was done to ignorant party, is not estopped from pleading that note was given for gambling debt; *Beaman v. Stewart*, 19 Colo. App. 222, 74 Pac. 342, holding that person, telling sheriff that property was not execution defendant's but not saying that it was his own, is not estopped from claiming it; *Griffith v. Wright*, 6 Colo. 248, holding that, to constitute estoppel by conduct, all essential elements must be present; *Yates v. Hurd*, 8 Colo. 343, 8 Pac. 575, holding that occupant, misleading intending purchaser by suppression of material fact, is estopped from asserting claim; *Birch v. Stepler*, 11 Colo. 400, 18 Pac. 530, holding that record owner of property, who treated another as owner, paid him rent and, upon inquiry, stated that property was his, is estopped to claim title as against latter's purchaser; *Denver City Irrig. & Water Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565 (dissenting opinion), on estoppel of party, accepting and retaining fruits of void judgment, to assail judgment; *Rockwell v. Coffey*, 20 Colo. 397, 38 Pac. 376, holding no estoppel, where condition of title is known to both parties, or both have same means of ascertaining truth; *Shannon v. Timm*, 22 Colo. 167, 43 Pac. 1021, holding that, to constitute estoppel, material facts must be concealed from person ignorant thereof; *Beals v. Cone*, 27 Colo. 478, 83 Am. St. Rep. 92, 62 Pac. 948, 20 Mor. Min. Rep. 591, holding that statements, to constitute estoppel in pais, must have been made with intention that they should be acted upon; *Globe Nav. Co. v. Maryland Casualty Co.* 39 Wash. 299, 81 Pac. 826, holding that design to mislead is not necessary to create estoppel, where conduct is such as to induce reasonable man to act on it.

Right of locator to reasonable time to perfect claim.

Cited in *Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037, 19 Mor. Min. Rep. 650, holding that locator of mining claim has reasonable time in which to mark boundaries of claim.

Cited in note in 7 L.R.A.(N.S.) 842, 843, 844, 851, on time of completion of discovery or development work.

— What constitutes reasonable time.

Cited in *Union Min. & Mill. Co. v. Leitch*, 24 Wash. 585, 85 Am. St. Rep. 961, 64 Pac. 829, holding that eight days after discovery is not unreasonable time in which to mark boundaries of claim; *Elwood v. Dickinson*, 26 Wash. 631, 67 Pac. 370, holding that holder of fishing license, unable to perfect his location for six weeks, has priority over subsequent locator with notice.

Right to follow vein beyond lines of claim.

Cited in *Hall v. Equator Min. & Smelting Co.* Fed. Cas. No. 5,931; *Stevens v. Williams*, Fed. Cas. No. 18,414, 1 Mor. Min. Rep. 557,—holding that locator cannot follow lode if it passes beyond vertical side lines; *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* 63 Fed. 540, 18 Mor. Min. Rep. 113, holding that locator cannot take mineral from claim of another without showing that it is part of vein having its apex in his own claim; *Bushnell v. Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771, on right to vein beyond side line of claim; *Wolfley v. Lebanon Min. Co.* 4 Colo. 112, 13 Mor. Min. Rep. 282, holding that patentee of lode mining claim may follow lode in its descending course, though it runs into adjoining land.

Presumption as to location of vein within claim.

Cited in *Armstrong v. Lower*, 6 Colo. 393, 15 Mor. Min. Rep. 631; *San Miguel Consol. Gold Min. Co. v. Bonner*, 33 Colo. 207, 79 Pac. 1025,—holding that owner of lode claim, who has made valid location upon vein, is entitled to presumption that vein so located upon extends through entire length of his claim.

Distinguished in *Iron Silver Min. Co. v. Campbell*, 17 Colo. 267, 29 Pac. 513, holding that presumption obtains that vein has its apex within side lines of patented territory.

Basis of rights of miner to surface.

Cited in *Colorado M. R. Co. v. Croman*, 16 Colo. 381, 27 Pac. 256, holding that rights of miner to surface of his location are dependent on relation which vein in course and direction bears to surface.

Effect of mining claim exceeding legal limit.

Cited in *Zimmerman v. Funchion*, 89 C. C. A. 53, 161 Fed. 859, holding that fact that placer mining claim exceeds legal limit renders it void only as to excess.

§ COLO. 545. EX PARTE FARNHAM.**When writ of habeas corpus lies.**

Cited in *Hirschburg v. People*, 6 Colo. 145, holding that writ of

habeas corpus lies, when presentment, trial, conviction and sentence were without any validity; *Martin v. District Ct.* 37 Colo. 110, 119 Am. St. Rep. 262, 86 Pac. 82, holding that person under maximum and minimum sentence cannot be discharged on habeas corpus, until minimum term has expired, such sentence being at most voidable; *Smith v. Hess*, 91 Ind. 424, holding that judgment of court of competent jurisdiction, valid on face, is unanswerable return to writ of habeas corpus; *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1111, holding that only ground for release on habeas corpus of prisoner under conviction is want of jurisdiction over person or cause, or other matter rendering proceedings void.

Cited in note in 87 A. S. R. 187, on release of prisoner on habeas corpus after judgment and sentence.

What reviewable on habeas corpus.

Cited in *Cooper v. People*, 13 Colo. 337, 6 L.R.A. 430, 22 Pac. 790; *Re Packer*, 18 Colo. 525, 33 Pac. 578; *Re Mahany*, 29 Colo. 442, 68 Pac. 235,—holding that only jurisdictional questions can be reviewed in habeas corpus proceedings.

3 COLO. 548, WIDNER v. WALSH.

Necessity for demand before suit on contract payable in property.

Cited in *Cordova Coal Co. v. Long*, 91 Ala. 538, 8 So. 765, holding that demand must precede suit on sale of lands to corporation, part of purchase-money being payable in its bonds; *Leiter v. Emmons*, 20 Ind. App. 22, 50 N. E. 40, holding that demand for payment in property specified in due bill is necessary before action thereon.

Distinguished in *Miller v. Slaght*, 11 Colo. App. 358, 53 Pac. 509, holding that demand is unnecessary under agreement to convey town lots in payment for services.

3 COLO. 551, MORGAN v. DOD.

Absolute transfer as pledge.

Cited in *Butler v. Rockwell*, 14 Colo. 125, 23 Pac. 462, holding that absolute assignment of contract as security is pledge; *Conrad v. Fisher*, 37 Mo. App. 352, 8 L.R.A. 147, holding that delivery of absolute bill of sale, as collateral security creates pledge.

Rights and remedies of pledgee.

Cited in notes in 49 A. D. 737, on rights of pledgee; 79 A. D. 501, on remedy of pledgee; 43 L.R.A. 756, 758, on conversion of pledged property by invalid sale.

Relief from legal effect of mistake.

Cited in *Renard v. Clink*, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692, holding that equity will relieve mortgagee from discharge of mortgage lien by refusal of tender of amount, less costs of foreclosure, afterwards ascertained to have been invalid.

Cited in notes in 65 A. S. R. 487, on reformation of contracts; 28 L.R.A.(N.S.) 841, on relief from mistake of law as to effect of instrument.

3 COLO. 556, HARDESTY v. PRICE.

Validity of obligation.

Cited in *Porter v. Stapp*, 6 Colo. 32; *Abbott v. Williams*, 15 Colo. 512, 25 Pac. 450,—holding voluntary obligation upon valid consideration enforceable, unless against public policy or forbidden by statute.

Cited in *Cooley*, Tax. 3d ed. 853, on invalidity of bond given to tax collector for return of property to be restored if tax is determined to be valid.

Defects available on motion in arrest of judgment.

Cited in *Floyd v. Colorado Fuel & Iron Co.* 10 Colo. App. 54, 50 Pac. 864, holding that motion in arrest of judgment reaches only those defects which appear on face of record and are not cured by verdict or saved by failure to demur.

3 COLO. 561, ABBOTT v. MONTI.

Force of verdict of jury in equity suit.

Cited in *Kyle v. Shore*, 18 Colo. App. 355, 71 Pac. 895; *McGan v. O'Neil*, 5 Colo. 58,—holding that verdict of jury as to issues of fact framed by court in equity suit is advisory only; *McDonald v. Thompson*, 16 Colo. 13, 26 Pac. 146, holding that verdict of jury on feigned issue out of chancery is not binding on chancellor, who may decide cause according to his own judgment; *Saint v. Guerrero*, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335, holding that equity court may submit specific questions of fact to jury, reserving power to make findings upon consideration of evidence and verdict; *Davis v. Holbrook*, 25 Colo. 493, 55 Pac. 730, holding that court, at close of defendant's testimony, if equitable defense has not been sustained, may take case from jury and enter judgment for plaintiff, or direct jury to return verdict to that effect; *McClelland v. Bullis*, 34 Colo. 69, 81 Pac. 771, holding that court, in equity case, can disregard verdict of jury and immediately enter decree contrary thereto, without further trial.

Necessity for cross-bill to affirmative relief by defendant.

Cited in *Monti v. Bishop*, 3 Colo. 605; *Nippel v. Hammond*, 4 Colo. 211,—holding that affirmative relief cannot be granted to defendant in equity suit, in absence of cross bill.

3 COLO. 564, CLARK v. HOWELL.

Defenses available in action on replevin bond.

Distinguished in *Imel v. Van Deren*, 8 Colo. 90, 5 Pac. 803, holding that, where plaintiff in replevin voluntarily dismissed his suit, defendant in action on replevin bond can show that plaintiff in replevin returned property to true owner.

3 COLO. 566, CENTRAL CITY v. WILCOXEN.

When verified plea is necessary to question execution of instrument.

Cited in *Lee v. Grimes*, 4 Colo. 185, holding that defendant must question authority of agent to execute bond by verified plea; *Parkison v. Boddiker*, 10 Colo. 503, 15 Pac. 806, holding that answer, in action on note, need be verified only when it challenges manner of execution of note.

Affidavit of merits as verified plea.

Cited in *Abbott's Pleadings*, 2d ed. 1140, on sufficiency of affidavit of merits as verified plea.

Necessity for presentation of warrant to treasurer before suit.

Cited in *Speer v. Kearney County*, 32 C. C. A. 101, 60 U. S. App. 38, 88 Fed. 749, on necessity of presentation of county warrant to county treasurer before action thereon; *Rochford v. School Dist. No. 11*, 17 S. D. 542, 97 N. W. 747 (dissenting opinion), on necessity of presentation of warrant to school treasurer, or excuse therefor, before action on warrant; *Farmers' Bank v. Wickliffe*, 129 Ky. 679, 112 S. W. 835, holding that suit does not lie on warrants drawn on municipal treasurer without allegation and proof of their presentation to him with demand for payment, or excuse therefor.

Right to file remittitur for excess of judgment.

Cited in *Duncan v. Whedbee*, 4 Colo. 143, holding that defendant in error may file remittitur for so much of judgment as is in excess of ad damnum.

Laches in moving to strike out record.

Cited in *Learned v. Tritch*, 6 Colo. 579, holding that objection to record should be taken by motion to strike out objectionable portion from record before joining in error and submitting cause; *Ritchey v. People*, 23 Colo. 314, 47 Pac. 384, holding that delay of four months, during which many arguments have been made by attorney-general and considered by court, based on bill of exceptions, is fatal to motion to strike bill from files.

3 COLO. 571, DOWNING v. BROWN.

What is subject of forgery.

Cited in notes in 8 A. S. R. 469, on what may be subject of forgery; 24 L.R.A. 41, on forgery of worthless instruments.

Effect of public officer keeping book not required by law.

Disapproved in *State v. Hanfin*, 134 Iowa, 493, 110 N. W. 162, holding fact that accounts are entered in book not required by law to be kept, no defense to prosecution for falsifying accounts of public office. **Plea of justification in libel or slander.**

Cited in *Atlanta Journal v. Mayson*, 92 Ga. 640, 44 Am. St. Rep. 104, 18 S. E. 1010, holding that plea of justification, where libelous matter charges crime, may be supported by preponderance of evidence only.

Cited in Sutherland, Dam. 3d ed. 391, on failure or abandonment of plea of justification in libel action as evidence of malice.

Cited in notes in 91 A. S. R. 302, 307, on justification in slander and libel; 10 L.R.A.(N.S.) 1051, on degree of proof necessary in defamation suit to establish justification for charging criminal act.

3 COLO. 597, HITTSON v. DAVENPORT.

Availability of new promise to take action out of statute of limitations.

Cited in Toothaker v. Boulder, 13 Colo. 219, 22 Pac. 468, holding that defense of limitations to action on specialty cannot be overcome by new promise, as in like actions upon simple contracts.

3 COLO. 605, MONTI v. BISHOP.

Right of defendant in equity suit to affirmative relief.

Cited in Sisty v. Bebee, 4 Colo. 52; Mills v. Buttrick, 4 Colo. 53,—holding that defendant in equity suit, failing to file cross bill, is not entitled to affirmative relief.

Effect of dismissal of writ of error.

Cited in McMichael v. Groves, 14 Colo. 540, 23 Pac. 1006, holding that, on dismissal without expressly reserving right, judgment stands affirmed and further review, either by appeal or by error, cannot be had; Caviness v. People, 27 Colo. 283, 60 Pac. 565, holding that person convicted of crime, on dismissal of writ of error for want of prosecution, is not entitled as matter of right to second writ.

REPORTS
OF
CASES AT LAW AND IN CHANCERY
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF COLORADO

By L. B. FRANCE

VOLUME IV

**CONTAINING CERTAIN CASES DECIDED AT THE DECEMBER
TERM, 1877; THE APRIL TERM, 1878; THE SPECIAL
OCTOBER TERM, 1878; THE DECEMBER TERM,
1878, AND OF THE APRIL TERM, 1879.**

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JUSTICES OF THE SUPREME COURT
OF THE
STATE OF COLORADO.

HENRY C. THATCHER, C. J.
SAMUEL H. ELBERT, J.
WILBUR F. STONE, J.

KEYES DANFORTH,
CLERK.

C. W. WRIGHT,
ATTORNEY-GENERAL.

A. J. SAMPSON,
ATTORNEY-GENERAL.
Term expired January 13, 1879.

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CASES
AT LAW AND IN CHANCERY
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF COLORADO.

DENVER, SOUTH PARK AND PACIFIC RAILWAY COMPANY
v. WOODWARD, Ad'r.

1. Where an administrator, in his representative character, brings suit upon a cause of action accruing to his intestate, and the general issue only is pleaded, the character in which the plaintiff sues is admitted.
In this case *held* that necessarily under the statute the plaintiff must sue in his representative character, and if the defendant had desired to challenge the appointment of the plaintiff as administrator he might have interposed the plea of *ne unques administrator*.
2. The regularity of an administrator's appointment can only be questioned in a direct proceeding for that purpose.
3. Letters of administration are to be considered as process under the statute (R. S. 1868, p. 524).
4. The probate judge should teste and sign process only when he elects to perform the duties which would otherwise devolve upon the clerk, and in all other cases process should be tested and signed by, and in the name of, the clerk.
5. This court will not reverse a judgment of the court below on the ground of informality alleged for the first time in this court.
6. The estimated accumulations of the deceased during the probable remainder of his life, having reference to his age, occupation, habits, bodily health and ability, furnish the true measure of compensatory damages under the statute. (Laws 1872, p. 117.)
7. For the purpose of showing the probable duration of the life of the deceased reference may be had to the Carlisle or other approved life tables.

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8. While a railroad company is not an insurer of its passengers, yet it is its duty to exercise the utmost care, diligence and vigilance consistent with the mode of transportation used, and the practical operation of the road.
9. If a passenger is killed in consequence of the overturning of a car, a presumption arises that the casualty was the result of negligence, but such presumption may be rebutted.

Appeal from District Court of Arapahoe County.

A DEFECTIVE switch on the track of the appellant caused the overturning of a car, resulting in the death of James Smith who was being conveyed as a passenger over appellant's road. Woodward, his administrator, brought an action for the use of Salome Smith, the widow. The declaration was in the ordinary form in case; plea of the general issue. The plaintiff below had judgment on the verdict in the sum of \$5,000. The facts as well as the positions contended for in this court by the appellant are sufficiently set forth in the opinion. The instruction relative to compensatory damages referred to in the opinion of the court was as follows :

"*Seventh.* If you find for the plaintiff on the question of negligence, you will, in determining the amount of damages to be assessed, take into consideration the evidence touching the probable accumulations of the deceased during the remainder of his life, that is, during the probable duration of his life, if he had not so come to his death, which would have gone to the benefit of his wife, having reference to his age, bodily health, occupation, habits and abilities to work—provided his wife was dependent upon him for support."

Messrs. SAYRE & BUTLER, and HUGHES & WELBORN, for appellant.

Messrs. SYMES & DECKER, for appellee.

THATCHER, C. J. This action is wholly statutory. It is founded upon section one of "an act concerning damages," approved February 8th, A. D. 1872 (Laws of 9th session, p. 117), which provides "when the death of any person is

caused by the wrongful act, misconduct, negligence or omission of another, the *personal representatives* of the former may maintain an action therefor against the latter, if the former might have maintained an action had he or she lived, against the latter for the same act, misconduct, negligence, or omission, provided the action shall be commenced within two years from the date of the death of the injured person, etc."

We are confronted *in limine* with the question as to whether to entitle a *personal representative* to recover in an action founded upon this statute, it is necessary, where the general issue only is pleaded, that he shall prove his character as such. Where an administrator, in his representative character, brings a suit upon a cause of action accruing to his intestate, and in his declaration makes *profert* of his letters of administration, he is not bound to produce the letters at the trial where the defendant has pleaded the general issue only. In such case the general issue admits the due appointment of the administrator, and puts the plaintiff upon proof of the alleged cause of action. The plaintiff's character is not questioned, but only his right to recover on the merits. *Brockington, Administrator, v. Vereen*, 1 Bailey (S. C.), 447; *Kowanchi v. Askew*, 17 Ark. 595; 2d Starkie on Ev. 548; 5 Robinson's Practice, 60; 1st Chitty's Pleadings, 517 (16th Am. ed.).

To a certain class of actions arising subsequent to the intestate's death, a different rule applies for obvious reasons.

Upon the appointment and qualification of an administrator, the personal property of the intestate by law vests in him. If, after his appointment, any such personal property should be converted by another, he may bring an action in trover at his election, either in his representative capacity, or in his individual character in his own right. In either case, upon general issue pleaded, in order to recover, he must show property in himself, which can only be done by the production of his letters of administration, or other competent evidence of his appointment. It is well under-

stood that the plaintiff cannot succeed in this action, unless he proves: 1st, property in the thing converted, either general or special; 2d, a wrongful conversion by the defendant; 3d, his right to the possession of it, at the time of the conversion. *Stevenson v. Little*, 10 Mich. 439; *Davidson v. Waldron*, 31 Ill. 129; *Vanderburgh v. Bassett*, 4 Minn. 251.

It necessarily follows that for a conversion, *in his own time*, an administrator, to make out his case, must prove his representative character. It is a link in his chain of title. 1st Chitty's Pleading, 517.

It is equally true that when an administrator *declares* in ejectment upon his own seizin, to make out his case, it is essential for him to prove his appointment as administrator, as part of his title, although he need not declare as administrator. *Aldis v. Burdick*, 8 Vt. 21.

The plaintiff in ejectment, in the absence of statute, without proof that he was seized of the legal estate in the premises at the time of the alleged demise, must fail.

To the extent here indicated, and for the reasons above set forth, the text-books and cases cited by counsel in support of the doctrine there laid down (2 Starkie on Ev. 548; Redfield on Laws of Wills, 128, note; 1st Chitty's Pl. 517 [16th Am. Ed.]; *Browning v. Huff*, 2 Bailey, 177; *Aldis, Ex. v. Burdick*, 8 Vt. 21; *Hunt v. Stevens*, 3 Taunt. 113; *Marsfield v. Marsh*, 2 Lord Raymond, 824; *Blainfield v. March*, 1 Salk. 285), and others, bearing a similitude to them in principle, go.

It will be observed that these authorities are confined to cases where the wrong or injury was done to the plaintiff, and *in which he could maintain a suit in his own name without designating himself as administrator*. The case under consideration does not belong to this class. *Necessarily*, under the statute the plaintiff must sue in his representative character. If he should not, the declaration would be demurrable. If the defendant had desired to challenge the appointment of the plaintiff as administrator, he might have interposed the plea of *ne unques adminis-*

trator. This plea would have put the plaintiff upon proof of his representative character. Having plead the general issue only, he thereby waived the production of the letters of administration at the trial, and admitted that plaintiff was authorized to bring the suit. But defendant strenuously contends that if the general issue does not require the plaintiff to prove his appointment, the plaintiff nevertheless chose to put that fact in issue by offering in evidence his letters, and that therefore the parties, by their implied agreement in open court, having tendered an issue as to the validity of the letters, the court must decide the point. This is a specious but mooted doctrine, and in the case of *Reynold's Executors v. Torrance*, 2 Brevard (S. C.), 484, it was denied by a majority of the court. If we were disposed to accept it (which we are not, as it raises an issue foreign to the record) it would not avail the defendant in this case.

Even had the plea of *ne unques administrator* been filed, we are of opinion that the plaintiff sufficiently proved his representative character to meet it. Letters of administration were offered and read in evidence. An exception was taken to the introduction of the letters on two grounds: first, because they purported on their face to be merely letters of administration to collect; and second, because an administrator is not a personal representative within the meaning of the statute upon which the action is founded. Upon examination of the letters read in evidence, they are found to be a literal transcript of the *form* prescribed by statute, with the blanks therein appropriately filled up. R. S. 1868, p. 655, § 46.

It is insisted that these are only letters of administration to collect, for the reason that full thirty days had not elapsed subsequent to the death of the intestate prior to the appointment of the administrator. The law provides that if "the widow or other relative of the intestate" shall fail to apply within twenty days from the death of such intestate, the probate court may grant administration to any

creditor or creditors who shall apply for the same within the ten days next ensuing, and if no creditor applies within that time, administration may be granted to any person or persons whom the judge of probate may think will best manage the estate. R. S. 1868, p. 654, § 44. The statute thus accords to the widow or next of kin, and to the creditors, the right of applying for administration in the order prescribed therein. The parties entitled to apply for administration may waive the right and the judge may thereupon appoint any fit person.

Whether they did in fact waive their right cannot be determined in this cause. In this collateral proceeding we may not inquire whether the letters were issued to a person entitled to them or not. As the judge of probate had competent jurisdiction of the cause the regularity of the administrator's appointment can only be questioned in a direct proceeding for that purpose. *Taylor v. Hosick*, 13 Kans. 527; *Sadler v. Sadler*, 16 Ark. 633; *Boody v. Emerson*, 17 N. H. 577; *Emery v. Hildreth*, 2 Gray, 231; *Wight v. Wallbaum*, 39 Ill. 554; *Schnell v. City of Chicago*, 38 id. 389.

This disposes of the first objection, and as to the second, that the administrator is a personal representative within the intent of the statute, and authorized to bring the suit, it is too well settled to need the citation of authorities.

Other objections to the letters of administration are raised for the first time in this court. It is objected that they are neither signed by the probate judge nor tested in his name as required by law.

Section 42 of chapter 90, concerning "Wills, executors and administrators," R. S., p. 654, declares that all letters testamentary and of administration shall be under the seal of the court, and attested and signed as *other process*.

Section 47 of the same chapter, R. S., p. 655, provides that all letters of administration shall be tested and signed, as *other process*, in the name of the probate judge, and be issued under the seal of the court.

Section 15 of chapter 71, concerning "Probate Courts," R. S., p. 524, provides that letters of administration, writs, summonses, citations, subpoenas, and *all other process*, which may be made or issued by the judge of probate in the discharge of his duties * * * shall bear teste in the name of the probate judge, and be sealed with the seal of the said probate court.

It is apparent from the language of these sections that letters of administration are to be considered as *process*, issuing out of the probate court, within the meaning both of the act concerning "Wills, executors and administrators," and the act concerning "Probate Courts," and that letters of administration are to be attested and signed in the same manner as all other process. Were these the only sections pertinent to the question under examination we would be bound to conclude that the letters read in evidence were not attested and signed as required by law. Until February 8, 1865 (R. S., p. 527), the probate judge of Arapahoe county acted as his own clerk, and necessarily issued and signed all process emanating from that court. No other person was authorized by law to do it.

March 11th, 1864 (R. S., p. 525), the legislature provided "that the county clerks of the several counties" (Arapahoe county not being included) "named in the act" (except the county of Gilpin) "shall be *ex-officio* clerks of the said probate courts therein, and they shall perform the duties respecting the said probate courts, which are performed by the clerks of the district courts." The clerk of a district court is required by law to sign and teste in his name all process issuing out of that court (R. S., p. 500, § 1). Hence it results that it is the duty of the clerk of the probate court to sign and teste in his name all process issuing from that court. The next legislature extended the provisions of the said act of March 11th, 1864, to Arapahoe county (R. S., p. 529, § 51), and further provided (§§ 49 and 50, R. S., p. 529) that "it shall be lawful for the probate judges in the several counties to perform the duties imposed

by the act, to which this is amendatory, upon the county clerks, whenever they shall elect so to do." And further, that "whenever the probate judge shall perform the duties of the clerk of his court, all process issued from such court shall be issued by, and in the name of, the judge thereof. These last two sections, considered in connection with the other sections cited, make it manifest that it is the intention of the law that the probate judge should teste and sign process only when he elects to perform the duties which would otherwise devolve upon the clerk, and that in all other cases process shall be tested and signed by and in the name of the clerk. The sections above quoted were re-enacted in the Revised Statutes. Although other objections were urged, we fail to discover that the letters of administration are defective in any respect. If they were informal in any particular, this court would decline to reverse the judgment below on account of such informality, alleged for the first time in this court. If the objections were valid, had they been raised in the court below, they might have been obviated by the introduction of other evidence of the appointment of the administrator. The production of the letters is evidence but not the only evidence of the administrator's appointment. The appointment is a matter of record, and by the record, if necessary, it may be established. *The State v. Price*, 21 Mo. 434; *Browning v. Huff*, 2 Bailey (S. C.), 175; *Elden v. Keddell*, 8 East, 189.

The appellant objects that there can be no recovery without an allegation in the declaration and proof at the trial, that the wife was dependent on her husband for support. This doctrine is announced by the supreme court of Illinois, under a statute different in some substantial respects from ours. *Chicago & R. I. R. R. v. Morris*, 26 Ill. 400.

We fail to discover in our statute any warrant for saying that unless the widow in the life-time of her husband was necessitous, or dependent, she is not entitled to recover. The Territorial supreme court, at its last term, repudiated that theory as being untenable. Without regard to the

needy condition of the widow, *caeteris paribus*, the measure of her damages is the same in each case. In the very carefully considered opinion just referred to, in the case of the *Kansas Pacific Railway Co. v. John Lundin, Administrator, etc.*, the court holds that the recovery under this statute is not governed by the needs of the wife, and what she would be entitled to demand from the deceased if he had lived, but that the estimated accumulations of the deceased during the probable remainder of his life, if he had not come to an accidental death, having reference to his age, occupation, habits, bodily health and ability, furnish the true measure of compensatory damages; and further, that for determining the number of years he would probably have lived, reference may be had to the Carlisle and other approved tables.

With this opinion we are in full accord, and as the instructions of the court (except the proviso therein contained) touching the measure of damages, are almost an exact re-script of the opinion on that subject, we see no error in them in that respect. That there was error in the proviso "that his wife was dependent on him for support," cannot inure to the benefit of the appellant, as it could not possibly be prejudiced thereby.

The question of fact submitted to the jury under proper instructions was for them to resolve, and in view of the wildly conflicting evidence adduced at the trial, if an appellate court were to interfere with their finding, it would be an unwarranted encroachment upon the province of the jury.

Although a railroad company is not, in a strict sense, an insurer of its passengers, nevertheless its duty is to guard and protect their lives by the exercise of the utmost care, diligence and vigilance consistent with the mode of transportation used, and the practical operation of the road. *Shearman & Redfield*, § 266; *Tuller et al. v. Talbot*, 23 Ill. 361.

If a car is overturned, and a passenger in consequence is

killed, a presumption arises that the casualty was the result of negligence. *Edgerton v. New York & Harlem R. R. Co.*, 39 N. Y. 228; *Yonge v. Kinney*, 28 Ga. 111; *Pittsburg, Cincinnati & St. Louis R. W. Co. v. Thompson*, 56 Ill. 138; *Ware v. Gay*, 11 Pick. 106; *Wilkie v. Bolster*, 3 E. D. Smith, 327.

This presumption may be rebutted by the company, by showing that the accident itself was such that human prudence and foresight could not have guarded against it. *Shearman & Redfield on Negligence*, § 280a.

That the accident occurred, and that it resulted in the death of James Smith, were not disputed; but the company sought to exonerate itself from liability by showing a state of facts from which the jury would be at liberty to infer that it (the company) is wholly free from fault in the premises; that no negligence or want of care is to be imputed to it in the construction and keeping in repair of its switch. But the jury, by their verdict, have found that the switch was not properly constructed; that the accident resulted either from the rail (which was forced out of its place), being too short, or from the clamp of the main switch-bar being too close to the end of said rail, or both. From the evidence they might have found either one or all of these facts. Had the defective rail been of proper length, or even had the clamp of the switch-bar, which was designed to hold the rail at its proper place, not been too near the end of such rail, the effect of the wheels of the engine and freight cars striking against the end of the defective rail would not have been to knock it out of the clamp of the main switch-bar connected with the standard. That the entire rail was too short by two or three inches, the jury may well have found from the evidence.

Williams, the appellant's witness, who was a brakeman on the road at the time of the accident, testified that the defective rail was always too short; that not thinking it was safe, three or four days before the accident, he had forced the switch end of the rail nearer the end of the

permanent connecting rail opposite, by driving a wedge between the remote end of the rail and the one next to it. The attention of the section boss was called to this defect. Nor was there any testimony to disprove that the clamp of the main or end switch-bar was too near the end of the defective rail for safety. The accident, under proper instructions, which were given, with the latitude which is allowed a jury in the determination of the weight of evidence, and the credibility of witnesses a jury might find, would not have occurred had that care and diligence been exercised which the law demands in the construction and keeping in repair of switches and tracks. So contradictory is the evidence that a verdict for either party would not be wholly without support.

With the exception of the proviso to instruction numbered seven, before referred to, we see no error in any part of the charge to which the appellant excepted, and that error is harmless. The evidence of Mr. Greenslit as to the *usual* distance on other narrow-gauge roads, between the end of a movable switch rail and the end of the adjacent permanent rail, was properly excluded, if for no other reason, on the ground that no foundation had been laid for the question. It did not appear that he had any knowledge whether there was usually a uniform distance between such rails. Nor did the court err in excluding testimony as to the distance he had found, by an examination made recently before the trial, "between the ends of switches on the Denver & Rio Grande road." The question as to whether that particular company had defectively or properly constructed its switches was not before the court, and was not a legitimate subject of inquiry.

Other and competent testimony as to the proper distance between such rails was introduced by the appellant. The jury was not, therefore, unadvised on this subject.

We have carefully examined all the specifications of error contained in the appellant's assignment, and failing

to discover any error that would warrant us in reversing the judgment of the court below, it must be

Affirmed.

Mr. Justice ELBERT did not sit in this case.

Upon petition for rehearing :

THATCHER, C. J. We have fully considered the grounds upon which the petition rests.

We see no reason for changing the views expressed in the opinion in chief, touching the principles which must govern the decision of this cause so far as those principles were discussed in the opinion

Even if we entertained a doubt as to the necessity, under the state of the pleadings, of the plaintiff proving his representative character, we are satisfied that the letters of administration read in evidence sufficiently establish the character in which the plaintiff sued.

A rehearing, however, is sought also upon another ground, not before considered by the court, nor so much as adverted to in argument by counsel, viz. : that the repeal of the statute upon which the judgment of the court below was recovered, operates to divest this court of jurisdiction to take a single step in the cause.

The statute was repealed while the cause was pending in this court. It is insisted that the judgment fell with the repeal of the statute. The question presented, therefore, is, whether a right to compensatory damages, conferred by a statute, and carried into judgment in the lower court, can be defeated in this court, by the repeal of such statute, before final judgment here. Counsel are requested to discuss :

1st. The effect of the repeal of this statute, independent of any provision in the State Constitution ;

2d. What effect upon its repeal, if any, has the constitutional provision, which inhibits the passage of laws, retrospective in their operation ?

Upon these points, counsel for petitioner may file briefs or arguments within ten days, to be answered in ten days thereafter.

NOTE.—For the opinion upon Petition for Rehearing in the foregoing case, see *post*.

PRESUMPTION OF NEGLIGENCE ARISES FROM KILLING OF PASSENGER in consequence of overturning of car, but such presumption may be rebutted: *Walt v. Litzoy*, 6 Colo. 469, citing the principal case, where it is said that though this rule is opposed to the Michigan cases, it is not opposed to the weight of authority, but rather in conformity with it.

JUDGMENT WILL NOT BE REVERSED FOR INFORMALITY alleged for the first time in the appellate court: *Quimby v. Boyd*, 8 Colo. 300.

DRUMMOND v. CARSON.

Evidence of conversations between the parties prior to or contemporaneous with the execution of a written contract is not admissible to vary the terms of such written contract.

Appeal from District Court of Bent County.

Mr. C. S. THOMAS, for appellant.

Mr. CHAS. E. GAST, for appellee.

ELBERT, J. The conversations given in evidence in this case were prior to, or contemporaneous with the written contract between the parties, and were not admissible to change or vary its terms.

There was not a word of evidence to show a *subsequent* alteration of the contract, as to the place of delivery, and the court erred, in submitting to the jury the question as to whether or not there was a subsequent alteration of the contract, in this particular.

The judgment of the court below is reversed, and the cause remanded for further proceedings according to law.

Reversed.

The Chief Justice having been of counsel in the court below, did not sit in this case.

WYATT v. FREEMAN.

1. Where a defendant fails to appear in an action before a justice of the peace yet files his appeal bond, he thereby enters his appearance in the appellate court, and by so doing waives all defects in the process and the service thereof.
2. In an action of replevin under the statute (Laws of 1876, p. 116), when the officer fails to give the defendant an opportunity to execute the statutory bond and retain possession of the property, the proper practice is for the defendant to appear before the court and move that the property be restored to him upon his executing the bond.
3. The admission of further testimony on behalf of the plaintiff after he has rested his case and a motion has been interposed for a nonsuit under the statute (Laws 1872, p. 99), rests in the sound discretion of the court and may not be assigned for error.
4. When a sheriff justifies under an execution and seeks to attack the title of the plaintiff in replevin on the ground of fraud, the plaintiff, being a stranger to the judgment upon which the execution is based, he must show that the judgment upon which the execution issued remains unsatisfied; the sheriff in such case being the mere agent of the judgment creditor.

Appeal from County Court of Weld County.

WYATT, the appellant, as sheriff, levied upon a wagon in the possession of one Pinneo, under an execution against him. Freeman, the appellee, claimed the ownership of the property, and brought an action in replevin in a justice's court against the appellant. The coroner seized the property under the replevin writ and at once turned it over to Freeman. Judgment was entered by the justice against Wyatt by default, and Wyatt appealed to the county court. In the county court Wyatt justified under his writ, and at the trial undertook to attack the title of Freeman upon the ground of fraud, but failed to introduce in evidence the judgment upon which his writ was based. Freeman had judgment, to reverse which Wyatt prosecuted this appeal.

Messrs. HAYNES, GIPSON & DUNNING, for appellant.

Messrs. GEORGE & BLACK, for appellee.

THATCHER, C. J. This is an action in replevin, brought by the appellee against the appellant, before a justice of the peace, to recover one light spring wagon. Judgment was rendered for the plaintiff, "no appearance being made by the defendant." The defendant appealed to the county court, where a trial was had to the court without the intervention of a jury, and judgment was rendered in favor of the plaintiff, from which the defendant appeals to this court.

It is assigned for error that the court overruled the defendant's motion to dismiss the suit at plaintiff's costs and award writ of *retorno habendo*, because of the non-compliance with the statute by the justice in issuing the writ of replevin, and the coroner in executing said writ and delivering property to the plaintiff. This motion was made for the first time in the county court, after the defendant's full appearance in the action. Although he failed to appear before the justice of the peace, by filing his appeal bond he thereby entered his appearance in the appellate court. R. S., § 46, p. 407; *Swingley v. Haynes*, 22 Ill. 216; *McCutchin v. O. and M. R. R. Co.*, 27 id. 11.

There is no authority in the statute that would warrant the officer in turning over the property seized by virtue of the writ of replevin to the plaintiff, until the lapse of three days after the day of service, and then only in the event that the defendant fails to give bond. Session Laws of 1876, p. 116. But the justice, nevertheless, had jurisdiction of the cause, and did not err in refusing to dismiss the writ. Had the defendant appeared before the justice of the peace and moved the court that the property seized might be restored to him, upon executing the statutory bond, the motion should have been allowed. This would have been proper practice. *Parlin v. Austin* and *Robinson v. Austin* (3 Col. 337, 375), decided at the April term.

When the plaintiff rested, the defendant moved for a nonsuit, on the ground that plaintiff had not proved demand before suit brought. The court denied the motion and permitted the plaintiff to prove demand. This is assigned for

error. Section 3, Session Laws 1872, p. 99, provides: "Where the plaintiff has produced his evidence and rests his case, the court *may*, on application of the defendant, if of opinion that the evidence produced will not support a verdict, nonsuit the plaintiff." This section is not mandatory to such an extent that it inhibits the court, upon such motion, from permitting other evidence to be introduced in support of the plaintiff's cause of action. The admission of such further testimony rests in the sound discretion of the court, and may not be assigned for error. *Sellar v. Clelland*, 2 Col. 551.

There is an irreconcilable conflict in the evidence, and although in our opinion, considering all the testimony detailed at the trial, there is strong reason for believing that Freeman was not a *bona fide* purchaser, that Pinneo was acting in the alleged purchase in his own behalf, and not in behalf of Freeman, yet we are reluctantly constrained to let the finding of the court below stand, as it is not unsupported by the evidence, although against its weight, if the court considered the evidence calculated to impeach the *bona fides* of the transfer. Evidence of that character, however, the court had the right, and it was its duty, in our view of the law, to disregard. The officer justified under an execution issued against Pinneo. The writ was introduced in evidence. Had the plaintiff not been a stranger to the execution or the judgment upon which it was based, this would have been sufficient. But here the sheriff seeks to attack, on the ground of fraud, the title of the plaintiff who was a stranger to the action in which the execution issued. To authorize the sheriff to contest the title on this ground it must be proved by the sheriff, who is but the agent of the creditor, that there existed an unsatisfied judgment. Having failed to produce a copy of the judgment, he was in no position to assail the plaintiff's title for fraud. *McCraw v. Welch*, 2 Col. 287; 9 Bacon's Abridgment, 495, title Trespass, letter G; *Lake v. Billers*, 1 Lord Raymond, 733; *Damon v. Bryant*, 2 Pick. 413; *High v.*

Wilson, 2 Johns. 47; *Jackson v. Hasbrouck*, 12 id. 213; *Jackson v. Hobson*, 4 Scam. 418. The court was, therefore, warranted in its disregard of the evidence tending to impeach plaintiff's title, the defendant having failed to produce the judgment. If the rule laid down in *Deitsch v. Wiggins*, 15 Wall. (U. S. Sup. Ct.) 546, is variant from this doctrine, we do not feel bound to follow it, as this cause was tried after the admission of Colorado into the Union.

the judgment of the lower court must be *Affirmed.*

CONVEYANCES TO HINDER, DELAY, OR DEFRAUD CREDITORS ARE VOID against those hindered, delayed, or defrauded: *Townsend v. Peterson*, 12 Colo. 496.

TAKING APPEAL IN APPEARANCE: *Cates v. Muck*, 6 Colo. 465; *Charles v. Amos*, 10 Colo. 277.

VOLUNTARY APPEARANCE WAIVES DEFECTS: *Union Pac. Ry. Co. v. J. W. Busk*, 12 Colo. 296.

WHEN OFFICER PLEADS JUSTIFICATION, he must allege and prove the existence and validity of the judgment as well as the writ: *Williams v. Meltor*, 12 Colo. 11.

COLE v. CHEOVENDA.

A, a drover, agreed in writing to deliver to B, a butcher, a certain number of beef cattle each month, for one year, at a fixed price per cwt. After carrying on the contract for a few months, A, being unable to furnish the requisite quality of beef cattle, agreed verbally with B, that the latter should supply himself and that A would pay the difference between the beef so purchased and the agreed price of the written contract. B purchased several lots of stall-fed Kansas cattle at a greater price than Colorado beef of the quality named in the contract. Upon a suit brought before the expiration of the year by B to recover the difference between the purchase-price and the contract price, *held*,

1. Although the written contract was misdescribed in the special count of the declaration, it was admissible as evidence under the common counts.
2. Under the terms of the contract B could have sued for the price of each lot when delivered by himself, and A could sue for the price difference due him upon any one or more purchases as he might elect.
3. Under the verbal contract, B was not at liberty to purchase cattle brought from without the State at a greater price than Colorado beef of the requisite quality, and charge A with the excess of price. The liability of A is to be measured by the difference between the contract price and the price of marketable Colorado beef at the time of the purchase.
4. But evidence as to the purchase of the Kansas cattle was admissible to determine the quantity of beef for which A was chargeable.
5. Evidence that A was prepared and willing to furnish beef at the time B was purchasing elsewhere, without showing that such beef was of the agreed quality, was properly rejected.
6. A party cannot assign error upon an immaterial issue tendered by himself.

7. When demand is made upon an opposing attorney in the trial of a cause, for the production of a paper in his possession relating to the case, verbal notice is sufficient. The time and place of such notice must be such as to enable the party, under the known circumstances of the case, to comply with the call for the production of the papers. An attorney is bound to answer whether a document is in his possession or elsewhere in court.

Error to County Court of Arapahoe County.

THE facts are stated in the opinion.

Messrs. MILLER & CLOUGH, for plaintiff in error.

Messrs. SYMES & DECKER, for defendant in error.

STONE, J. Cole, the plaintiff in error, agreed in writing to deliver to Cheovenda, the defendant in error, a certain number of beef cattle every month, at a stipulated price per cwt. The contract was to continue for one year. Delivery commenced in the fall and was continued until spring, when Cole, being unable to furnish the requisite quality of beef to supply Cheovenda's market, agreed that the latter should buy to supply himself, and that he—Cole—would pay the difference between the price of the beef so purchased, and the contract price of the written agreement. Cheovenda purchased for himself during about three months, from March 22d to June 20th. Cole furnished two or three lots in the meantime, and in the latter part of June, he notified Cheovenda of his ability to furnish all the beef required; but the parties disagreed in attempting to settle the difference which Cheovenda claimed was then due, and further business between them ceased. Cheovenda brought suit to recover the amount claimed to be due as the difference between the price he had paid for the beef purchased by him under the last agreement, and the stipulated price at which Cole was to furnish.

We do not consider it necessary, nor is it perhaps expected by the counsel for the plaintiff in error, that we should review in detail each of the twenty-four assignments of error made as grounds for reversal of the judgment in

favor of the plaintiff in the court below. It is contended that the court erred in admitting the written contract as evidence, because it was misdescribed in the special count of the declaration. Whether this variance was so far material as to exclude the contract as evidence, or defeat a recovery under the special count, we need not determine, since the contract was admissible as evidence under the common counts.

It is claimed that the verbal contract being indefinite as to duration, authorized only one purchase by Cheovenda; but that if held otherwise, then it must be held to continue during the whole period of the written contract; and hence, that suit could not be brought until the end of the year.

Under the written contract, Cheovenda was to pay for the cattle delivered by Cole as soon as weighed. Cole could therefore have sued for the price of each lot for any breach of the condition of payment as soon as weighed.

Under the evidence as to the general condition of the Denver beef market at the time of the making of this new contract, and the unfitness of Cole's own herd for beef, the jury may have reasonably concluded that the parties intended that these purchases by Cheovenda should continue until Cole should be able to fully supply the amount and quality of beef required under the first contract. It would follow that Cheovenda was entitled to be paid the excess in price of each several purchase as soon as made, and might therefore sue for the amount due upon any one or upon the total of such previous purchases.

Under the first contract, Cole was to deliver "the same kind of beef cattle as furnished to Mills Bro., and Rife & Co.," which was shown by the testimony to be Colorado cattle.

Under the authority given to purchase cattle in lieu of those Cole had agreed to deliver, Cheovenda was not at liberty to purchase, as he did, imported stall-fed Kansas cattle, at a price much greater than marketable Colorado

beef at that time, and charge Cole with such excess in price. He could purchase what kind of beef he pleased, but might not charge Cole with a liability therefor beyond the excess in price of what Colorado beef of the required quality could have been purchased for at the same time. In other words, the liability of Cole is to be measured by the terms of the original contract. The measure of damages is the same as it would have been had he, without this temporary agreement, failed to deliver during the same time on the original contract, to wit: the difference between the contract price and the market price.

The court below, therefore, properly instructed the jury upon this point, the giving of which instruction is one of the errors assigned.

The admission of evidence as to the purchase of Kansas cattle is assigned for error; but this evidence was competent and necessary to determine the entire quantity of beef purchased by Cheovenda for which Cole was chargeable. The offer of the defendant below to show that he was ready to supply cattle during the time Cheovenda was purchasing, was properly rejected. If he had offered to show a tender of the *kind and quality* of beef cattle that under the original contract he was bound to furnish, and thereby given notice of a termination of Cheovenda's authority to make further purchases, it would have raised an entirely different question. So, too, the offer to show that Cheovenda refused to pay for all the cattle he had received under the original contract, at the time they were weighed, was properly rejected. Cole, upon demand and refusal to pay, could have sued for such price after each weighing, or any time afterward; and therefore the proof of what was due him under his plea of set-off, was all that was admissible.

True, the question as to whether there was such refusal was put in issue by the second amended plea, and error is assigned, for giving and refusing instructions by the court upon this point; but the plea itself was obnoxious to demurrer, since it tendered an immaterial issue under the

declaration. And a party cannot assign error upon an immaterial issue tendered by himself. *Graham v. Dixon*, 3 Scam. 115.

Preliminary to the trial, one of the attorneys for the defendant below was put upon the witness stand and interrogated by plaintiff's counsel touching his possession of the original contract between the parties. Upon disclosing his possession of the paper, he was notified to produce it. The objection for want of sufficient notice was overruled, and failing to produce the instrument, the plaintiff, Cheovenda, was put upon the stand ; but after testifying to the execution of such contract, and before giving secondary evidence of its contents, the contract was produced and thereafter admitted in evidence. Error is assigned upon the exception, to the ruling of the court in allowing the examination of said attorney, and in requiring the production of the contract upon the notice given therefor at bar.

The object in requiring notice is declared in the text-books to be, not only to procure the paper, but to give the adverse party opportunity to provide the proper testimony to support or impeach it. 1 Greenleaf's Ev., § 561, note. But where the paper is either the contract declared on, or is set up as a matter of inducement, it is apparent that the reason for giving notice any considerable time previous to the production of the paper is wholly wanting. The plaintiff was as much entitled to the benefit of this paper as the defendant, and the latter had been advised by the declaration of the evident use the former would make of it in the trial of the case, and therefore had ample opportunity to be prepared to attack or defend it. Verbal notice is sufficient, and as to the time and place of service, no precise rule can be laid down, further than it must be such as to enable the party, *under the known circumstances of the case*, to comply with the call for the papers to be produced. 1 Greenleaf's Ev., § 562. And an attorney is bound to answer whether a document is in his possession or else-

where in court. *Id.*, 13th ed., note 1 to § 561, citing *Brandt v. Kline*, 17 Johns. 335. Nor do we find that the verdict was excessive. Guided by the instructions of the court as to the measure of damages, the verdict is shown to cover only the value of the beef proven to have been purchased by Cheovenda at the average market price for Colorado beef at the time of the purchase.

For these reasons the motions for new trial and in arrest of judgment were properly overruled.

We fail to perceive sufficient ground for reversing the judgment of the court below, and it will accordingly be
Affirmed.

WILLOUGHBY v. GEORGE.

Under the Code (§ 335) the only method by which a judgment of the district court may be reviewed in this court is by appeal.

Error to District Court of Jefferson County.

MOTION to quash writ of error.

Mr. J. W. HORNER, for plaintiff in error.

Mr. THOMAS GEORGE, *pro se.*

ELBERT, J. The judgment in this case was rendered after the Code went into effect.

A writ of error is a new suit. *Filley v. Cody*, 3 Col. 221, and cases cited.

The case does not therefore come within the saving clause of section 447 of the Code.

Section 335 of the Code provides "a judgment or order in a civil action, except when expressly made final, may be reviewed by appeal as prescribed by this act and not otherwise."

The phrase, "*except when expressly made final*," is

peculiar and has given rise to doubts, as to whether the section ought not to be held to apply to interlocutory judgments and orders only. By reference, however, to section 333 of the California Code, of which our Code is largely a transcript, we find substantially, and almost in language the same provision, except that the phrase there reads, "except when expressly made final *by this Code*." Harston's Prac., § 936.

As the phrase is still susceptible of the same construction as if the omitted words had been adopted, we do not feel authorized to say that their omission was with the design of changing or limiting the force or effect of the section as it existed in the Code from which it was adopted. The exception then is of judgments and orders which under the law are not reviewable by any mode.

In this view the provision is plain and positive, and under it, in the case of judgments rendered after the Code went into effect, the remedy is by appeal and *not otherwise*. *Haight v. Gray*, 8 Cal. 300.

If it is possible for a case to occur not falling within the cases prescribed in the act as appealable, in such a case a different view might be taken.

The writ of error does not lie. The Constitution saves the writ to the county court only.

The motion to quash is sustained.

Motion sustained.

JUDGMENT—HOW REVIEWABLE.—Prior to February 24, 1873, under the code, the only method by which a judgment of the district court could be reviewed was by appeal; writ of error did not lie: *Bernard v. Boggs*, 4 Colo. 73; *Connor v. Connor's Estate*, 4 Colo. 75; *Willoughby v. George*, 5 Colo. 81; *Hewitt v. Colorado Springs Co.*, 5 Colo. 185. This applies only to district courts and not to probate courts, the writ to the latter being shielded by the constitution: *Stebbins v. Anthony*, 5 Colo. 275.

LUNDIN, Admr., etc., v. THE KANSAS PACIFIC RAILWAY
COMPANY.

Where judgment was rendered in the district court prior to October 1st, 1877,
a writ of error will lie to review such judgment.

Error to District Court of Arapahoe County.

MOTION to strike suit from the docket.

ELBERT, J. The judgment in this case was rendered prior to October 1st, 1877.

The plaintiff's right to the writ of error accrued therefore prior to the date the Code went into effect, and comes within the saving clause of section 447. Under any other view, the aggrieved party to a judgment rendered prior to October 1st, 1877, would be without remedy.

The writ of error lies, and the motion to strike the cause from the docket is overruled.

WRIT OF ERROR WOULD LIE TO PROBATE COURT from supreme court, under the code: *Stebbins v. Anthony*, 5 Colo. 278. See, also, the note to *Willoughby v. George*, 4 Colo. 22.

TRIPP v. FISKE.

If any element of proof necessary to make out the plaintiff's case is wanting, it is the duty of the court, upon motion of the defendant, to enter a judgment of nonsuit.

Error to County Court of Arapahoe County.

TRIPP, the plaintiff in error, brought his action against Fiske, the defendant in error, before a justice of the peace, and recovered judgment for \$168. Fiske appealed to the county court. Upon the conclusion of the plaintiff's testimony in the county court, the defendant moved for a judgment of nonsuit; the motion was sustained, and thereupon the plaintiff sued out this writ of error.

Messrs. SYMES & DECKER, for plaintiff in error.

Mr. THOMAS GEORGE, for defendant in error.

THATCHER, C. J. The day has gone by when courts will refuse to enter a judgment of nonsuit upon motion of defendant, when the plaintiff has failed to introduce sufficient evidence in a case tried by a jury to support a verdict for the plaintiff, and in a case tried to the court, to warrant a finding and judgment in favor of the plaintiff. *Wheelton v. Hardisty*, 92 E. C. Law, 262; *Ryder v. Wombwell*, Law Rep., 4 Exchequer, 38; *Commissioners, etc., v. Clark*, 4 Otto, 284.

If he upon whom the burden of proof rest falls short in any essential particular; if any element of proof necessary to make out his case is wanting, upon motion of the defendant, it is the duty of the court to enter a judgment of nonsuit.

In the case before us the court might on motion, when the plaintiff rested his case, have gone further, and rendered final judgment for the defendant upon the merits.

That the court might have rendered a judgment that would be a bar to another action, but instead thereof, entered only a judgment of nonsuit, certainly affords to the plaintiff no ground of complaint.

So meagre and unsatisfactory is the evidence that is pertinent to the plaintiff's right to recover, that the court below was, as this court certainly is, unable to say that the plaintiff's case was made out.

Judgment affirmed.

CITY OF DENVER v. CAPELLI.

1. When the law confers a power, judicial in its nature (*e. g.*, to construct all necessary drains and sewers) upon a municipal corporation, no liability attaches so long as the authorities fail or refuse to exercise that power; nor can the city be made to respond for a mere error in judgment in the plan or system adopted. But if the power be exercised the city will be held to a strict performance of whatever ministerial duties may be incident thereto.

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2. When a jury is given two instructions, one of which lays down the law correctly, and the other is inconsistent therewith, and this court cannot determine by which instruction the jury was governed, the judgment will be reversed.

Error to Probate Court of Arapahoe County.

ACTION on the case ; plea of the general issue. The defendant in error had judgment in the court below for seven hundred and fifteen dollars.

Mr. CHARLES S. THOMAS, for plaintiff in error.

Messrs. PATTERSON & CAMPBELL, for defendant in error.

THATCHER, C. J. The defendant in error was the owner of a two story brick building, situate on the corner of First and Fifteenth streets, in Kasserman's addition to the city of Denver.

This action was commenced to recover damages, which, it was alleged, were sustained by her, by reason of the overflow of her premises in June, 1874, May, 1875, and August, 1875, and the consequent destruction of certain personal property, contained in the cellar of the building, and injury done to the building itself. It is alleged in the declaration, that these injuries resulted from the carelessness and negligence of the city, in the construction of a drain or sewer at the intersection of First and Fifteenth streets, and in the failure of the city to keep the same open and free from all impediments.

The law confers a *power*, judicial in its nature, upon the city to construct all necessary drains and sewers; but until that power is exercised it imposes no *legal duty* upon the city authorities. Session Laws of 1866, p. 100.

The distinction between the power of the city, and its legal, as separate from its political duty, must be kept steadily in mind. As long as the city authorities fail or refuse to exercise their discretionary powers, no liability attaches; but if that power be exercised, as is sought to be

proved in this case, by the adoption of a partial system of drainage, to the strict performance of whatever ministerial duties may be incident thereto, the city is bound; and for any failure in that respect it cannot escape liability. But for a mere error of judgment in the plan or system adopted, it cannot be made to respond. If the municipality fails to act, or if acting, it adopts a plan, however inefficient, and constructs its drains in conformity thereto, and injury results to an individual in consequence of the plan being defective, or of the drains not being of sufficient size to accommodate all the water, which (if the drains were larger) would naturally flow through them, there is no resulting liability to the city. If, however, a drain be constructed, whether of large or small dimensions, the duty of the city at once arises to keep it in repair. To the extent of its capacity it must be kept efficient. It is equally true that the city is liable for damages resulting from the unskillful or negligent manner of constructing its drains or sewers. These principles are, it is believed, in accord with the weight of authority and the better reason. *Mills v. The City of Brooklyn*, 32 N. Y. 489; *Carr et al. v. The Northern Liberties*, 35 Pa. 324, *City of Atchinson v. Challis*, 9 Kans. 603; *Judge v. City of Meriden*, 38 Conn. 90; *The City of McGregor v. Boyle*, 34 Iowa, 268; Wharton on Negligence, § 260; Dillon on Mun. Corp., § 802, *et seq.*; Shearman & Redfield on Negligence, § 127.

In the Pennsylvania case cited, *supra*, Chief Justice LOWRIE, speaking for the court, says: "Any street may be complained of as being too steep or too level; gutters as being too deep or too shallow, or as being pitched in a wrong direction; and there may be evidence that these things were carelessly resolved upon, and then a tribunal that is foreign to the municipal system, will be allowed to intervene and control the town officers. And the end is not yet; for if a regulation be altered to suit the views of one jury, the alteration may give rise to another case, in which the new regulation will be likewise condemned. This theory is so vicious that it cannot possibly be admitted."

The defendant objected and excepted to the introduction of evidence in regard to the dimensions of the drains, the fall given them, and the manner in which they were connected at the point of intersection. It follows from the principles above laid down, that a subsidiary question for the jury to determine in arriving at a verdict, was whether the drains were of sufficient size to carry off the large quantity of water that accumulated near the corner of First and Fifteenth streets on the occasions of the three heavy rainfalls; if not of sufficient capacity, although they may not have been in proper repair, the plaintiff would not be entitled to recover, in a case where the fall of water was so great that the conduits, if unobstructed, would have been so wholly inadequate to carry off its great volume, that the surplus thereof would have overflowed the plaintiff's premises, and occasioned the identical grievance complained of. In other words, if the proximate, efficient cause of the injury, is not attributable to the carelessness or negligence of the defendant, there can be no recovery. One method of determining whether the drains, if unobstructed, were of sufficient capacity to carry off the flood of waters, was by a calculation based upon the dimensions of the conduits, the fall given them, and the manner of their construction at the point of junction. For this purpose the evidence was admissible.

It was not proper for them to consider evidence of this character, with the view to fix the liability of the defendant on the ground that the city had adopted an injudicious *plan* of sewerage, or had constructed sewers that were insufficient, when in good repair, to discharge, at all times and under all circumstances, whatever quantities of water might find their way to them. The jury were not uninstructed upon this point. The court charged them, in this behalf, as follows:

"But in ascertaining whether the culverts were unskillfully constructed, you will neither consider the fact of the elbow in the culverts, the inadequate size of them, their

inadequate fall or decline, the place where upon the streets they were constructed, nor the plan of their construction, because these are matters wholly of judgment on the part of agents of the city, and for which defendant is not liable to the plaintiff."

This instruction was quite as favorable, on the points it touches, as the law will warrant.

Error is assigned upon the following instruction :

"If the jury believe, from the evidence, that rainfalls such as those in June, 1874, and May and August, 1875, had occurred in the city of Denver previous to these dates, several times, and within the general knowledge of persons then living in the city, and, while such rainfalls had not been frequent, they had still been of occasional occurrence, the defendant cannot escape responsibility in this case, solely on the ground that the rainfalls in controversy were extraordinary or unusual. Such rainfalls cannot be said to be the acts of God, for damages resulting from which, persons are in no case to be held responsible. *If such rainfalls might have reasonably been anticipated from past experience, no matter how great or violent they were, the defense must fail the defendant.*"

This instruction is, we think, so worded as to create the impression upon the minds of the jury, that it was the duty of the defendant, possessed of the knowledge that extraordinary rainfalls, at more or less remote intervals, had visited the city, to adopt such a system of drainage as would effectually protect property owners from injury resulting from the overflow of their premises, occasioned by such unusual rainfalls. The city is charged with no such duty. It is not called upon to anticipate or estimate the probable amount of water that may, at any time, fall within its limits, and to construct drains with reference thereto. It is not legally bound to construct any drains whatever, for the purpose of protecting its inhabitants from surface water. If the city constructs a drain, it is not for the citizens to say, that it is not of sufficient capacity to

convey all the water that may accumulate at a time of a flood, such as experience teaches, may now and then be anticipated. It is with the city authorities exclusively, to determine whether *any* drain shall be built, its dimensions and the plan according to which it shall be constructed. If the drain intended for the escape of surface water be constructed, the citizen has a right to expect that it will be kept open and in repair; so that it will at all times, up to its original capacity, be efficient.

The question whether, when a ditch is once constructed, it may thereafter be wholly abandoned, and the city, in consequence of such abandonment, be exempt from liability to an individual, in a case where he was left in no worse condition than he would have been had the drain not been made (*City of Atchison v. Challis*, 9 Kans. 603), does not arise, there being no evidence tending to prove such an abandonment.

The jury may have been misled by this instruction which left so much to inference. That in another part of the charge, another instruction, laying down the law correctly, and inconsistent with the instruction under consideration, was given, is not material. This court cannot determine by which instruction the jury was governed. It is enough for us to know that error may have intervened. On this ground the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MUNICIPAL CORPORATIONS—DRAINS AND SEWERS: *Denver v. Rhodes*, 9 Colo. 161; *Guldager v. Rockwell*, 114 Cal. 606, 52; *Springfield v. Spence*, 39 Ohio St. 670.

WHERE CONFLICTING INSTRUCTIONS ARE GIVEN some of which are correct and others wrong, and the court cannot determine by which the jury was governed, the judgment will be reversed: *Boulder v. Niles*, 9 Colo. 421.

KANSAS PACIFIC RAILWAY COMPANY v. WARD.

1. A railway company has the undoubted right to the exclusive use of its roadway, except at public crossings, for the unimpeded passage of its trains; but notwithstanding this right the company is still bound to use ordinary care to avoid injury to persons who may be upon or near the track.

2. Whether there was not a want of ordinary care on the part of the defendant in this case, in running a freight train backward within the city limits, at the rate of seven or eight miles an hour, with many pedestrians passing along the side of its track, with a beam projecting a foot and a half beyond the side of the car, without brakemen, lookout or signal to give warning, was a question properly submitted to the jury.
3. The question of contributory negligence is a question for the jury, to be by them determined in view of all the circumstances of the case.
4. When the instructions given by the court are in the nature of a general charge, excepting to "each and every" of the instructions will not avail if any one proposition of law therein is correct; the same rule applies to a like exception to instructions refused, if any one proposition of law contained therein was properly refused. Where instructions refused consist of separate and distinct propositions of law, each standing independent and alone, making it necessary for the court either to give or refuse them separately, an exception to the ruling of the court in refusing to give the said instructions "and each and every" of them, is sufficient.
5. The refusal of the court to give a proper instruction cannot be assigned for error where an instruction has already been given embracing the correct principle contained in the instruction asked.
6. Good practice requires that instructions be numbered.
7. The credibility of witnesses is for the determination of the jury, and this court is not at liberty to interfere, except where the verdict is not supported by the evidence.

Appeal from District Court of Arapahoe County.

THE facts are sufficiently stated in the opinion.

The fourth and sixth assignments of error were based upon the ruling of the court on the following questions propounded to defendant's witness at the trial:

Q. Just as that train was passed, then, state whether or not it was possible for the engineer and fireman to see the track in advance of the car?

Plaintiff objected. Objection sustained and defendant excepted.

Q. Now I will get you to state to the jury whether or not a person could, by looking at that train, tell which way it was going?

Plaintiff objected because immaterial and incompetent. Objection sustained and defendant excepted.

The following are the instructions asked by defendant, and which this court holds to have been properly refused:

"The jury are instructed that the presumption of the law is, in the absence of testimony upon the point, that the place where the accident complained of occurred was not the crossing of a public highway, and that if they shall find from the evidence that the accident occurred between the two tracks of the defendant, that the place where the same did occur was the property of the defendant.

"If the jury shall believe, from the evidence, that a bar was placed upon the front end of the flat car in the freight train that was ahead of the train, for the purpose, as supposed by the witness Ward, of protecting the load that was upon the car from falling off, and that this bar or beam extended out over the sides of the track a distance of one foot and a half, the jury are instructed that this is not negligence on the part of the defendant."

Messrs. SAYRE, WRIGHT & BUTLER, for appellant.

Mr. V. D. MARKHAM, for appellee.

ELBERT, J. This is an action of trespass on the case, brought by the appellee against the appellant, to recover damages for injuries sustained by reason, as it is alleged, of the negligence of the appellant in running a certain train of cars, by which appellee was knocked down and so injured that amputation of his leg became necessary.

The jury returned a verdict for \$3,750, and judgment was rendered for that amount.

The evidence on behalf of the appellee, touching the circumstances under which the injury was sustained, consisted alone of his own testimony.

The motion for nonsuit raised the question whether the plaintiff was entitled to recover on his own statement of facts.

The locality of the accident was not at a public highway or crossing, but at or near a foot-path leading diagonally to

and across the tracks of the defendant, and within the city limits.

A railway company has the undoubted right to the exclusive use of its roadway, except at public crossings, for the unimpeded passage of its trains. To travel upon the track laterally is negligence, and to do so in full view of an approaching train would, as a rule, be culpable negligence. *Shearman & Redfield on Neg.*, §§ 489, 491; *Phila. & Reading R. Co. v. Hummell*, 44 Penn. 375; *Evansville, etc., R. Co. v. Hiatt*, 17 Ind. 102.

The plaintiff, however, according to his testimony, which the motion for a nonsuit accepts as true, was not *on* the track of the defendant, but by the side of it, and sufficiently removed from it to be out of the reach of any danger from the passing train, but for the presence of a beam or tie, which lay across the end of the flat car, which was at the head of the train, having reference to the direction in which the train was moving.

It was "fair time," and defendant was running excursion trains along its track, to and from the city and the fair grounds. Many persons were passing to and from the fair grounds, along and near the track where the accident happened.

The plaintiff, on approaching the road along the foot-path, ran between the two tracks, which were about twelve feet apart, not for an idle purpose, but to rescue a child which he thought to be falling from one of the windows of a passing excursion train.

The train by which he was injured was a freight train, consisting of three box cars, two flat cars and an engine; the box cars being next to the engine. The train was running backward, at the rate of twelve or fifteen miles an hour. The flat car in front was loaded with machinery, in connection with which, and perhaps to secure which on the car, the projecting beam was used; there was no lookout upon the advancing end of the train, nor any one on the train except on the engine; there was no warning given by

those in charge of the train, by whistle or bell, or other means of warning.

The plaintiff saw the freight train about one hundred and fifty yards away, but did not pay special attention to it; he could not see the engine, and thought it was standing still or going the other way. Not the car, but the projecting beam, struck him on the head, and knocked him partly under the wheels.

Notwithstanding the company's exclusive right to the use of its roadway, it is still bound to use ordinary care to avoid injury to persons who may be upon or near its track. What is ordinary care is to be measured, not only by the dangerous forces put in motion, but by the special circumstances of the time and place; running along a line within the city limits, more or less thronged with pedestrians, requiring a higher degree of care than when in the open country, with a presumably clear track. *Shearman & Redfield on Negligence*, § 477.

Under the facts as testified to by the plaintiff, there was a question, whether there was not a want of ordinary care, on the part of the defendant, in running its freight train backward within the city limits, with many pedestrians passing along the side of its track, to and from the fair, at the rate of speed testified to, with a beam projecting a foot and a half beyond the side of the car, without lookout, brakeman or signal to give notice or warning, and this question was properly submitted to the jury.

The question of contributory negligence on the part of the plaintiff was also a question for the jury, to be by them determined in view of all the circumstances of the case.

Being situated as he was, the plaintiff was bound to the exercise of peculiar care and caution to keep out of the way of the defendant's trains; but was he bound to anticipate a departure from the usual mode of loading freight cars, and be on the watch for beams projecting beyond the sides of the cars? He saw the freight train, but supposed

it going in the other direction or standing still. Did not the act of the defendant in running its train backward, without lookout or signal on or from the train, contribute to mislead him? These were questions for the jury. The motion for nonsuit was properly overruled.

The fourth and sixth assignments of error are not well taken. In the one case, the evidence went to the jury notwithstanding the objection sustained by the court. In the other, the evidence offered was not competent.

It remains for us to examine the instructions of the court.

The objection made by the appellee, that the exceptions to the giving and refusing instructions by the court are to the instructions *en masse*, is well founded as to the instructions *given* by the court, but not as to the instructions *refused*. The instructions given are in the nature of a general charge to the jury, and cover three printed pages of the abstracts. "To the giving of which instructions, and each and every of them, the defendant, by its counsel, then and there excepted." This presents a different question from that passed upon in the case of *Webber v. Emmerson*, 3 Col. 248. That was the case of a general exception to "said instructions."

When the instructions given by the court are in the nature of a general charge, excepting to "each and every" of the instructions will not avail.

The rule is founded upon the proposition, that it is the duty of counsel to call the attention of the court trying the cause, particularly to the error complained of, that there may be an opportunity to correct it. This is due to the court and a fair administration of justice.

In the case of *Jones v. Osgood*, 2 Selden, 235, an exception "to the whole charge and every part of it," was held bad. Justice JOHNSON says: "The exceptions taken did not call the attention of the judge to the points which were claimed to be erroneous. They did not suggest to his mind what the counsel excepting would have him hold, or

wherein his charge was wrong. If the counsel had presented to the judge the two distinct points which he makes here, we cannot say how he would have disposed of them. It has been held, in many cases, that the party complaining of the charge of the judge must put his finger on the point of which he complains. If he does not do so, no court of review can regard it."

The exception under consideration can have no greater force than a general exception to the entire charge of the judge. It cannot be said that the charge in this case contains no single correct proposition of law; on the other hand, although we are not called upon to inquire, we regard it as substantially correct. The rule laid down in the case of *Webber v. Emmerson* must be applied, as though the exception had been, in terms, general. It would follow that instructions of like character, *refused* and excepted to in like manner, would not be the subject of review in this court, if any one proposition of law contained therein was properly refused. The instructions, however, *refused* by the court in this case do not come within the rule. They are a series of separate and distinct propositions of law, each standing independent and alone, and against each of which the court was enabled to write on the margin the words "given" or "refused" as required by section 28 of chapter 70 of the Revised Statutes. They each enunciated some rule of law, which, the appellant claimed at the trial, should be given. As it was necessary for the court, to either give or refuse them separately, each particular proposition was therefore called to the attention of the court. *Davenport Gas-light, etc., Co. v. City of Davenport*, 13 Iowa, 237. Such being the fact the exception "to the ruling of the court in refusing to give the said instructions and each and every of them," was sufficient.

It is true the instructions are not numbered, as good practice requires; and it is perhaps well to observe in this connection, that failure in this particular is the source of great trouble and annoyance to this court, as well as to all who

have to do with the case. Where the instructions are in the nature of a general charge to the jury, it is but fair to counsel and litigating parties, that they be submitted to counsel, that an opportunity may be had to examine them, and except to such portions as they deem objectionable.

Considering the instructions in the order in which they stand, the first was properly refused. The locality of the accident was fixed by the evidence at a point where there was no public highway or crossing, and it was not necessary for the jury to indulge in any presumption concerning it. The right of property was a matter to be proved like any other fact; there was no presumption of law that it was in the defendant.

The second, third and fourth instructions were substantially embraced in the instructions already given by the court.

The fifth instruction was also properly refused, as it took from the jury the question of negligence respecting the manner in which the car of the defendant was loaded.

We find no error in this case which calls for a reversal. The evidence on the part of the defense, it is true, is in direct contradiction of the testimony of the plaintiff; but the jury evidently accepted the testimony of the latter as true. It is not for this court to say it was not true. The credibility of witnesses is for the determination of the jury; and an appellate court is not at liberty to interfere, except when the verdict is not supported by the evidence. *Taylor v. Randall*, Special Term, 1877.

The judgment of the court below is affirmed with costs.

Affirmed.

EXCEPTIONS TO INSTRUCTIONS EN MASSE will not be noticed, if one instruction is correct: *Coon v. Repten*, 4 Colo. 279; *Wootton v. Siegel*, 5 Colo. 424; *Keith v. Wells*, 14 Colo. 325.

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE generally are questions for the jury: *Stover Cord C. M. Co. v. McDonald*, 14 Colo. 196.

RAILWAY COMPANY HAS EXCLUSIVE RIGHT OF WAY OVER ITS ROAD for railroad purposes, except at public crossings, and the owner of the fee is a trespasser if he obstructs it: *Colorado Cent. R. R. Co. v. Holmes*, 5 Colo. 205; *Kennedy v. Denver S. P. & P. Co.* 10 Colo. 500; *St. Ouge v. Holmes*, 11 Colo. 372.

SEARS v. TAYLOR.

1. Title by occupancy is, under the statute of Colorado, an interest in real estate, and such an interest as may be the subject of conveyance by deed.
2. A general averment in a declaration, that the plaintiff, on a day specified, was in possession of the premises in question, and that afterward, on a day specified, the defendant entered thereon, and unlawfully withheld possession from the plaintiff, sets out a sufficient cause of action. (R. S. 1868, p. 274, § 7.)
3. Ejectment is a possessory action, and to maintain it the defendant must be in possession, actual or constructive, at the time of the commencement of the suit, and possession is presumption of ownership until the contrary is shown. Prior possession alone in the plaintiff will entitle him to recover as against a mere intruder, whose entry is without right or title.
4. Where the plaintiff avers title in fee, proof of possession is evidence of seizin in fee in him; no further or higher evidence of title is required until the defendant shows an anterior possession or has traced title from a paramount source. Hence, if a less estate than a fee is averred, proof of possession is presumptive evidence of seizin under such averred title.
5. The plaintiff need not go back in his title further than to antedate that of the defendant.

Appeal from District Court of Clear Creek County.

THE case is stated in the opinion.

Messrs. SAYRE, WRIGHT & BUTLER, for appellant.

Mr. E. L. SMITH, for appellee.

STONE, J. This was an action of ejectment brought by the appellee for the possession of a parcel of the public domain, described as placer-mining ground, and which appellee claimed by right of possession.

There was a verdict and judgment, in the court below, for the plaintiff, from which the defendant appealed to this court; and error is assigned by appellant, upon exceptions to certain evidence given on behalf of appellee, at the trial, and for the giving of the following instructions to the jury by the court upon its own motion:

1. "If the plaintiff had actual possession of the premises in controversy, and the defendant entered upon them during such occupancy by the plaintiff, for the purpose of making a survey with a view to procure a government title, the plaintiff may recover."

2. "But with respect to possession and occupancy, it is to be observed that the exterior boundaries of the land claimed by the plaintiff were not marked; and therefore he cannot recover more than he had improved, unless at or before the time of the alleged survey, he pointed out the boundaries of his claim to the defendant. If the plaintiff made known the boundaries of his claim to the defendant, at or before the time of the alleged survey, and he was then in the actual possession of any part of the claim, such possession should be regarded as extending to the whole claim. But if he did not point out the boundaries, his possession cannot extend beyond the surface which he may have leveled, or otherwise changed in such manner that the possession was visibly marked. If you believe, from the evidence, that the plaintiff purchased from Skinner, he acquired thereby no right whatever which he can now assert. He must recover upon actual and visible possession of the ground, if at all; and whether he had such possession at the time of the alleged survey by defendant, and the state of his possession, you are to determine, upon the evidence, as a matter of fact and not of law."

3. "If you find for plaintiff you should describe the premises, and declare in your verdict that the plaintiff is entitled to possess and occupy them. If you find for the defendant, your verdict will be simply 'not guilty.' "

Upon the evidence, as disclosed by the record, the foregoing instructions correctly set forth the law as applicable to the case.

That portion of the second instruction referring to the appellee's purchase from Skinner is evidently based upon the fact that the transfer was by parol, and not by deed as required by statute, and was therefore invalid; and no

notice to defendant, or any one else, of the vendee's claim in any respect whatever. A title by occupation is, under our statute, an interest in real estate, and such an interest as is the subject of conveyance by deed. *Gillett et al. v. Gaffney et al.*, 3 Col. 351.

Appellant also assigns for error the refusal of the court to give certain instructions asked by the defendant below.

The second and third of said instructions refer to derivation of appellee's title from Skinner, the first occupant of the ground in controversy; but as the second of the instructions given by the court and set forth above, denies to appellee any right by virtue of his purchase from Skinner, it was unnecessary to give the instructions asked upon that point; nor was the appellant prejudiced by such refusal.

The only other instruction, for the refusal of which error is assigned, that we need notice is as follows:

4. "The plaintiff in this case claims the property in question in the first count of the declaration, by virtue of the local laws and customs of Grass Valley and Ohio Mining Districts, and by occupation and purchase; and in order to recover on said count, he must show what the laws and customs of said districts were, and that he complied with the same."

Section 8 of the chapter on Ejectment (R. S. 274), in force at the commencement of this suit, requires the plaintiff in this action to declare the nature of the estate claimed, whether in fee or otherwise. One of the objects of this is to give the defendant notice of the character of the title which he is called upon to defend against. Appellee, in his declaration, described the ground in controversy as a parcel of placer-mining ground; and concluded by an averment in the first count, that he claimed the right to occupy and possess the same by virtue of and under the "local laws, rules and customs of Grass Valley and Ohio Mining Districts;" and that he claimed the said premises "for mining and building purposes by occupation and purchase." The general averment in the declaration, that the

plaintiff, on a day specified, was in possession of the premises in question, and that afterward, on a day specified, the defendant entered thereon, and unlawfully withholds possession from the plaintiff, sets out a sufficient cause of action. The appellee proved an unequivocal, exclusive and continued possession for three years previous to the alleged entry of appellant. The possession of appellant was at most but constructive merely, the entry being made in order to survey the ground, for the purpose of procuring a patent for it, together with other ground which he claimed adjoining. The evidence even shows that the appellant, before his entry, so far admitted the right of appellee, that he offered to pay the latter a certain price for the premises. No testimony whatever was offered by the appellant on the trial.

Ejectment is a possessory action; and to maintain it, the defendant must be in possession, actual or constructive, at the time of commencing the suit. This possession is presumptive of ownership until the contrary is shown. The plaintiff in such action avers prior possession and right of possession, by fee or otherwise. If he shows such prior possession upon trial, the title he has declared upon will be presumed, without his being required to trace his title back to its origin, in the first instance. If, however, the defendant controverts such title or *jus possessionis*, the plaintiff may then go back to establish such right; and so each party seeking to establish paramount title may alternate proof until the point is reached, where the title of one antedates that of the other, and the contest be determined.

In the case of *Smith v. Lorillard*, 10 Johns. 356, Chief Justice KENT, in delivering the opinion of the court, epitomizes the principles of this action as applied to cases resting upon possessory rights, as follows: "That the first possession should in such cases be the better evidence of right, seems to be the just and necessary inference of law. The ejectment is a possessory action, and possession is always presumption of right, and it stands good until other

and stronger evidence destroys that presumption. This presumption of right, every possessor of land has in the first instance, and after a continued possession for twenty years under pretense or claim of right, the actual possession ripens into a right of possession which will toll an entry. But until the possession of the tenant has become so matured, it would seem to follow that if the plaintiff shows a prior possession, and upon which the defendant entered without it having been formally abandoned as *derelict*, the presumption which arose from the tenant's possession is transferred to the prior possession of the plaintiff, and the tenant to recall that presumption must show a still prior possession; and so the presumption may be removed from one side to the other, *toties quoties*, until one party or the other has shown a possession which cannot be over-reached, or puts an end to the doctrine of presumptions founded on mere possession, by showing a regular legal title or right of possession."

It is an elementary principle, having almost the force of a legal maxim, applicable to cases of this sort, that prior possession alone in the plaintiff will entitle him to recovery as against a mere intruder, whose entry, as in this case, is without right or title. And it matters not in such case, what is the character of the title declared on, whether in fee or by virtue of local mining laws, or a right of possession generally.

The appellee, having made out a *prima facie* case, was not required to go farther until his title already shown had been attacked. Had the appellant controverted the validity of the appellee's possessory right by setting up an adverse right of like nature, proof of compliance with the local laws on the part of the plaintiff below, as averred in his declaration, might then have become necessary.

The prior possession of the plaintiff being uncontroverted, a legal presumption arose that he had complied with all the requirements of the *lex loci* peculiar to that mining district necessary to the acquisition of the title upon which he had declared.

The supreme court of California, in an opinion delivered by Justice FIELD in the case of *Keane v. Cannoran*, 21 Cal. 305, held, that even where the plaintiff avers title in fee, proof of possession is evidence of seizin in fee in him, and no further or higher evidence of title is required to enable him to recover until the defendant has shown an anterior possession, or has traced title from a paramount source. And this is the settled ruling of the courts of that State. *A. H. Association v. Willard*, 48 Cal. 617; *Winans et al. v. Christy et al.*, 4 id. 70; *Bird v. Lisbros*, 9 id. 1. For the general rule upon this point, see, also, Tyler on Ejectment, pp. 70-74, and the numerous cases there cited.

Hence if any less estate than a fee is averred, proof of possession is presumptive evidence of seizin under such averred title.

This rule is consistent with the underlying doctrine, that the State or general government, in its corporate and sovereign capacity, holds and always retains the absolute and ultimate right of property in and to all the land within its territorial limits; and that possession in an individual is *prima facie* evidence of the grant of an estate from the sovereign authority. Bingham on Real Estate, pp. 2-5.

Hence the plaintiff need not go back in his title further than to antedate that of the defendant.

Under an averment of the plaintiff's ownership in fee and right to the possession of the land, at the date of the commencement of the suit, he may prove any facts which would entitle him to possession at that time. *Gillespie v. Jones*, 47 Cal. 263.

It was therefore unnecessary for the appellee to prove more than he did to establish *prima facie* his right of possession at the commencement of his suit.

There was no error in the admission of the testimony objected to by the defendant in the court below, that could, in view of the instructions given, prejudice the appellant.

The judgment will accordingly be

Affirmed.

POSSESSION: *Lobban Mfg. Co. v. Consolidated Republican Mfg. Co.*, 6 Colo. 381; *Putcher v. Keeley*, 19 Nev. 411, 413.

THE LA CROSSE GOLD MINING CO. v. SCUDDER.

Where the evidence, in a case tried to the court, clearly does not warrant a finding and judgment for the plaintiff, such judgment will be reversed on writ of error.

Error to Probate Court of Gilpin County.

ASSUMPSIT for work and labor, etc.; the declaration consisted of the common counts; plea of the general issue.

Mr. L. C. ROCKWELL, for plaintiff in error.

Mr. CLINTON REED, for defendant in error.

ELBERT, J. The trial in this case was to the court, and the evidence clearly did not warrant a finding and judgment in favor of the plaintiff.

He claims compensation for his services as agent, in taking care of, and protecting from trespassers, certain mining claims belonging to the defendant company, and yet, during and near the end of the period for which he claims to have been acting as agent, he writes to the president of the company, under whose authority he claims to have acted, respecting the mill site of the company, and says: "Parties now stand ready to make surveys upon it, (meaning the mill site) and the reason they don't is, they think I am your agent, when the truth is, you have no actual agent in the country."

Again, if from what the president of the company wrote the plaintiff, a promise could be implied to pay him a reasonable compensation for his guardianship of the property, or for any labor done upon it, his evidence respecting the service rendered is too uncertain and contradictory to support a verdict. He says in his testimony: "I have not charged the company any thing for looking after the property described in the lease," and yet the only mines from which he claims to have driven intruders, and the shafts of which he covered, are the mines indicated in the

lease. The only exception is the "Ashtabula Lode," and the extent of his care and labor concerning this lode, consisted in paying to it, as he testified, "some attention."

The promise, which he claims was made him by the directors of the company at the meeting in New York, was not a promise to pay a salary, but certain *expenses* which he had incurred, and was, thereafter, to incur. The expenses proven, if any, amounted to a little over \$100. The judgment was for \$1,100.

In our view the plaintiff was not entitled to recover, except, perhaps, for actual expenses incurred independent of the evidence of the president, Van Ness, who testifies that the defendant never had any business transactions with the plaintiff, except as a lessee of their mines.

The judgment of the court below is reversed with costs, and the cause remanded for further proceedings according to law.

Reversed.

HETZER v. THE PEOPLE.

1. The legislature is competent to confer concurrent jurisdiction upon the city and county authorities to demand each a license from an individual for vending spirituous liquors within the city limits.
2. Where the legislature vests either in the city or county authorities the *exclusive* right to license vendors of spirituous liquors, a license to a vendor from the authority exclusively authorized to grant it is all that can be required. (*Paton v. The People*, 1 Col. 79, distinguished.)

Error to District Court of Boulder County.

THE case is stated in the opinion.

MR. L. C. ROCKWELL and Messrs. THOMAS MACON & ALPHEUS WRIGHT, for plaintiff in error.

A. J. SAMPSON, attorney-general, for the People.

THATCHER, C. J. There can be no question that it is,

competent for the legislature to confer concurrent jurisdiction upon the city and county authorities to demand each a license from an individual for vending spirituous liquors within the limits of a city.

When such laws are enacted and penalties prescribed for their violation, the vendor of liquors within a city, unless armed with a license from both city and county (where a license from each is required), will not be protected from prosecution. One act may constitute two distinct offenses. It is no less clear, that the legislature may vest either in the city or county authorities the *exclusive* right to license vendors of spirituous liquors, and that when, in unequivocal terms, the sole authority to license is lodged either in the city or county, but one license will be required.

Section eight of chapter LIII, R. S., 1868, concerning "Licenses," provides that the board of county commissioners may grant licenses to keep saloons, hotels, public houses, or groceries, upon the conditions therein named.

Section nine provides, that upon application for licenses to keep saloons or groceries, the board may reject or grant the same in their discretion.

Section eleven provides, that "the board of trustees, or common council of every incorporated town or city, shall have *exclusive authority* to license saloons, groceries, and all places wherein spirituous, vinous, malt, or other intoxicating liquors are sold by quantities less than one quart."

The plaintiff in error, as alleged in the information, was the keeper of a saloon within the meaning of this chapter, in the incorporated town of Nederland, in the county of Boulder. The board of trustees of Nederland had issued to him a license authorizing him to keep the saloon. He held no license from the board of county commissioners. This the court below thought was necessary, and accordingly, upon the agreed statement of facts, found him guilty.

The conviction was error. The town license was a complete protection. Not by mere implication, but by express

words, the authority of the board of trustees to issue the license is *exclusive*. This case is clearly distinguishable from *Paton v. The People*, 1 Col. 79.

The opinion in that case rested largely upon the ground that the power to license was not declared to be exclusively vested in the city of Black Hawk.

Judgment reversed and cause remanded. *Reversed.*

TIPPLING HOUSES — LICENSE — LEGISLATIVE AND MUNICIPAL CONTROL. — A statute conferring on a city exclusive control of tipping houses will divest the state of its control (*Huffsmith v. People*, 8 Colo. 178); and the legislature is competent to so confer such control: *Rogers v. People*, 9 Colo. 453. A municipal license in such case is complete protection against a prosecution for keeping such a house and selling liquors: *Helmsen v. State*, 14 Colo. 244, 248.

VANCE'S HEIRS v. MARONEY, AD'R.

1. Executors, administrators and others acting in a like fiduciary capacity in making sale of property, must comply strictly with the requisites of all statutory provisions relating to the subject before those whose interests are to be affected by the proceedings will be held concluded thereby.
2. A return of *non inventus* made before the return day of the writ is not in compliance with the law requiring service of notice to defendants, and will not support a notice by publication. (R. S. 1868, p. 94, § 8.)

Error to Probate Court of Gilpin County.

THE case is stated in the opinion.

MESSRS. BELFORD & REED, for plaintiffs in error.

MR. L. C. ROCKWELL, for defendant in error.

STONE, J. The sole question for our determination is as to the validity of the decree of the probate court for the sale of the lands of David C. Vance, the decedent.

In such determination, the first question to be examined is, did the court at the time of rendering the decree have jurisdiction?

If not, then we need not determine that other question upon which the learned counsel on both sides have cited very numerous authorities, whether this court can go back to an investigation of the appointment of the administrator, the character of the claims against the estate, and whether

they were properly allowed as debts, for the discharge of which the sale of property of the estate was decreed.

Section one hundred and four of the chapter relating to wills, executors, and administrators (R. S., p. 671) provides, that the mode of proceeding upon a petition of an administrator to sell the lands of his decedent for the payment of debts allowed against the estate, shall, as nearly as practicable, conform to the proceedings of courts of chancery in like cases.

By the record of the case at bar, it appears that an attempt was made by the administrator to conform to such practice, but it is evident that in several particulars the proceedings fell short of the requirements of law.

It is well settled as a general rule, that executors, administrators and others, acting in a like fiduciary capacity, in making sale of property, must comply strictly with the requisites of all statutory provisions relating to the subject, before those whose interests are to be affected by the proceedings will be held concluded thereby. *Ventres v. Smith*, 10 Pet. 161.

To enable the court below to decree such sale, jurisdiction must have been acquired by certain essential preliminary steps, among which are the filing of the proper petition setting out cause, and due notice of the hearing thereupon, to the parties defendant, by personal service or by publication coupled with attempted personal service as required by law.

Touching the sufficiency of the petition in this case, no question has been raised that we need discuss. In the matter of notice, however, the record discloses that summons was issued on the 4th day of September, 1871, returnable on the 2d day of October ensuing, and which writ was returned *non inventus* on the 21st day of September, seventeen days after its issue.

Order of publication was also made on the 4th day of September, and upon the 2d day of October *after hearing testimony*, the case, upon the ground of insufficiency of

notice, was continued to the November term ensuing, and afterward to the December term.

On the 6th day of October, 1871, an *alias* summons was issued, returnable on the 6th day of November, the date to which the cause was first continued. This writ was returned on the 17th day of October—eleven days after its issuance—indorsed like the first, *non inventus* as to all o. the defendants.

On the 6th day of December, 1871, the decree of sale was entered.

Under that clause of section 8 of the Chancery Act, providing for notice by publication, which declares that "this proceeding shall not dispense with the usual exertion on the part of the sheriff to serve the summons," this court has repeatedly held that a return, *non inventus*, of the writ by the officer before the return day, is not a compliance with the law requiring service of notice to defendants. The reasons for such ruling are so clearly set forth in the case of *Palmer v. Cowdry*, 2 Col. 6, that we need not repeat them here.

Without holding the writ until the return day and a proper return accordingly, the publication of notice will not avail to confer jurisdiction upon the court to render final decree upon the petition.

The record discloses other errors in the proceedings affecting the validity of the decree, but since the failure of service is fatal, we need not pass upon any other question touching the decree directly, nor need we discuss those antecedent questions raised by the assignment, relating to the appointment of the administrator and the character of the claims allowed against the estate.

The probate court having acted without jurisdictional authority, the decree was void, and will, therefore, be set aside, and the cause remanded for further proceedings, not inconsistent with this opinion.

Reversed.

SALES OF PROPERTY BY EXECUTORS, ADMINISTRATORS, AND LIKE FIDUCIARIES must be made in strict compliance with the statutory provisions on the subject to conclude parties whose rights are to be affected: *Sloan v. Strickler*, 12 Colo. 185.

WRIT OF ERROR—EXECUTORS' SALES.—The principal case does not decide what proceedings, if any, in the course of administration antecedent to filing the petition may be reviewed on writ of error to test the validity of a decree of sale: *Sloan v. Strickler*, 12 Colo. 181.

RETURN NON INVENTUS BEFORE RETURN DAY OF WRIT will not support a notice by publication: *Clayton v. Clayton*, 4 Colo. 418; *Israel v. Arthur*, 7 Colo. 7; *Cheele v. Clayton*, 110 U. S. 707.

THE GEORGETOWN AND SILVER PLUME ROAD CO. v.
HUTCHINSON.

The neglect of the board of county commissioners to keep a record of its action in prescribing rates of toll (R. S. 1868, p. 125, § 28) to be charged and collected, cannot prejudice the right of an incorporated company to charge and collect tolls.

Error to Probate Court of Clear Creek County.

THE plaintiff in error, a corporation organized under the statute, brought an action before a justice of the peace against Hutchinson, the defendant in error, to recover a balance of one hundred and sixty-five dollars claimed to be due from Hutchinson for tolls upon its wagon road. The plaintiff had judgment and the defendant appealed to the probate court. At the trial in the probate court, E. L. Shepherd was called as a witness for the plaintiff, and the following proceedings were had as appears *inter alia* by the record:

"I knew the corporation plaintiff; knew also the corporation that existed prior to the plaintiff's organization, of the same name of plaintiff, except the word 'Wagon' was a part of the name; it was the Georgetown and Silver Plume Wagon Road Company; the plaintiff is the Georgetown and Silver Plume Road Company; this company purchased the same road now owned by and occupied by plaintiff; plaintiff's road was built by former company, which sold the road to plaintiff. I was one of the directors; one of the original incorporators, and secretary of the company. I was attorney for the new company, the plaintiff as secretary of the old company. I applied to the board of county commissioners by petition, asking them to establish the rates of toll from Georgetown to Silver Plume, over the company's road. I cannot state exactly when, but it was just about the time the road was finished, and soon after the articles of incorporation were filled.

Question — Did the county board establish rates of toll over this road?

Counsel for defendant objects. Counsel for plaintiff stated that they expected to show that the present plaintiff had its toll rates established at the same rates as the old company. Objection sustained by the court. Counsel for the plaintiff then and there excepted.

Witness continued in answer to another question: After the old road had sold out to this company (the plaintiff), and after plaintiff's articles of incorporation had been filed with the secretary of the Territory and the county clerk (the same now shown me) as attorney for the plaintiff, I did apply to the county commissioners of Clear Creek county, to establish the rates of toll over the company's road from Georgetown to Silver Plume, and asked them to establish as rates, the same rates as were prescribed for the former company, but do not recollect what those rates were.

Question — Did the county commissioners establish rates of toll for this road (the plaintiff's) at the time you speak of?

Counsel for defendant objected, because there was or should be a record of the same. Counsel for plaintiff admitted that no record of the same could be found in the proper office after diligent search for the same. Objection sustained. Counsel for plaintiff then and there duly excepted to the ruling of the court.

Question — Did the board of county commissioners, at your request and application as secretary of the old company, establish rates of toll?

Counsel for the defendant objected. Plaintiff offered to show that the board so established the toll for the old company, after offering to show that the rates of toll prescribed for the old company were also prescribed for the plaintiff, and that the same rates were prescribed for each company; at the same time admitting that no record of the acts of the county commissioners in respect to the same could be found after sufficient and diligent search of the records in the proper office. Objection sustained. Counsel for plaintiff then and there excepted to the ruling of the court."

The defendant had judgment for costs.

Mr. W. S. ROCKWELL and Mr. W. T. HUGHES, for plaintiff in error.

Messrs. POST & COULTER, for defendant in error.

ELBERT, J. The failure of the board of county commissioners to make and keep a record of its actions prescribing rates of toll to be "charged and collected" by the plaintiff, could not prejudice the right of the plaintiff to charge and collect its tolls.

The absence of such record being made to appear, the plaintiff should have been allowed to show that application was made, and that its rates of toll had been, in fact, prescribed by the board, in compliance with the provisions of the statute.

The judgment of the court below is reversed, and the cause remanded for further proceedings according to law.

Reversed.

SISTY v. BEBEE.

It is error to decree affirmative relief upon an answer in a suit in equity (in the absence of a cross-bill) praying to be "hence dismissed," etc. (*Monti et al. v. Bishop*, 8 Col. 605.)

Appeal from Probate Court of Clear Creek County.

Mr. JOHN C. MCCOY and Messrs. POST & COULTER, for appellant

Mr. L. C. ROCKWELL, for appellee.

Per Curiam. The defendant below having failed to file his cross bill, under the rule laid down in the case of *Monti et al. v. Bishop*, decided at the present term, this writ must be dismissed.

The only prayer of the answer is, that the defendant "be hence dismissed with the costs wrongfully sustained."

No error is assigned upon the ground that costs were decreed the complainant, nor could there be, as the award of costs rested in the discretion of the court. R. S., § 14, p. 156.

Writ dismissed.

MILLS v. BUTTRICK et al.

A defendant in a suit in chancery failing to file a cross-bill is not entitled to affirmative relief.

Error to Probate Court of Clear Creek County.

Mr. L. C. ROCKWELL, for plaintiff in error. '.

Mr. M. S. TAYLOR, for defendants in error.

Per Curiam. The plaintiff in error was defendant below. Having failed to file a cross-bill, he was not entitled to affirmative relief. He cannot complain, that relief to which he failed to assert a right was not granted him. His attitude in this respect is similar to the attitude of the plaintiff in error in the cases of *Monti & Caze v. Bishop*, and *Sisty v. Bebee*, decided at this term.

For the reasons expressed in the opinions in those cases, the writ must be dismissed.

Writ dismissed.

GARGAN et al. v. SCHOOL DISTRICT No. 15.

1. In an action of debt on a bond, where the plaintiff, instead of demurring, replies to a plea of *nil debit*, he will be put upon proof of every allegation in his declaration, and the defendant may avail himself of any ground of defense which in general might be taken advantage of under that plea.
2. [If a person becomes bound as surety to or for several persons, the engagement must be understood to be in behalf of those persons collectively

and jointly, and in case of the death of any of them it will not continue on behalf of the survivors, unless the obligation so expressly states, or the parties to or for whom the surety is bound are described as a class, body or the like, so as to plainly imply that the security is given to or for a class or body.—Per STONE, J.]

3. The question of service of process or appearance is a jurisdictional question; it cannot be open to doubt, but must be made to appear conclusively by the record.
4. An entire judgment against several, if reversed as to one must be reversed as to all.

Appeal from District Court of Weld County.

THE plaintiff in the court below obtained a verdict in the penalty of the bond, and damages were assessed in the sum of \$443.03. A motion for a new trial was overruled and judgment entered on the verdict, and thereupon the defendants prayed an appeal to this court.

Messrs. MILLER & CLOUGH, for appellants.

Messrs. WELLS, SMITH & MACON, for appellees.

STONE, J. Goddard and Gargan entered into written contract with the School District, appellee, for doing certain work in the building of a school-house, and to secure the due performance of the contract on their part, they, together with Niemeyer and Getz, as sureties, executed a bond to the district in the penal sum of one thousand dollars.

This action is in debt on the bond, brought against Gargan and the sureties aforesaid (Goddard having died before performance of the contract), the breaches assigned being the failure of Gargan and Goddard in the life-time of the latter, and of Gargan afterward, to perform certain of the work specified in the contract, and for unskillful performance of portions of what was done, whereby damage accrued, etc.

The pleas are: 1st. *Nil debit*; 2d. *Non est factum*; 3d. Non-performance by plaintiff of conditions as to payment; 4th. Non-performance as to conditions to be performed by

plaintiff respecting the foundation of the building ; 5th. Covenants performed ; 6th. *Nul tiel corporation* ; and 7th. Set off.

From the view which we take of this case under the state of the pleadings presented by the record, we do not deem it necessary to examine in detail all the questions offered for our consideration by counsel for appellants upon the very numerous assignments of error, and the elaborate briefs filed in the cause.

The plea of *nil debit* interposed was, in this action, bad on demurrer, but having been replied to, the plaintiff was thereby put upon proof of every allegation in his declaration, and the defendants were at liberty to avail themselves of any ground of defense which in general might be taken advantage of under that plea. 1 Chit. Pl. 483.

This plea puts in issue the existence of the debt at the time of pleading, and consequently any matter may be given in evidence under it which shows that nothing was due at that time, as payment, release or other matter in discharge of the debt. 1 Chit. Pl. 481. And hence under issue made by this plea as it stood, it was competent for the sureties to have shown the death of Goddard, one of the principals in the bond, in discharge of any liability thereafter.

Mr. Chitty lays down the doctrine that "if a person engage as surety for more persons than one, the engagement is understood to be on behalf of those persons collectively and jointly, and in case of the death of any of them, it will not continue on behalf of the survivors." 1 Chitty's Contracts (11th Am. ed.), 767 ; Fell on Suretyship, 520.

The doctrine that whenever a surety becomes bound for the performance of more than one person, his obligation does not extend beyond the death or retirement of any of those for whom he has engaged to be answerable, is established by an almost unbroken line of decisions, both English and American, reaching back for three quarters of a century. And this rule is applied as well to the parties to

whom the surety is bound — the obligees, as to those for whom he is bound — the principal obligors.

The reason upon which the doctrine rests, when applied in a case like the one before us, is well expressed by Lord MANSFIELD in the case of *Weston v. Barton*, 4 Taunton, 673, wherein, after a review, of all the preceding cases, he says: "It is very probable that sureties may be induced to enter into such a security by a confidence which they repose in the integrity, diligence, caution and accuracy of one or two of the partners. In the nature of things there cannot be a partnership consisting of several persons in which there are not some possessed of those qualities in a greater degree than the rest, and it may be that the partner dying or going out may be the very one on whom the surety most relied; it would be, therefore, very unreasonable to hold the surety to his contract after such a change."

The leading cases in which this doctrine is enunciated are, *University of Cambridge v. Baldwin*, 5 M. & W. 585; *Simpson v. Cook*, 1 Bing. 452; *Cremer v. Higginson*, 1 Mason (U. S. Cir. C.), 337; *Myers v. Edge*, 7 Term R. (Durnford & East) 254; *Strange v. Lee*, 3 East, 484; *Weston v. Barton*, *supra*; *Penoyer v. Watson*, 16 Johns. 100; *Smith v. Montgomery*, 3 Texas, 203.

The only exceptions to the doctrine of these decisions are: *first*, where the language of the obligation expressly limits the liability, or extends it to survivors, or to any or either of the obligees or principals, whether associated together or otherwise; and *second*, where the parties for or to whom the sureties are bound, are described as a class, company, bank, or the like, and not to the members or partners *nominatim*, so as to plainly imply that the security is given to or for the class or body as such regardless of changes in the integral parts. *Barclay v. Lucas*, 1 Term Rep. 291. There is nothing in the language of the bond to take this case out of the operation of the general rule.

As a general rule such defense should be pleaded specially, and on behalf of the sureties alone, but as we have

shown, under the plea of *nil debet* as it stood in this case, the defense might be made the ground of a proper motion.

The death of Goddard appeared in the evidence of the plaintiff, as well as upon the face of the declaration, and it was not, therefore, necessary for the defendants to introduce proof of the fact. Such being the case, the motion of the defendants for a new trial should have been granted on the ground that the verdict was against the evidence.

A question, however, is made as to whether the pleas interposed were on behalf of the sureties alone, or on behalf of all the defendants.

The record shows that the sureties, Niemeyer and Getz, only, were served with process; that as to the defendant, Gargan, the return was *non est inventus*. The "defendants served" appeared by G. W. Miller, Esq., as attorney. The rule to plead was on the "defendants served." The pleas filed were on behalf of "the defendants." These pleas are to be taken as the pleas of the defendants served, and not of all the defendants named to the action. *Boiloin v. Edwards*, 4 Gilm. 119; *Chester v. Miller*, 13 Cal. 558; *Violet v. Waters*, 1 J. J. Marshall, 303; *Hubbard v. Dubois*, 37 Vt. 94; Freeman on Judgments, § 155.

The record should distinctly show the service of process on defendants, or their voluntary appearance; it ought not to be left to inference or conjecture. *McCall v. Leshen*, 2 Gilm. 47; *Clemson v. State Bank*, 1 Scam. 45.

At a subsequent term of the court—the third term after that to which suit was brought and the process returned—Gargan makes an affidavit in support of a motion for continuance on behalf of "the defendants" and names himself as "a witness and a party." This, however, in nowise necessarily connects him with the pleas which had two terms previously been filed on behalf of the defendants served, nor does it prove that he had appeared to the action. He might well be a witness on behalf of the sureties, and yet not have either appeared or pleaded to the action. To say that he had done either, is to indulge in conjecture.

The question raised by want of service of process, or upon doubtful appearance, is a jurisdictional question, affecting, necessarily, the validity of the judgment, and, therefore, such service or appearance cannot be open to doubt or conjecture, but must be made conclusively to appear.

The pleas, therefore, must be held to be the pleas of the sureties alone, and their defense clearly available under the plea of *nil debet*, which was made to stand as the general issue.

The verdict being in part for damages accruing on alleged breaches after the death of Goddard, was to that extent unauthorized by the evidence, and the motion for new trial should have been granted.

Gargan not having been served with process, and not having appeared to the action, nor pleaded therein, the judgment was erroneous as to him also.

This error with respect to the judgment against Gargan would in itself be sufficient to reverse the judgment, without reference to errors relating to the case of the sureties.

The judgment being entire, if reversed as to one, must be reversed as to all. *Arnold v. Sanford*, 14 Johns. 424; *Richards v. Walton*, 12 id. 434; *Boyce v. Watson*, 3 J. J. Marshall, 498; *Gaylord v. Payne*, 4 Conn. 190; *Mumford v. Overseers, etc.*, 2 Rand. 313.

And this is the case, although the error relates only to one. Powell on Appellate Proc. 285.

The judgment of the district court will therefore be
Reversed.

THATCHER, C. J. I agree that the court below erred in entering a joint judgment against Gargan, Niemeyer and Getz, as the record, properly construed, shows that only Niemeyer and Getz appeared and pleaded to the action, and for this error, I think, the judgment should be reversed. In this view brother ELBERT concurs. As to the liability of the sureties for breaches of the building contract, occurring subsequent to the death of Goddard, no opinion is at present expressed.

HEATON v. MYERS.

1. A plea of *non est factum*, unverified, can serve no purpose in an action of assumpsit when pleaded with the general issue.
2. Whether the principal or agent is the party liable upon a note or bill of exchange, must be determined from the instrument itself. Parol evidence is not admissible in the case of negotiable paper, to charge an unnamed principal.
3. A defendant has no right to continue to present the same defense by different pleas. When a defendant takes leave to amend his plea after demurrer sustained thereto, he waives his right to assign error on the action of the court in sustaining the demurrer.
4. A promissory note, like any other chattel, may be the subject-matter of a contract, but such contract must be supported by an independent consideration. Failure of title to land given in consideration of a note is a good defense in an action on the note.
5. A subsequent written agreement, showing a contingency upon which the payment of a promissory note is to depend, is admissible in evidence under the general issue in an action on the note by an assignee after maturity, against the maker.
6. The question in assumpsit under the general issue is: was there a subsisting debt or cause of action at the time of commencing the suit? Under it the defendant may show performance of the contract declared upon, or any legal excuse for non-performance.

Error to District Court of Gilpin County.

MYERS, the defendant in error, brought an action of assumpsit against Heaton, the plaintiff in error, upon the following instrument, which had been assigned to plaintiff after maturity:

“BLACK HAWK, COLORADO, *May* 19, 1873.

Received of George W. Heaton, President of the Sierra Madre Tunnel Company, five hundred dollars in part payment of the sum of five thousand dollars, on payment of which I hereby covenant to him for and in behalf of said company my (160 a) homestead, situate near Black Hawk, aforesaid, together with the fences, houses, tenements, buildings, horses, wagons, tools, water-works, and all and sun-

dry the goods, chattels and property thereon, and I do hereby assign and give over the use and benefit of the said foregoing property, real, personal and mixed, to the said G. W. Heaton, or his order, fully, freely and for all purposes as he may will or designate. Witness my hand, this 19th day of May, A. D. 1873.

\$500.00.

PETER C. JOHNSON."

"May 19, 1873.

I, the above-named G. W. Heaton, do acknowledge that four thousand five hundred (4,500) dollars are yet due to P. C. Johnson, who has given me a deed for the above-named properties, on the payment by me of five hundred (500) dollars.

G. W. HEATON."

The cause was tried to the court, upon the general issue, the only plea remaining in the record. The agreement adverted to in the opinion of the court as having been made subsequent to the foregoing instrument, and which was offered in evidence by the defendant and rejected, is as follows:

"Memorandum.—Whereas, by a warranty deed, recorded at Central City, Gilpin county, Colorado, from Peter C. Johnson to George W. Heaton, on the 27th day of May, A. D. 1873, a certain title, purporting to convey one hundred and sixty acres in section 17, township 3, range 72 west, was, with all the improvements and other property, real and personal thereon, transferred from the said Johnson to the said Heaton, for the consideration of \$5,000; and whereas, \$500 have actually been paid to the said Johnson by the said Heaton, on his receiving possession of the above from the said Johnson, it is agreed and hereby witnessed between the said parties that the said P. C. Johnson shall prove to the satisfaction of the said Heaton and his counsel the clearness and soundness of the said Johnson's title to the land aforesaid, by all the evidence necessary and possi-

ble, and that such proof shall be made before the payment of the next instalment of the purchase-money.

P. C. JOHNSON. [x]

“Delivered, sealed and signed by P. C. Johnson on the 20th day of June, A. D. 1873, at the Sierra Madre Tunnel Company's works, Black Hawk, Colorado, in presence of
JAMES McQUEEN.”

The plaintiff had judgment for \$4,920.

Messrs. H. M. & W. TELLER, for plaintiff in error.

Mr. ALVIN MARSH, for defendant in error.

ELBERT, J. The second plea of the defendant below, denying the execution and delivery of the note declared on, had no force or effect, as it was not verified as required by statute. In an action where it was properly pleadable at common law as the general issue, the plea of *non est factum* would be good, though not verified, and under it, the defendant might insist on any legal defense that he could have done at common law, except denying or disproving the execution of the instrument declared on. *Longley et al. v. Norrall*, 1 Scam. 389.

But this was an action of assumpsit. The general issue, *non assumpsit*, was pleaded, and the second plea, which in effect, though not in form, is a plea of *non est factum*, had no place nor served any purpose, so long as it was unverified.

The demurrer to the third plea was also properly sustained. It, in substance, alleges, that the defendant Heaton executed and delivered the note declared on, to Johnson, the original payee, on behalf of the Sierra Madre Tunnel Company, and as the agent of said company, “and that it was not made or intended to be an acknowledgment of any debt due from the defendant to said Johnson.”

Whether the principal or agent is the party liable upon a note or bill of exchange must be determined from the instrument itself.

Oral evidence is not admissible in the case of negotiable paper to charge an unnamed principal. In the expressive language of the authorities, a note or bill of exchange, "is a courier, without luggage, whose countenance is its passport." 1 Daniel on Neg. Inst., § 303; Byles on Bills, 37 * (6th ed.); Story on Agency, § 154, p. 199 (n. 5).

The rule is, as stated by Mr. Story, "if it can upon the whole instrument be collected, that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed."

The due bill in this case is a personal acknowledgment of indebtedness to Johnson by the defendant, and there is nothing to disclose that he acted as agent for or on behalf of a principal.

If the due bill be construed in connection with the writing which precedes it, the words, "president of the Sierra Madre Tunnel Company," are but *descriptio personæ*, and would not bind the company as principal. There is nothing indicating that the due bill was made in *execution* of an agency.

The fourth plea was twice amended. As first amended it was demurred to, and the demurrer sustained. As again amended, it was stricken from the files, upon the ground that it was but a repetition of the plea which it proposed to amend. A comparison of the two pleas shows the objection true in fact. There is no substantial difference between the plea as it stood, and the plea as amended; and it was entirely within the discretion of the court to strike such a plea from the files. A defendant has no right to continue to present the same defense by different pleas (*Parks v. Holmes*, 2 Ill. 554), nor may he repeatedly refer to the decision of the court, the legal sufficiency of the same defense, under the guise of an amended plea. The defendant having taken leave to amend his fourth plea, waived his right to assign error on the action of the court, in sustaining the demurrer thereto. *Dean v. Gecman*, 44 Ill. 286; *Wawn v. McGoon*, 2 Scam. 74.

The further additional plea was but a repetition of the defense sought to be set up in the third plea, and was also properly stricken from the files.

It is claimed that the court erred in excluding the subsequent agreement between Johnson and the defendant Heaton. It sufficiently appeared that the subject-matter of this agreement was the note declared on, and the land for the purchase-money of which this note was given.

A promissory note, like any other chattel, may be the subject-matter of a contract, but such contract must be supported by an independent consideration. 1 Daniel on Neg. Inst., § 157.

The agreement offered was under seal, and imported a consideration. Aside from this, however, Johnson's title to the land conveyed was questioned by Heaton. Failure of title was a good defense to the note held by Johnson for the purchase-price. *Mason v. Wail et al.*, 4 Scam. 127; *Gregory v. Scott*, id. 392.

Johnson was also liable on his covenant of warranty in case of eviction. The settlement of these disputes without resort to litigation was a sufficient consideration for the agreement of Johnson not to demand further payment of the purchase-money until he had submitted satisfactory evidence touching the validity of his title. Nor, as urged by the appellee, was the agreement void, as imposing an impossible condition.

The condition that Johnson should prove to the satisfaction of Heaton and his counsel, the clearness and soundness of his title to the land, "before payment of the next installment of the purchase-money," only required such proof of title as a reasonable man would be bound to accept, and which a court of justice would not permit him to arbitrarily reject. Myers having taken the note after maturity, his action was subject to the same defenses as if Johnson, the payee, had been plaintiff. Was this agreement admissible under the general issue? The doctrine of the general issue is exceptional, and under the authorities, the defenses

not admissible under this issue are very limited. It was held in the case of *Munro v. King*, 3 Col. 238, that a written agreement, cotemporaneous with the note declared on, and the effect of which was to prescribe a contingency until the happening of which no action could be maintained, was admissible under the general issue. We are unable to see any sufficient reason for saying that a subsequent written agreement, making the payment of a note conditional, should not likewise be admitted under the general issue.

Under the authorities, the fact that it is a *subsequent* agreement would not operate to exclude it. Payment, release, a specialty given for the debt, a judgment rendered for either party in a former action for the same cause, an award of arbitrators deciding the right in question, and accord and satisfaction, all imply subsequent matter, and yet are all good defenses under the plea of *non assumpsit*. Gould's Plead., § 47 *et seq.*

The few defenses which are held not admissible under this issue, are such as admit the debt, but go in denial of the remedy only. Gould's Plead., § 57.

The written agreement offered in evidence does not admit the debt; on the contrary it excludes any liability on the part of the defendant, except upon a condition precedent.

The question in *assumpsit* upon the general issue is, was there a subsisting debt or cause of action at the time of commencing the suit? 2 Tidd's Prac. 647.*

Under it the defendant may show performance of the contracts declared upon, or any legal excuse for non-performance. *Ib.*

Unimpeached, this agreement, together with the testimony of Heaton, that the proofs of title stipulated for, had not been produced, presented a legal excuse for non-payment of the note declared on. They disproved any subsisting debt or liability at the time of the commencement of the suit.

The court erred in refusing to admit it in evidence.

The agreement concerns alone the purchase-money remaining unpaid. The rights of the parties respecting the land conveyed, and the five hundred dollars purchase-money already paid, are not involved and need not be determined.

The judgment of the court below is reversed, and the cause remanded for further proceedings according to law.

Reversed.

DEFENDANT HAS NO RIGHT TO CONTINUE TO PRESENT SAME DEFENSE by different pleas:
Hurd v. Smith, 5 Colo. 29.
QUESTION WHETHER RIGHT OF ACTION HAD ACCRUED at the time of commencement of
the suit was at common law frequently tried under the general issue: Watson v. Lemen, 9 Colo.
202.

LOCKE v. THE CITY OF CENTRAL.

No *assumpsit* is implied on the part of a municipal corporation in respect to services performed by one of its officers, for which the ordinances allow no compensation.

Error to District Court of Gilpin County.

JUDGMENT of nonsuit was entered against the plaintiff in the court below.

Mr. L. C. ROCKWELL, for plaintiff in error.

Mr. H. M. ORAHOOD, for defendant in error.

THATCHER, C. J. In April, 1874, Bradford H. Locke was duly elected by the council of the city of Central, as city surveyor for the then ensuing municipal year. His general duties were prescribed by ordinance; which also provided that he should "perform such other duties as might be enjoined upon him by ordinance or resolution of the city council." The same ordinance prescribed the compensation he should receive for surveying, subdividing or giving the grade of any lot or piece of ground within the city, and furnishing a certificate thereof — which compensation was to be paid by the parties at whose request such work was done. The ordinance is silent as to fees to be paid the city surveyor for all other services. It was admitted at the trial that he had received full compensation for such work as the

ordinance prescribed fees. The suit was instituted to recover for the performance of various duties, imposed upon him by ordinance or resolution, for which no fees were fixed. The plaintiff proceeded upon the notion that upon an implied assumpsit he was entitled to recover from the municipal corporation whatever his services were reasonably worth for the discharge of all duties for which the ordinance allowed no compensation.

It is competent for the city council to increase or diminish the fees pertaining to the office of city surveyor, or abolish them altogether. Its incumbent, if the fees be diminished or entirely taken away, may at once resign. As the relation between himself and the city does not rest upon contract, he is not legally bound to continue his services until the expiration of his term. But having accepted the office, as long as he performs its duties, the measure of his compensation must be determined by the city authorities.

Where the relation of employer and employee exists both parties are bound by the terms of the contract. If either party violates his agreement with the other, he may sue for breach of contract. If the employer discharge the employee before the expiration of his term of service, he can be made to respond in damages. But between a municipal corporation and its officers, a very different relation exists. If an officer neglects to perform his duties, the municipality has no remedy against him for breach of contract. At his pleasure he may relinquish his office. His remuneration for services to be rendered may, in the absence of any charter restriction, be changed from time to time at the will of the city council. In the *City of Hoboken v. Gear*, 3 Dutcher, 278, the court says: "An appointment to a public office, therefore, either by the government or by a municipal corporation, under a law fixing the compensation and the term of its continuance, is neither a contract between the public and the officer that the service shall continue during the designated term, nor that the salary shall not be changed during the term of office. It is, at most, a

contract that while the party continues to perform the duties of the office *he shall receive the compensation which may from time to time be provided by law.*" See, also, *Baker v. The City of Utica*, 19 N. Y. 326; *Smith v. The Mayor of New York*, 37 id. 520; *The Commonwealth v. Bacon*, 6 Serg. & Rawle, 322.

As the city surveyor entered upon the performance of the duties incident to his office with reference to the provisions of the city charter and ordinances, no assumpsit is *implied* on the part of the corporation in respect to his services. 1 Dill. on Mun. Corp., § 169, and cases cited.

That during the year the plaintiff in error served the city of Central the duties of the city surveyor were more onerous than usual, by reason of the great fire that had destroyed a large portion of the city, cannot be held to affect or modify the rule here laid down. A departure from it cannot but be fraught with mischief to the public service. Whether the dictate of common honesty, under the peculiar state of facts presented by the record in this cause, should have prompted the city council to make the city surveyor additional allowance for his services, it is not our province to determine.

It will follow from what we have before said in relation to implied assumpsit, that the offer to prove that the city council had paid its former "surveyors on bills presented from time to time *irrespective of said ordinance*" was properly rejected.

The judgment of the court below is affirmed with costs.

Affirmed.

BISHOP v. GRIFFITH.

1. When an instrument, lacking one of the incidents of a promissory note, was nevertheless so misnamed, but was thereafter correctly described in the declaration according to its legal effect, in an action thereon between the parties; *held*, as the defendant was not misled, the instrument was properly received in evidence.
2. As a general rule the allegation of the performance of a contract cannot be supported by proof of performance of a substituted contract.

Appeal from District Court of Arapahoe County.

ASSUMPSIT. The plaintiff had judgment in the court below for \$1,857.35. The case is stated in the opinion.

Messrs. WELLS, SMITH & MACON, for appellant.

Messrs. CHARLES & DILLON, for appellee.

THATCHER, C. J. The instrument in writing sued on is in the following form :

“CHICAGO, *April 21st*, 1870.

“Due D. Thos. Griffith, one thousand four hundred and twenty-five dollars, on or before the first day of January, A. D. 1871, for value received, payable to him in person, or, in case of his death, then to his heirs or executors; but, for reasons well known between the parties, this note is not negotiable.

A. E. BISHOP.”

The declaration contained a special count only, upon a promissory note. Although the instrument, as particularly described in the declaration, differs in legal effect in no respect, as between the parties, from the instrument offered in evidence, the appellant insists that the court erred in allowing it to be read in evidence. The ground of his objection is, that the plaintiff, before describing the instrument in his declaration, according to its terms, *misnamed it a promissory note*. As it is sought, in the body of the instrument, to restrain its negotiability, and as all promissory notes and due-bills, under our laws, are declared to be negotiable

by indorsement, it is claimed that this instrument was not properly received in evidence. Without stopping to consider the effect of the restrictive words incorporated into the instrument, as the suit is between the original parties to it, it is sufficient to say, that although it may lack one of the legal incidents of a promissory note, under our statute, as it is thereafter correctly described, according to its legal effect as between the parties, the court did not err in admitting the instrument. *Smith v. Webb*, 16 Ill. 105. No injury could result to the defendant. The instrument, as described, was in no way misleading.

The third plea, upon which the defendant chiefly relied at the trial, alleges, that the plaintiff, through his agent, sold to the defendant certain mining property, to wit: the undivided one-sixteenth interest in the Par Lode and Tunnel Property at Georgetown, for the price of three thousand one hundred and twenty-five dollars; and that, upon such purchase or sale, the defendant paid the sum of seventeen hundred dollars, and executed his note for the balance of the purchase-money; that by the contract of sale, the plaintiff sold the said interest in said mining property, upon condition that the said plaintiff should make a perfect title to the same, and also, upon the condition that every thing in regard to said property was as represented to him by the plaintiff's agent.

The contract of sale is set out *in hæc verba*. The plea further avers, that the plaintiff had never made, or offered to make to him a deed to the property he had agreed to convey; and further, that the plaintiff had no valid title himself, and could convey none to the defendant.

The defendant further avers, that the mining property was the only consideration for said promissory note, and that said consideration had wholly failed.

The plaintiff, in reply to this plea, averred that he had made the defendant a good and sufficient title to the said mining property, in the said plea mentioned. The mining property described could only be conveyed by deed.

Whether the plaintiff had by deed conveyed to the defendant an undivided sixteenth interest in the Par Lode and Tunnel Property was put in issue. No deed from the plaintiff, conveying or purporting to convey to the defendant any such interest, was offered in evidence.

For the purpose of proving performance of the agreement, on the part of the plaintiff, evidence, however, was let in, tending to show the organization of the Par Mining and Tunnelling Company ; and a deed was read in evidence, executed by David Thomas Griffith to " Daniel P. Kidder, John P. Owen, A. E. Bishop, Henry M. Kidder, David T. Griffith, Henry E. Pickett, and their associates, trustees of the Par Mining and Tunnelling Company," purporting to convey to them the "*Par Tunnel Site*;" that after the contract of sale, entered into between H. M. Kidder, as the agent of the plaintiff of the one part, and the defendant of the other part, it was agreed, at a meeting of the trustees of said company, that the entire property should be conveyed to them ; that the defendant was present at such meeting, and consented thereto. This evidence was excepted to, on the ground that it was not pertinent to the issue. The jury may have found, on the evidence, that the defendant accepted the performance of the substituted agreement as performance of the original agreement. The plaintiff having averred performance of the original agreement, was required to show performance according to its terms. The defendant had, by the pleadings, no notice that the plaintiff relied upon the performance of an agreement, essentially different from that set up by the defendant as the sole consideration for the note. It was, doubtless, competent for the parties, to change the terms of their original agreement. If an alteration had been made, and that fact pleaded, a legal reason for the non-performance of the original agreement would have been made to appear. If properly pleaded, the performance of the substituted agreement, if performed according to its terms, might have entitled the plaintiff to recover. But the evidence admitted involved a

departure from the issue. We are of opinion that, as a general rule, an allegation of performance of a contract, cannot be supported by proof of performance of a substituted contract. *Crandall v. Clark*, 7 Barb. 169; *Warren v. Bean*, 6 Wis. 122, and authorities there cited; *Thompson v. Jewell*, 1 A. K. Marshall, 95.

This doctrine is not thought to be at variance with the doctrine announced in *The Atlantic Insurance Co. v. Manning*, 3 Col. 224, that the averment of performance of a *formal* condition precedent, in an insurance policy, to the effect that preliminary proof of loss should be furnished to the company by the insured, is supported by proof of total waiver of that requirement. Such a condition, it is held by the supreme court of Pennsylvania, is merely formal, and, at most, a condition precedent, not to the undertaking of the insurers, but to the right of action of the insured. *Inland Insurance & Deposit Company v. Staffer*, 33 Penn. 403; *Hartford Fire Insurance Company v. Smith & Doll*, 3 Col. 422.

The judgment of the court below is reversed, and the cause remanded for further proceedings.

Reversed.

FIRST NATIONAL BANK OF LAKE CITY v. BERNARD et al.

A notice of appeal is not, within the meaning of the Code, either a summons, writ or other process. When a party has an attorney, a notice of appeal served upon the party himself has no force or effect whatever.

Appeal from District Court of Hinsdale County.

JUDGMENT of nonsuit was entered in the district court. The plaintiff appealed. A motion was made in this court to dismiss the appeal, assigning among other grounds that "the notice of appeal was not served at the time or upon the persons required by law."

Mr. A. DANFORD and Mr. A. T. GUNNELL, for appellant.

Mr. C. S. THOMAS, for appellee.

Per Curiam. The record shows that the appellee, Boggs, appeared in the court below by his attorneys. The only notice of appeal, given in the case, was served upon Boggs personally. Section 339 of the Code provides that a copy of such notice may be served upon the adverse party or his attorney; but it affords no light as to the circumstances under which service may properly be made upon one or the other. By section 397 it is provided as follows: "But in all cases where the party has an attorney in the action or proceeding, the service of papers, when required, shall be upon the attorney instead of the party, except of summons, writs, and other process, issued in the suit, and of papers to bring him into contempt."

A notice of appeal is not, within the meaning of the Code, either a summons, writ or other process. *Tripp v. DeBow*, 5 How. Pr. 116.

Where the party has an attorney, notice of appeal, served upon the party himself, has no force or effect whatever. Such is the construction of a similar provision in the California Code. *Abraham v. Stokes*, 39 Cal. 150; *Grant v. White*, 6 id. 55.

There having been no positive act of submission to the jurisdiction of this court by the attorney of Boggs, and he having appeared to protest against the validity of the appeal, by moving that it be dismissed upon the ground that the statutory notice had not been given, this court is powerless to save the appeal.

The appeal will be dismissed without prejudice.

Dismissed.

BERNARD et al. v. BOGGS.

Where a judgment or decree is rendered after the Code went into effect, in a cause commenced prior thereto, the only mode of review, by the party in whose favor the judgment or decree is rendered, is by appeal under the provisions of the Code.

Appeal from District Court of Hinsdale County.

Mr. C. S. THOMAS, for appellee, now moved to dismiss this appeal.

Per Curiam. In taking his appeal, the appellant in this case has followed the practice prescribed by the Revised Statutes. The conditions of the appeal bond prescribed by section 41 of the Practice Act (R. S. 513), show that an appeal by a party in whose favor a judgment or decree is rendered, was not contemplated by the statute. The condition that the appellant shall pay the judgment, costs, interest and damages, in case the judgment shall be affirmed, can only apply where the party, against whom the judgment is rendered, is the appellant.

A party, in whose favor a judgment is rendered, cannot appeal under this act. This has been the uniform ruling of the supreme court of Illinois, under a similar statute. *Addix v. Fahnestock*, 15 Ill. 448; *Carr v. Mines*, 40 id. 33.

Under the rule laid down in the case of *Willoughby v. George*, ante, p. 22, the decree having been rendered after the Code went into effect, the writ of error would not lie.

Where a judgment or decree is rendered after the Code went into effect, in a cause commenced prior thereto, the only mode of review by the party in whose favor the judgment or decree is rendered, is by appeal under the provisions of the Code.

Motion to dismiss allowed, without prejudice.

Dismissed.

PARTY IN WHOM FAVOR JUDGMENT IS RENDERED CANNOT APPEAL: *Hall v. Fay Hook*,
Conn. Mg. Co. 6 Colo. 81.

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JACKSON, impl., etc. v. McMURRAY.

1. Where an issue has been twice found for the plaintiff by a jury, their verdict should not be disturbed unless it is clearly unsupported by evidence.
2. To admit in evidence a certificate of entry of a register of the U. S. Land Office, proof of the signature of the register is necessary.

Appeal from District Court of Gilpin County.

THE case is stated in the opinion.

Mr. L. C. ROCKWELL, for appellant.

Messrs. H. M. & W. TELLER, for appellee.

ELBERT, J. This was an action of ejectment, brought by the appellee to recover the possession of mining claims Nos. 16 and 17 west, on the Gregory Lode.

A trial was had at the May term, 1875, resulting in a verdict for the plaintiff.

The evidence on behalf of the plaintiff below showed, more or less conclusively, the actual possession and occupancy of these claims by James Graham, from 1860 to 1864; afterward the possession and occupancy of Thomas Graham, one of his heirs, until he was forcibly ejected from the property, in 1865. Joseph Graham appears to have occupied the property, from 1860 until some time in 1861, in connection with his brother James.

With this title by occupancy and possession, the plaintiff below connected himself, by conveyance from the heirs of James and Joseph Graham.

The evidence on the part of the defendant tended to show possession of the premises, on the part of the defendant's grantors, as early as 1860.

The evidence is conflicting as to which was the prior possession.

This issue has been twice found in favor of the plaintiff, by a jury; and their verdict should not be disturbed, unless

it is clearly unsupported by the evidence. That such is the case there can be no claim.

We need not inquire whether the deeds, admitted in evidence on behalf of the appellee, to show paper title in the Grahams, were properly admitted or not, as, independent of these deeds, there was sufficient to warrant a finding in favor of the plaintiff.

The offer of the defendant, to show, by the certificate of the register of the United States Land Office, that the property in dispute had been entered by the Consolidated Bobtail Gold Mining Company, since the commencement of the suit, was properly rejected. There was no proof of the signature of the register, and this was necessary to entitle the certificate to admission. *Fail et al. v. Goodtitle*, Breese, 201.

Had proof of signature been made, the question of its admissibility, except under a plea of *puis darrein continuance*, would still have remained to be determined.

We find no valid objection to the instructions of the court. They were as favorable to the defendant as he was entitled to ask.

The judgment of the court below is

Affirmed.

HURD et al. v. WHITSETT.

1. The statute (R. S. 1868, Forcible Entry and Detainer) recognizes a tenancy from month to month; *held*, that the evidence in this case disclosed a tenancy from month to month.
2. Where there was a holding over by a tenant from month to month, after conveyance by the original lessor, with the assent of both the landlord and tenant; *held*, that such holding over was upon the same terms as the prior letting, and, in the absence of a new lease, the character of the tenancy continued the same.
3. The word "terms," in the statute (R. S. 1868, p. 333, § 7), cannot be construed as giving a landlord authority, by a mere notice to a tenant holding from month to month, to enlarge the *term* or duration of the tenancy.

Error to County Court of Arapahoe County.

WHITSETT, the plaintiff in the court below, based his action upon the seventh section of chapter thirty-five of the Revised Statutes, concerning forcible entry and detainer. The declaration was substantially as follows:

First count: "Plaintiff complains that the defendants are indebted to him in the sum of \$700, for that on June 1st, 1874, Frank L. Moore possessed lot 28, in block 20, East Denver, Colorado, with a certain building thereon; that on that day the said Moore rented said building to the defendants for one month certain, and from month to month thereafter; that by such demise the defendants retained the possession of said premises until March 26th, 1875; that on January 25th, 1875, the said Moore conveyed said premises to the plaintiff; that by such conveyance the defendants became tenants to the plaintiff at a tenancy from month to month; that on March 26th, 1875, the plaintiff gave notice in writing to the defendants that on and after the month of April, he should consider them his tenants for one year, at a monthly rental of \$175 per month, payable on the first day of every month; that failing to consent to such terms and time, they should surrender said premises at the expiration of the month of April, the defendants continued in possession of said premises, and still possess the same that thereby the defendants became tenants to the plaintiff for one year certain next after said month of April, and became liable to pay the plaintiff \$175 per month during said term; that on November 2d, 1875, \$700 for said rent for the months of August, September, October and November, was due to the plaintiff.

"Second count: That the plaintiff on May 1st, 1875, did demise to the defendants one certain other brick building on lot 28, block 20, in East Denver, for one year certain, commencing on the day last aforesaid, for the monthly rent of \$175, by force whereof said defendants possessed said

premises until November 1st, 1875, at which time \$700 was due and owing to the plaintiff from defendants.

Breach.—That defendants, though often requested, have not paid said sum of money or any part thereof.”

To the above declaration defendants pleaded: First, *nil debit*; and, second: “That after the expiration of said month of April, the defendants continued to occupy said premises as tenants from month to month until July; that the plaintiff received the rent for said months from the defendants, as tenants from month to month; that on the first day of July they gave notice to the plaintiff that they would quit the possession of said premises at the end of the month of July; that at the end of said month they did vacate said premises, and offered the keys thereof to the plaintiff, and have not since occupied any part of said premises.”

“Replication.—That defendants did not at the expiration of the month of April continue as tenants from month to month until the end of July; that defendants did not pay the rent of said premises as tenants from month to month, and that plaintiff did not receive the rent from defendants as tenants from month to month.”

Upon the character of the tenancy the court below gave, among others, the following instructions, which are adverted to and approved in the opinion:

“4. If the jury believe, from the evidence, that the defendants, while in possession of the premises under Moore and Whitsett respectively, were accustomed, prior to March 26th, 1875, to pay rent for said premises monthly in advance, that is *prima facie* evidence that they were holding as tenants from month to month, and raised a presumption of a monthly tenancy, which the jury must be governed by, unless overthrown by other testimony.

* * * * *

“6. If the jury believe, from the evidence, that the original lease of the defendants from Moore was for an unlimited or indefinite time, but with the reservation of a monthly

rent, this is considered in law as creating a monthly tenancy, and the tenants under such lease would be tenants from month to month."

The plaintiff below recovered judgment for the sum of \$700, debt, nominal damages, and costs of suit. To reverse this judgment the defendant sued out this writ of error.

Mr. JOHN W. BLACKBURN and Messrs. BUTLER & WRIGHT, for plaintiffs in error.

MESSRS. WELLS, SMITH & MACON, for defendant in error.

STONE, J. Two questions arise for our determination: *First*, what was the character of the tenancy as to duration; was it from month to month? *Second*, under the notice given, did the statute operate to change such character of the tenancy?

I. The first question is to be determined by the terms of the contract, if there was a contract respecting the term at all; if not, then by implication, based upon whatever facts in the whole case exist from which a legal inference fixing the term may be deduced.

There was no written lease, and the evidence shows no express contract as to the length of term beyond the first month.

Whitsett testifies that "the younger Hurd said they had the property from month to month at \$175 per month; I received rent from defendants up to August 1, 1875, at that rate; * * * I wanted the defendants to rent the property for a year, and they always said they wanted to rent it from month to month; * * * they refused to lease the premises by the year; * * * I accepted them as tenants on the same terms as they had of Moore; I read the notice to Hurd, and he got huffy and said they were to have the store as long as they wanted it."

Moore deposes: * * * "D. Hurd & Sons' lease was to commence in August, 1873; I made the lease through an agent; * * * John Clough & Co. were my agents;

* * * I called at the store and agreed with Daniel Hurd that they could have the place, but nothing definite was said as to time or terms; the defendants continued to occupy the building until I sold it to Richard E. Whitsett in January, 1875; they paid the rent monthly in advance; after the first term expired I demanded a larger rent, but accepted the same that defendants had been paying rather than have them move out; no definite agreement was made for the future."

Daniel Hurd testified: * * * "Looked for a house to do business in, and found the house in controversy; saw the agent, John Clough, and got the refusal of it; we were to pay \$175 per month; I told him I wanted it for a large wholesale grocery business, and wanted a place where we could stay, as it would be ruinous to move, but would take it for no specified time; * * * Moore brought Whitsett to my office and introduced him to myself and son; he said he had sold the property to Whitsett, and we were to pay rent to him; our understanding with Clough was referred to, and the same terms were to be continued; * * * Whitsett came in several times afterward, and wanted us to keep it on the same terms for a year; we refused, and said we would get out as soon as we could * * *."

Charles R. Hurd testified: "Paid the rent monthly in advance; made the bargain with Clough; * * * he wanted us to take a lease, but no time was set; Clough was not to turn us out without notice, and we were not to quit without notice; * * * Moore said he had sold the property to Whitsett, who would be our landlord on the same terms we had before; I don't think any thing was said about the particular terms on which we had held the property * * *."

Under the state of facts as disclosed by this testimony, we must hold the tenancy to have been a tenancy from month to month. .

The general rule at common law is, that a tenancy for an indefinite time, or even for any aliquot part of a year, as

stated in some of the books, is to be considered a holding from year to year. A holding merely at the will of the landlord, according to the ancient meaning of the term "tenancy at will," is an estate unknown in modern times, unless where created by express agreement between the parties, or by clear implication. All such tenancies are, for the purpose of a notice to quit, deemed to be tenancies from year to year. 1 Wash. Real Prop. 589; Tyler's Eject. and Adv. Enj. 212. And where a tenant for a year or for years holds over after the expiration of his term, with the assent of his landlord, the holding is implied to be from year to year. But where the term is for a shorter period than a year, according to the current of authorities, both English and American, the holding over is implied to be for a like term, and the notice to quit is determined thereby, and is sufficient if it equal the length of the term or the interval between the times of payment of rent Taylor's L. & T., § 478; Tyler's Eject. & Adv. Enj. 243; 1 Wash. Real Prop. 610; 1 Greenl. Cruise, 269, n. 2; *Noel v. McCrary*, 7 Cald. 627; *Schuyler v. Smith*, 51 N. Y. 309; 10 Am. Rep. 609.

And the reservation of rent and its payment at stated periods, as for a year or month is, in the absence of express agreement as to length of the lease, one of the principal criterions to determine the duration of the term. Taylor's L. & T., §§ 56, 57, 61; *Blumenberg v. Myers*, 32 Cal. 93; *Skaggs v. Elkins*, 45 id. 158; *Coffee v. Lunt*, 2 Pick. 76; *Rich v. Bolton*, 46 Vt. 84; 14 Am. Rep. 615.

In the case at bar, the defendants below, as they themselves testify, refused to accept a lease for a year, or to consider their tenancy as one from year to year. The rent was a fixed sum per month, and paid each month in advance. Our statutes recognize a monthly tenancy as distinct from one from year to year. R. S., p. 336, § 18.

Moore, the first lessor, in his testimony says: "They paid the rent monthly in advance. After the *first term expired*, I demanded a larger rent," etc.

Since the only evidence as to the term is that it was a general holding, at a monthly rental, and with payment of rent each month, it is evident that the "first term" referred to by Moore was meant as the first month of the defendant's occupancy, and as the holding over afterward was with the assent of both landlord and tenant, such holding, under the authorities cited above, constituted it a tenancy from month to month upon the same terms as the prior letting. And as no new lease was made, when the premises were conveyed to the plaintiff below, it follows that the character and terms of the tenancy continued the same thereafter. The jury were, therefore, correctly instructed upon this point.

II. Was the notice within the meaning of the statute?

This question is not without some difficulty, inasmuch as it involves a legal construction of the specific meaning of the terms of the statute under which the notice was framed and given.

The language of the section is as follows :

"In all leases of lands or tenements or any interest therein, from month to month, the landlord may, and it shall be lawful for him, upon giving notice in writing to the tenant, at least fifteen days before the expiration of the month, to change the terms of the lease or agreement under which such tenant holds, to take effect at the expiration of the month ; said notice, when served upon the tenant, shall of itself operate and be effectual to create and establish as a part of the lease or agreement the terms and conditions specified in said notice, if such tenant shall continue to hold the premises specified in the notice after the expiration of such month."

The following is the notice which was served by the plaintiff below upon the defendants:

"D. Hurd & Son : Take notice that after the month of April, A. D. 1875, you will be considered my tenants of the premises hereinafter mentioned, for the term of one year certain, at a monthly rent of \$175, payable on the first

day of each and every month. The premises referred to are the certain brick store building situate on lot 28 in block 20, in the east division of the city of Denver, county of Arapahoe, and Territory of Colorado, which you now hold of me from month to month ; failing to assent to hold said premises according to the terms and time above specified, you will surrender and quit the same at the expiration of the month of April.

RICHARD WHITSETT.

DENVER, COL., *March 26th, 1875.*'

Since the purpose of the notice was to convert the tenancy from month to month into a tenancy for a year certain, by operation of the statute above quoted, it will be seen that the plaintiff's right to recover for rent claimed to have accrued after the defendants vacated the premises, and had paid up to the time of going out, depends upon the meaning that is to be attached to the word "*terms*" in the section referred to.

First—The word "term" or "terms" in its general signification, denotes words, phrases and expressions by which the definite meaning of language is conveyed and determined.

Second—The word "terms" in the plural form, in its restricted and legal sense, and as used chiefly in reference to contracts, means the conditions, limitations and propositions which comprise and govern the acts which the contracting parties agree expressly or impliedly to do or not to do. As employed in respect to leases, the word "terms" embraces the covenants and conditions which impose, confer and limit the respective obligations and rights of the landlord and tenant during the continuance of the tenancy ; such as the extent and manner of the use of the premises ; quiet enjoyment ; rent and its amount, mode and time of payment ; repairs ; payment of taxes, and the like express or implied agreements.

Third—The word "term" when used in respect to tenan-

cies has in law a distinct and technical definition, signifying time, duration, and it means not only the limitation on the estate granted as to time; *e. g.*, for life, for years, for a year, a month and the like, as may be specified in the lease; but it signifies the estate also, and interest that passes by the lease. Bouv. Law Dic.; Burrill's Law Dic.; Taylor's L. & T., § 16; Greenl. Cruise, tit. 8, § 6.

In all the text-books, terms and conditions are spoken of *as annexed to the term*. A term signifying an estate of a certain duration is the subject of the grant; the "terms and conditions," are the incidents of a term granted, and the tenant, unless prohibited by the terms of his lease, may grant a portion of his term to another, and he may in such grant impose other and different terms and conditions from those incident to his own estate. These propositions serve to illustrate the difference in use and meaning of the words "term" and "terms" when used in respect to the subject before us.

Does, then, the notice provided for in the statute, contemplate a change of the term as well as of the conditions of the lease, or only the terms and conditions annexed to the term?

In giving a judicial interpretation to these terms, we must hold to the technical signification of legal nomenclature, and whatever may have come to be the popular meaning attached to their use, we cannot allow that they are to be interchanged and confounded in meaning when employed in the grant of estates or in relation to tenancies created thereby; nor can we think that the law-makers in framing the statute in question, employed these words in any other than the fixed technical meaning which has been attached by a use as old as the common law; nor can we think, therefore, that it was the legislative intent that by the service of such notice the statute would operate to change the character of the estate by an enlargement of the term or duration of the tenancy.

Let us examine (for *a sociis noscitur*) some other portions

of the same statute as matter to be properly considered *in pari materia*. In defining what shall be sufficient to constitute an unlawful detainer, the 5th section of the act uses the following language:

"If any person shall, with or without force, hold over any lands, tenements, mining claims, or other possessions after the termination of the time for which such lands * * * were let * * * or contrary to the conditions, covenants or terms of the lease * * * or after any rent shall become due according to the terms of such lease," etc. It is evident that the word "terms" is here used in its strict legal sense, and cannot be construed to embrace the duration or term of the lease, for that is designated by the word "time."

Again, in the latter part of section seven, it is declared that the notice shall operate to create and establish "as a part of the lease or agreement the terms and conditions specified in said notice." Not that it shall create a new lease, which would be the case if the term was changed, but create and establish the new terms and agreements specified in the notice *as a part of the lease* or agreement; that is to say, a part of the former lease or agreement.

And in this connection we may be pardoned for observing that in the use of the following language in the notice given to the defendants below, to wit: "Failing to assent to hold said premises according to the terms *and time* above specified, you will surrender," etc. The coupling of the added word *time* with the statutory word *terms* seems to imply a doubt as to whether the word "terms" was broad enough to include the duration of the tenancy; a doubt possibly suggested by the difficulty which the learned counsel who framed the notice found in trying to divest his mind of the settled meaning of the words used in the statute, and a difficulty attempted to be overcome by making the notice broader than the statute.

And in searching to discover the intent of the law makers, it may not be improper to consider the circumstance that at the time of the adoption of this act, a condition of things

existed common to all new mining countries while the population is alternately increasing and decreasing by immigration and emigration, and towns and settlements are building up and decaying in rapid succession, resulting in this, that the rental price of houses and tenements in these new towns and cities is ever fluctuating. A business house on a particular street or in a particular part of the town may command a high rent one month, and a low rent the next, and *vice versa*, dependent upon the increase or decrease of business in particular parts of town. Where, therefore, the terms of leasing were made short—for the most part monthly—in order to provide against loss to either landlord or tenant, it is not difficult to perceive the utility and fitness of a statute permitting that in case of a monthly tenancy the landlord might provide against a holding over from one month to another by the tenant without a change of terms respecting rent, by giving notice of a change in the rental price or other conditions without being compelled to turn out the tenant by an unconditional notice to quit; and, on the other hand, protecting the tenant by giving him fifteen instead of ten days' notice to quit, providing he should not, by remaining in possession, elect to accept the new conditions.

This statute was first enacted by the legislative assembly of Colorado in 1864, and the seventh section is a transcript of the sixth section of the California act of 1863. Nevada borrowed the same law from California the same year we did, and so far as we have been able to discover, no other State has adopted a similar statute. We cannot find that the courts of Nevada or California have ever given judicial construction to this law upon a question precisely similar to the one before us.

In the case of *Stoppelkamp v. Maugeot*, 42 Cal. 316, there was a storehouse rented for a month certain, at twenty-five dollars for the month, and the landlord gave notice to the tenant that, in case he held over the month, the rent would be increased thereafter to \$500 per month. Upon the tenant holding over and refusing to pay this increase of rent, suit

was brought to recover it, and the court held, that inasmuch as the statute, which should be strictly construed, authorized the change in the terms of the lease only in cases where the tenancy was "from month to month," it did not apply to a case where the lease was for a month certain. In conceding, however, that the law applied to a tenancy from month to month, the court say: "But in that event the terms of the lease could only be changed by giving the notice in the mode prescribed by the sixth section, for the time commencing after the expiration of the first month of the tenancy, from month to month."

It seems clear that the court referred the word "terms" to conditions, such as rent, and not to a change of the duration or term; the latter being expressed by the word "time."

If the legislature had intended a change of the term itself, nothing could be easier than to have so specified it by declaring in unmistakable language that the landlord might change the *term and the conditions of the lease*, or in other words of like import; but in the absence of legal terms that will import such a construction of the language, we are not at liberty to give it other than that strict construction which the rule relating to the judicial interpretation of statutes requires

In this view of the case we may agree with the learned counsel for the defendant in error, that this statute is little other than declaratory of the common law; but in the case of *Roberts v. Hayward*, 14 Eng. C. L. R. 648, cited in support of the point contended for, it is to be remarked that there was no pretense of attempting to change, by the notice given to the tenant, any thing more than the rent, which, as in the California case, was a mere condition sought to be annexed to the term. We can find no authority in the numerous text-books on the subject of tenancies, nor in any adjudicated case, for holding that under either the common law or the statutes of any State, the landlord may enlarge or otherwise change the term of an estate, by a

mere notice to a tenant. As we have shown in the first part of this opinion, if a tenant for a year or a month holds over the expiration of the term, the landlord may at his election treat him as a trespasser or as a tenant ; but if the latter, then the law implies the holding to be from year to year or from month to month, according to the duration of the expired term, upon the same terms as the previous tenancy. Or the landlord may impose new terms such as rent and the like, by giving notice, as in the case of *Roberts v. Hayward, supra* ; but we cannot find that he may by such notice change the character of the estate ; and where the law steps in to imply a contract respecting the term, as in the case of a holding over, it seeks to do no more than to say that the new contract, which arises by implication from the acts of the parties, shall be as nearly as possible the same as the antecedent contract made by the parties themselves, and in no case is the term ever thereby enlarged. Undoubtedly by agreement of the parties, the terms of a lease may be changed during the continuance of the term, without a change of the term itself, and it would be an unwarranted stretch of the meaning of law language to say that where a statute provides for a change of the "terms of the lease," a change of the term is also implied.

When, under the general rule, a tenant for one or more years, by holding over may be treated by the landlord as a tenant for another year on the same terms as the prior lease (*Schuyler v. Smith*, 51 N. Y. 309), if the prior lease be for more than one year, the *term* created by the holding over is certainly not the same as the prior one, although the *terms*, *i. e.*, conditions, are.

We conclude, therefore, that these words "term" and "terms" cannot legitimately be used synonymously ; that they are not generic in their relations to each other, but have each a technical and specifically distinct meaning as applied to estates in the nature of tenancies. True, the words are both derived from the latin *terminus*, a limit or

boundary ; but their application is nevertheless technically distinct ; "term," meaning in brief a limited estate ; and "terms," the limitations in the use of that estate arising out of the covenants and conditions thereto annexed.

For these reasons we must conclude that the notice given by the plaintiff below to the defendants was not within the statute, and hence, the instruction given to the jury, by the court, that : " If the jury believe, from the evidence, that the defendants, on the said 28th day of March, were tenants of the plaintiff of lot 28, block 20, East Denver, from month to month, holding the same at a monthly rental from month to month, and that they continued in possession and held said premises after the expiration of the month of April, the legal effect of such notice was to change the terms of the lease by creating a yearly in place of a monthly tenancy," was erroneous ; and the judgment of the court below will be reversed accordingly..

Reversed.

HAGER v. RICE.

If a bill of exchange is complete in itself, free from any latent ambiguity, obviously carrying its passport upon its face, there is no need of oral testimony to aid in its exposition. Where there is a latent ambiguity, as between the original parties to the bill and others affected with notice, the real nature of the transaction may be investigated. (*Tannatt v. National Bank*, 1 Col. 278, disapproved.)

Error to County Court of Arapahoe County.

Messrs. CHARLES & DILLON, for plaintiff in error.

Mr. JOHN W. HORNER and Mr. D. J. HAYNES, for defendant in error.

THATCHER, C. J. This was an action in assumpsit, brought by Stephen A. Rice against Frederick D. Hager, upon two certain bills of exchange, in the following form :

“§309.

DENVER, COL., 22d June, 1874.

Ninety days after date, pay to the order of S. A. Rice, three hundred and nine dollars, value received, and charge the same to account of

Boulevard and Sloan Lake Steam Navigation Company.

By WM. ANDERSON, *Pres't.*

To F. D. HAGER, *Treas.*

Denver, Colorado.”

“§309.

DENVER, COL., 22d June, 1874.

Sixty days after date, pay to the order of S. A. Rice, three hundred and nine dollars, value received, and charge the same to account of

Boulevard and Sloan Lake Steam Navigation Company.

By WM. ANDERSON, *Pres't.*

To F. D. HAGER, *Treas.*

Denver, Colorado.”

Written across the face of each bill are the words, “Accepted, F. D. Hager, *Treas.*”

Upon these bills of exchange, the plaintiff sought to charge the defendant individually ; and, in the court below, recovered judgment for the amount due thereon. In his third plea, the defendant substantially alleges, that he was the treasurer of the company ; that he was authorized, and it was his duty as such treasurer, to pay out all moneys in his hands, belonging to said company, on its order, and to accept, as its treasurer, by the name and style of F. D. Hager, *Treas.*, all orders or bills of exchange, drawn by said company on its treasurer, and to pay the same when due, if he had sufficient funds of the company in his hands, of all which the plaintiff *had notice* ; that said bills of exchange were given for an indebtedness, due from the company to the plaintiff ; that he, to the knowledge of the plaintiff, accepted the same as treasurer of the company, and not otherwise ; that when the bills became due, there was no money of the company in his hands. To this plea the court sustained a general demurrer. The allowing of

the demurrer is the chief error relied upon for the reversal of the judgment.

If a bill of exchange is complete in itself, free from any latent ambiguity, obviously carrying its passport upon its face, there is no need of oral testimony to aid in its exposition. The clear and intelligible terms of such an instrument may not be explained by extrinsic evidence. This is a familiar rule, of constant application in the interpretation of written contracts. Can it be said that the drafts in question belong to this class? That upon their face, it is proclaimed to the world, that Hager was acting in his individual capacity, in accepting them? Or rather, would not the more natural construction be, that these drafts were drawn by the principal, the company (whose name appears on the face of the instrument), by its president, upon its treasurer as such? Giving to each word its appropriate meaning, considering each instrument in every part and as a whole, and having reference to well-established commercial usage, as to the mode of drawing bills of exchange by a corporation upon itself, we do not hesitate in our conclusion, that the drafts in controversy must have been understood, especially if the averments in the third plea are true, as having been accepted by the treasurer as such, and not as an individual. But, keeping in view the assignment of errors, it is unnecessary to decide, whether, upon the face of the drafts, the acceptance by Hager is *prima facie* only an acceptance by him in his official capacity.

The defendant assumed by his third plea the burden of proving, and at the trial offered to introduce evidence to establish the character of the acceptance, and that the plaintiff, at the time the acceptance was indorsed, had knowledge of the facts set up in the plea, and regarded the drafts as solely the obligations of the company. The case of *Babcock et al. v. Beman*, 11 N. Y. 200, is in point. In that case, Babcock and others brought an action against Beman, as indorser of a promissory note, executed by Adam Smith & Co., and made payable to the order of Beman. The note was in the following form :

"Four months after date we promise to pay to the order of R. Beman, Treas., five hundred dollars, value received.

ADAM SMITH & Co."

Indorsed, "R. BEMAN, Treasurer."

The defendant plead that he was the treasurer of the Union Manufacturing Company at Raritan, a corporation created under the laws of New Jersey, and, as such, had authority to receive the note, and indorse it to the plaintiffs, of which they had notice; that the company was indebted to the plaintiffs for goods sold; that the defendant, having received the note as treasurer of the company, indorsed it as treasurer, and not individually; and that the plaintiffs received it, as an obligation of the company, on account of said debt, and not otherwise. Upon demurrer, the court held the defense good. Upon appeal, the judgment of the lower court was affirmed; the appellate court holding, substantially, that the plaintiffs, having received the note on account of a debt due them from the corporation, *with notice* of the capacity in which Beman acted, no individual liability attached to him as indorser of the note.

The case before us, upon the faces of the bills sued on, is certainly stronger than the one cited. Here the bills were drawn by William Anderson, president of the company. When paid, their amount was to be "charged to the account of the company." They were drawn upon and accepted by F. D. Hager, as treasurer. The concurrence of all these circumstances would appear to evince that the bills were solely the bills of the company, and to be paid out of company funds; and would seem to exclude the idea of the personal liability of Hager. The acceptance by Hager, as treasurer, may be deemed as a promise, that, on the day named, the company would, through its treasurer, pay the amount of the bills. This is especially true, if the fact that Hager was acting in behalf of the company as its treasurer, in accepting the bills of exchange, was known to Rice, or if, under all the circumstances, he was bound to take notice that he was acting in an official capacity only.

Where there is a latent ambiguity, as between the original parties to a bill of exchange and others affected with notice, especially where the name of the principal is in some manner disclosed upon the face of the instrument, we deem the true rule to be, that the real nature of the transaction may be investigated ; and the general principle applies, that an agent is not liable to be sued, upon contracts made by him on behalf of his principal. Edwards on Bills and Promissory Notes, 82 ; *Hicks v. Hinde*, 9 Barb. 528 ; *Rich. Fred. & Pot. R. R. Co. v. Smead & Smith*, 19 Gratt. 354 ; *Haile et al. v. Pierce*, 32 Md. 327 ; *McClellan v. Reynolds*, 49 Mo. 312 ; *Musser v. Johnson*, 42 id. 74 *Hovey v. Mugill*, 2 Conn. 680.

If the allegations of the third plea are true, it follows from the principles here laid down, that the plea presented a complete defense to the action. The court erred in sustaining the demurrer.

As the other errors assigned were not urged at the hearing, it is not thought necessary to notice them. The views here expressed are not in accord with the majority opinion of the court, in *Tannatt v. Rocky Mountain National Bank*, 1 Col. 278. We cannot assent to the doctrine there laid down—a doctrine whose tendency is to defeat rather than effectuate the intention of the parties to written contracts.

The judgment of the court below is reversed, and the cause remanded for further proceedings, not inconsistent with this opinion.

Reversed.

LEONARD v. BARTELS et al.

The writ of prohibition is a prerogative writ used with great caution where the ordinary remedies provided by law are not applicable or adequate, and will not be used to correct an erroneous exercise of jurisdiction with which an inferior court is vested.

PETITION for writ of prohibition. The case is sufficiently stated in the opinion.

MR. JOHN C. FITNAM, for petitioner.

MR. ALFRED SAYRE, for respondents.

ELBERT, J. The writ of prohibition is defined as an extraordinary judicial writ, issuing out of a court of superior jurisdiction, and directed to an inferior court, for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested. High's Extraordinary Leg. Rem., § 762.

It is not granted *ex debito justitiæ*, but rests in the sound discretion of the court.

It is a prerogative writ, used with great caution, where the ordinary remedies provided by the law are not applicable or adequate. It is never allowed to usurp the office of a writ of error or an appeal. It is used to confine inferior courts in the exercise of their powers, within the limits fixed by the law.

A clear distinction is made by the authorities between the assumption of a jurisdiction, to which the court has no legal claim, and the mere erroneous exercise of a jurisdiction, with which the court *is invested*. If the inferior court has jurisdiction of the subject-matter, a mistaken exercise of that jurisdiction, or of its acknowledged powers, will not justify a resort to the extraordinary remedy by prohibition. There must be *excess* of jurisdiction, and not mere error in the exercise of a jurisdiction which is conceded. High's Extraordinary Leg. Rem., § 762 *et seq.*

The grounds upon which the writ is prayed in this case

relate to errors in the exercise of a jurisdiction conferred by law. It is clear that the county court had jurisdiction of the subject-matter under the statute. The objections go to the sufficiency of the affidavit and the summons. They relate to mere matters of practice within the power of the court to determine. If the court erred in holding that the affidavit and summons were sufficient under the statute to give it jurisdiction of the cause and the person, it is an error in the exercise of a jurisdiction granted and not an illegal claim of jurisdiction. It is an erroneous *exercise* not an *usurpation* of authority. Such errors must be corrected by the ordinary methods provided for review.

In this view, the demurrer must be sustained and the rule to show cause discharged.

Rule discharged.

WRIT OF PROHIBITION IS USED TO CONFINE INFERIOR COURTS in the exercise of their powers within the limits fixed by law: *People v. District Court*, 6 Colo. 536.

CRANMER v. THE KANSAS PACIFIC R'Y CO.

In the absence of an agreement of parties, a judge has no authority to sign a bill of exceptions tendered after the expiration of the time limited by the order of the court.

Appeal from District Court of Arapahoe County.

Messrs. HUGHES & WELBORN, for appellant.

Mr. ALFRED SAYRE, for appellee, now moved to strike the bill of exceptions from the files.

Per Curiam. This action was commenced before the Code went into effect. Judgment was entered on the 4th day of February, A. D. 1878. On the same day an appeal was prayed to this court which was allowed. The appellant was allowed thirty days within which to *tender* his bill of exceptions, which, when allowed and signed, was to be filed as of the day the judgment was rendered. The bill of exceptions was filed March 26th.

having been tendered March 7th. Thirty-one days elapsed between the day of the order allowing the appeal and the day on which the bill of exceptions was tendered. In the absence of an agreement of parties, the judge had no authority to sign the bill of exceptions tendered after the expiration of the time limited by the order of the court. The bill of exceptions will be stricken from the record.

Motion allowed.

ALVORD et al. v. McGAUHY.

The filing of a notice of appeal must precede or be cotemporaneous with the service thereof. An undertaking filed two days before filing notice of appeal has no office to perform.

Appeal from County Court of Ouray County.

MESSRS. MILES & ANDREWS appeared specially for appellee, and now move to dismiss the appeal.

Per Curiam. On the 19th day of December, A. D. 1877, Alvord caused to be served upon the attorney of the plaintiff below a notice of appeal. The notice was not filed in the office of the clerk of the court until two days later. In taking an appeal, the first essential act without which it will have no validity, is the filing of the notice thereof. Unless the filing of the notice either precedes, or is cotemporaneous with the service thereof, it will be ineffectual. *Hastings v. Hallack*, 10 Cal. 31; *Buffendean v. Edmundson*, 24 id. 94; Harston's Practice, § 940, note.

The undertaking was filed two days before the filing of the notice of appeal. No appeal was pending. The undertaking had therefore no office to perform. *Carpentier v. Williamson*, 24 Cal. 609.

Motion to dismiss appeal is allowed.

Dismissed.

FILING OF NOTICE OF APPEAL MUST PRECEDE or be cotemporaneous with the service thereof: *Daniel v. Daniels*, 9 Colo. 133. But a difference of five minutes is of no consequence, as fractions of a day are not noticed, except to prevent injustice: *Willoughby v. Brown*, 2 Colo. 122.

HEPBURN v. JONES.

A valid award cannot be made under the statute, if the arbitrators, or any one of them, fail to take the oath prescribed. (R. S. 1868, p. 50, § 3.) Where a submission is under the statute, it must be presumed that the parties contemplated an adjudication of the controversies submitted by the *score* tribunal prescribed by the statute.

Error to Probate Court of Park County.

THE case is stated in the opinion.

MR. JOHN W. WEBSTER and MR. ORRIS BLAKE, for plaintiff in error.

MR. M. B. CARPENTER, for defendant in error.

ELBERT, J. Section 3, chapter 5, of Revised Statutes, provides, that "arbitrators shall not have power to act hereafter until they take an oath before some person authorized by law to administer oaths," etc. This provision is imperative. The legislature evidently intended to give to parties submitting their controversies to arbitration, a tribunal acting under the sanction of an oath; and no valid award can be made, under the statute, if the arbitrators, or any one of them, fail to take the oath prescribed. *Walt et al. v. Huse et al.*, 38 Mo. 210; *Toler v. Hayden*, 18 id. 400; *Inslee v. Flagg*, 2 Dutch. 370; *Jackson v. Steele*, Sneed (Ky.), 21; *Graham v. Hamilton*, 1 Binney, 461.

A different rule has been laid down in New York, but under a statute, we think, materially different. Where an umpire acts it is equally necessary that he take the oath prescribed. *Frissell v. Fickes*, 27 Mo. 557.

A submission under the provisions of the statute, we think, was clearly intended by the parties in this case. The agreement of submission complies with the requirements of the statute, and provides that the award be made a judgment of the court. The objection, therefore, that the umpire, James Y. Marshall, failed to take the statutory oath

was fatal to the award. It is claimed, however, that the award may be sustained as good at common law. It is not necessary for us to inquire whether our statute concerning arbitrations and awards either abrogates or modifies the right of submission as at common law. With a view of carrying out and giving effect to the intention of the parties to a submission, courts have sometimes held a submission as good at common law, where a statutory submission was obviously intended. Morse on Arbitration and Award, 48, and cases there cited.

The doctrine of these cases is based upon the propriety of carrying into effect the intent of the parties to the submission.

That cases may arise where a statutory submission, invalid for want of compliance with some *formal* requirement of the statute, should be enforced as a common-law submission, need not be discussed.

As the submission was under the statute, it must be presumed that the parties contemplated an adjudication of the controversies submitted by the *sworn* tribunal prescribed by the statute.

By intentment, this entered into and was a part of the contract of submission. They never agreed to a common-law submission—nor to abide the award of unsworn arbitrators. The court below was not at liberty to make a contract for the parties, or force upon them the finding of a tribunal, acting without the sanction of an oath.

The propriety of carrying into effect the intention of the parties to the submission, instead of being a reason for holding the award in this case good at common law, is a substantial and conclusive reason why it should not be enforced.

Williams v. Walton, 9 Cal. 146; *Allen v. Chase*, 3 Wis 252; *Denfield v. Ames*, 20 Pick. 480.

The court below should have sustained the motion to set aside the award; and, in the absence of a re-submission, have proceeded with the cause as though it had never been submitted. *Smith v. Smith*, 28 Ill. 56.

The judgment of the court below is reversed, and the cause remanded for further proceedings.

Reversed.

VALID AWARD CANNOT BE MADE BY ARBITRATORS WHO FAIL TO TAKE OATH prescribed by law. The defect is jurisdictional: *Glass Peedry Co. v. Meyer Mfg. Co.* 7 Colo. 66.

SCHILLING et al. v. ROMINGER.

1. The first appropriator of the water of a natural stream has a prior right to such water to the extent of his appropriation.
2. Parties by their joint acts may acquire common rights to appropriate water for the purposes of irrigation unaffected by the statute of frauds. Such right is not only given by statute, but, in a country with a climate like Colorado, arises *ex necessitate rei*.
3. Notwithstanding the omission of formal averments, yet when the facts set out in the bill disclose a case properly invoking the aid of chancery jurisdiction, a court of equity will not refuse to look into the substance of the bill for the purpose of granting the relief to which the facts alleged show the complainant to be *prima facie* entitled.
4. When a court of equity has once acquired jurisdiction of a case, it may give entire relief, notwithstanding that for a part of such relief the complainant might have a remedy at law.
5. This court will not reverse a decree upon a point which the court below was given no opportunity to pass upon, and when the objection, had it been made in the court below, might have been obviated.

Appeal from District Court of Saguache County.

THE complainant's bill states in substance :

That complainant on the 26th of June, 1874, settled upon the west half of north-west quarter, the south-east quarter of north-west quarter and the south-west quarter of north-east quarter of section twenty-one, township forty-five, north, range 10, east New Mexican Meridian, as a homestead and that he has continued to reside thereupon. That theretofore on the 29th of April, 1874, the defendant Schilling settled upon the west half of south-east quarter and the east half of south-west quarter of section twenty-one, township forty-five north, range 10 east New Mexican Meridian, adjoining complainant's lands, and that Schilling, the defendant, con-

tinues to reside thereon. That the said land of defendant Schilling is occupied and cultivated by him and the defendant Albers, as tenants in common. That in July, 1874, complainant and defendant Schilling and Albers agreed to construct an irrigating ditch from a point on Major creek, in said county of Saguache, four or five miles distant from their said lands, by the terms of which agreement the complainant was to have one-half of the water to be run in said ditch from said creek, and defendants Schilling and Albers the other half. That pursuant to said agreement, complainant and defendants Schilling and Albers constructed said ditch to and upon their said lands and thereby took all the available water from Major creek and prevented the same from wasting. That said Major creek is a small stream without more water than is necessary to irrigate the lands of complainant and defendants Schilling and Albers, and otherwise than from said creek their said lands are without irrigating facilities. That at the time of their said appropriation of the water of Major creek, the same was not owned or claimed by any other person than complainant and defendants Schilling and Albers. That on or about November 31, 1874, defendants E. W. Bennett and Ira S. Bennett settled upon lands over which said ditch was constructed, and knowing of the said appropriation of the water in Major creek on the 1st of June, 1876, they began to claim and use water from said creek and obstructing the flow of the water therein by shutting off the same and constructing other ditches from said creek, and now continue so to do, and, aided and encouraged by defendants Schilling and Albers, totally deprived complainant of the use of any part of said water. That complainant has planted upon his lands fifteen acres of oats which have failed to grow and mature by reason of the said interference, in consequence of which he has lost said crop and is damaged not less than \$300. That complainant has applied frequently to said defendants, Schilling, Albers, E. W. and Ira S. Bennett, to allow him the use of the water in said ditch and to

desist from further obstruction of the flow of the water therein, but confederating together to injure him, the said defendants refuse to allow him any part of said water, or to desist from obstructing the same in said ditch, and sometimes denying and at other times admitting the interest of complainant in the water of said ditch, but at same time deny and prohibit him by force and threats from the use of any part of said water ; prays that defendants be decreed to make satisfaction to complainant for all damages done by them ; that said defendants by injunction of said court be restrained from obstructing the flow of water in said ditch, and from using more than one-half of same and from interfering with complainants in the use and enjoyment of one-half of said water ; that defendants be compelled to fill up the new ditches cut by them, and to re-open those made by complainant and defendants Schilling and Albers, and to restore them to same condition as when filled up by said defendants. Prays for writ of injunction therefor and for summons."

The only material averment in the answer necessary to be inserted here is in reference to the agreement alleged in the bill and to which the defendant answered :

"That in July, 1874, complainant proposed to defendants Schilling and his tenant, Albers, that they vacate a portion of their said ditch, adjacent to said Major creek, and that complainant and defendants (Schilling and Albers) would take out a ditch near the mouth of the canon, two miles further up said creek, and by so doing they would furnish a new channel for the flow of said water and save the same from sinking as it did in the old bed of said creek ; and by so doing they would have two heads of water reaching the said land of defendant Schilling. That it was agreed between defendants Schilling and Albers and the complainant, that if by so constructing said ditch there was not more water than was necessary to irrigate the lands of said Schilling, and for his domestic uses, then complainant would not claim any interest in either said ditch or the

water flowing therein." And that the ditch was constructed in accordance with this agreement. Replication was filed and the cause was referred to a master to take proofs. Upon the coming in of the master's report, the cause was heard upon the bill, answer, replication and report, and a decree rendered in favor of the plaintiff in accordance with the prayer of the bill, and damages were awarded in the sum of \$187.50. The defendants prayed an appeal. In this court the appellants assign for error: "1. That the agreement between the appellants and appellee was within the statute of frauds and void. 2. The decree is not sustained by the evidence taken before the master. 3. The court had no jurisdiction of the subject-matter."

Mr. CHAS. W. TANKERSLY, for appellants.

Messrs. CHARLES & DILLON, and LOVE & VAN LIEW, for appellees.

STONE, J. That the first appropriator of the water of a natural stream has a prior right to such water, to the extent of his appropriation, is a doctrine that we must hold applicable, in all cases, respecting the diversion of water for the purpose of irrigation. Hence, the prior appropriation of the water of Major creek by Schilling, by the construction of the ditch for the irrigation of his land, secured to him a prior right to the use of such water to the extent of such appropriation. But when under a subsequent agreement with Rominger, the appellee, a new acequia was constructed by Schilling, Albers and Rominger, whereby all the water of the stream was appropriated at another point higher up the stream, for the purpose of procuring a greater supply of water, sufficient for all three, and upon the agreement that Rominger should share and enjoy the use of the water thus obtained in common with the other two, the prior right which had theretofore been acquired by Schilling and enjoyed by him and his co-tenant Albers, was waived by them, and a new right then accrued to the parties simultaneously, to

use the water in common to the full extent of their joint appropriation. The right thus acquired by the appellee accrued to him in virtue of the joint acts of the parties in thus appropriating the water whereby they acquired a common right unaffected by the statute of frauds, inasmuch as such right is not only given by statute, but in a country with a climate like ours, this right arises *ex necessitate rei*, and hence the statute may be regarded as declaratory merely of the law of necessity in this respect, and as regulating the right thus acquired. *Yonker v. Nichols*, 1 Col. 551.

If Schilling and Rominger had both settled on the stream at the same time, and for mutual advantage in the saving of expense, had, by agreement, constructed the ditch together, and thus appropriated the water jointly for irrigating their respective lands, it certainly could not be contended that the respective rights to the water thus acquired could be asserted by either as against the other, on the ground that the mutual assent or agreement to thus appropriate the water was not in writing. So in this case, there was no more a license or grant from one than from the other. Schilling could abandon his first acequia and waive his right of prior appropriation as effectually by words and acts as by an instrument in writing. And the agreement to share equally in the use of the water as between Schilling and his co-tenant Albers, on the one side, and Rominger on the other, was no more, in effect, than an assent by the parties to the acquisition of rights which accrued under the law as declared by the statute, upon such joint construction of the ditch, and the cotemporaneous appropriation of the water thereby. Upon this branch of the case we regard the doctrine of *Yonker v. Nichols*, *supra*, so fully applicable that it is unnecessary to repeat here the reasoning of the court in the well-considered opinions in that case.

It may, however, be objected that while what we have said thus far in relation to the respective rights of Schilling and Rominger applies, unquestionably, to these rights so far as they relate to that portion of the ditch jointly con-

structed by them, yet that since the other portion of the ditch constructed by Schilling belonged to him solely, the right of Rominger to its use was an easement which could be conveyed by deed only, as an interest in land.

As to this, we think it need only be remarked that there was no pretense of a conveyance to Rominger of any ownership or interest in the ditch, as such; the agreement was simply that upon constructing the new part of the ditch, Rominger should have one-half of all the water that flowed through the entire ditch—old and new together—to the lands of both parties. Under this agreement, then, Rominger was entitled to half the water and a usufructuary right to the flow of such water in common with Schilling, through the entire length of the ditch. While Rominger's right to such use of the old part of the ditch is derived from the agreement, yet that agreement must be regarded as an entirety; there was no separate contract respecting the old part.

It was undoubtedly in Schilling's power at the time of the agreement to have exacted from Rominger contribution for part of the expense of construction of that portion of the old ditch which they were to use thereafter in common, but he did not ask such compensation; no allusion was made to this subject. Schilling has not sought to assert an exclusive ownership in the old part of the ditch as a ground of his denial of water to Rominger, nor is a question based upon such claim raised in the case in any manner. It is, therefore, not necessary for us to decide whether an irrigating ditch or any interest therein must be conveyed by deed alone, nor whether the use thereof as a permanent easement must be so conveyed. In either case, since part performance of a parol contract respecting land will take it out of the statute of frauds, equity will enforce the right thus acquired. In this case there was more than part performance; there was entire performance. The agreement was wholly executed, and an uninterrupted user thereunder for two years. *Bloomstein v. Clees*, N. Chancery Court (Tenn.), 6 Cent. Law Jour. 50.

The objection made by counsel for appellants under the third assignment of error, that the court had no jurisdiction of the subject-matter, for the reason alleged that there is no averment in the bill that the complainant was without a full, complete and adequate remedy at law, is not well taken. Notwithstanding the omission of such formal averment, yet where the facts set out in the bill disclose a case properly invoking the aid of chancery jurisdiction, a court of equity will not refuse to look to the substance of the bill for the purpose of granting the relief to which the facts alleged show the complainant to be *prima facie* entitled.

And where a court of equity has once acquired jurisdiction of a case it may give entire relief, notwithstanding that for a part of such relief the complainants might have a remedy at law. The decree for damages was, therefore, properly within the jurisdiction of the court. Story's Eq. Jurisp., §§ 64, 71, 76, 457; Bispham's Prin. Eq., § 30; High on Injunct., §§ 258, 459, 515, 545, 559, 564; note 2, 695; *Armstrong v. Gilchrist*, 2 Johns. Cases, 431; *Rathbone v. Warren*, 10 Johns. 587; *King v. Baldwin*, 17 id. 384.

But were this not true, the objection to the jurisdiction cannot, we think, in this case be raised for the first time in this court. Such objection, as a general rule, must be taken by plea, demurrer or otherwise in the court below, in order to give that court an opportunity to pass on it, and if held valid the complainant be allowed his remedy by amendment or otherwise. This court will not reverse a decree upon a point which the court below was given no opportunity to pass upon, and where the objection, had it been made in the court below, might have been obviated, as is apparent from the record might have been done in this case. *Mosselman v. Cain*, 21 How. Pr. 248; *Beekman v. Frost*, 18 Johns. 558; *Bidwell v. Ins. Co.*, 16 N. Y. 267; *Powell's Appellate Proceed.* 132, 156, 178, 204.

The authorities make a distinction between jurisdiction as to the person and jurisdiction as to the subject-matter,

holding that in the latter case it is not essential for the purpose of review in the appellate court, that objection should be made in the court below for want of such jurisdiction. But, here, while the error assigned is against the jurisdiction of the court over the subject-matter, the sole ground urged in support of the assignment is, that the bill does not contain certain formal averments, such as that the complainant has not a complete remedy at law; that the defendants are insolvent or irresponsible and the like. The bill, however, sets forth sufficient facts to bring the case within the equitable jurisdiction of the court; such objection if valid might therefore have been obviated, if made in the court below, and for this reason comes within the general rule. Powell on Appellate Proc. 132, note 3; 1 Daniel's Ch. Pr. (4th ed.) 555, and cases cited; *Gordon v. Clarke*, 22 Cal. 533.

It is also assigned for error that the evidence does not sustain the decree. Under this assignment it is contended that a preponderance of the testimony shows that the agreement for the joint construction and use of the ditch was upon a condition that more water would be thereby obtained than was needed by Schilling and Albers. In their answer to complainant's bill, the defendants below aver that it was agreed between Schilling and Albers and the complainant "that if by so constructing said ditch there was not more water than was necessary to irrigate the lands of the said Schilling, and for his domestic uses, then the complainant would not claim any interest either in said ditch or the water flowing therein."

The evidence in support of this averment is that of two of the appellants, Schilling and Albers, who both testify that Rominger agreed when they constructed the new ditch, that "if there were not two heads of water in the ditch, he would not claim any of the water in the ditch or creek."

There was no evidence proving the size or amount of a "head" of water, and the testimony on that point leaves the definition as vague and undetermined as the traditional "piece of chalk."

But this alleged condition of the agreement is positively

denied by Rominger, and the admitted facts as to the joint use of the water strongly rebuts the probability of such condition. Upon the completion of the ditch, and for two years thereafter, Rominger was allowed a common and uninterrupted use of the water, without, so far as the testimony shows, any denial by Schilling or Albers of such use, or that they ever hinted at there being less than "two heads" of water, or that there was an insufficiency for both parties, or that there was any such condition as is set up in the answer to the bill. The denial of water to appellee seems to have arisen after the settlement of the Bennetts, and their use of the water by permission of Schilling and Albers in the fall of 1875.

The acts of Schilling and Albers thus appear to contradict their testimony as to the conditional use of the water by Rominger, else we must conclude that if there was any such condition originally, it was either waived afterward, or that the condition was in fact fulfilled by obtaining the two heads of water referred to.

It is argued that the testimony of the witness Schultz, that in October or November, 1874, he heard Rominger say that if they got two heads of water in the ditch, he would get one head, otherwise he could not get any thing, corroborates the testimony of Schilling and Albers on this point; but the undisputed evidence in the case proves that the ditch was completed in July, 1874, and that Rominger had the use of the water for irrigating his crops in August thereafter, so that we are forced to believe that this testimony of Schultz to the effect that in the following October or November Rominger was speculating as to the amount of water to be obtained, and his chance of getting any, is without probability or weight.

This being the only material point in dispute in the evidence, we think the court below was warranted in rendering the decree, and that this court would not be justified in disturbing it on the ground of lack of evidence to support the decree.

Decree affirmed.

ELBERT, J. I concur in the result.

THATCHER, C. J. I coincide with the conclusion reached by brother STONE, but so far as it is intimated in the opinion *in arguendo*, that a servitude over the lands of another in this State for the purpose of irrigation can only be created by deed, I do not concur. Primarily, where the climatic conditions are such as exist in Colorado, the right to convey water for irrigating purposes over land owned by another is founded on the imperious laws of nature, with reference to which it must be presumed the government parts with its title. And although a patent from the government may be silent in regard to conditions, which, if expressly named, would have no greater force, it cannot be asserted that therefore they do not exist. *Yonker v. Nichols*, 1 Col. 551.

Subject to regulation by statute and resting upon the law of nature, it is conceived that the right to convey water over another's land is inseparable from the enjoyment of the land which the United States conveys to its grantees. This right passes with the estate in the land as a necessary incident.

RIGHT TO APPROPRIATE WATER FOR IRRIGATION PURPOSES may be acquired by parties jointly: *Farmers' H. L. C. & R. Co. v. Southworth*, 13 Colo. 135, 136.

BILL IN EQUITY.—Court will look to the substance of the bill, notwithstanding the absence of formal averments: *Whitwell v. Kershaw*, 4 Colo. 452.

APPROPRIATION, water must be applied to beneficial use: *Coffin v. Left Hand Ditch Co.* 6 Colo. 447; *Platte W. Co. v. North Colo. I. Co.* 12 Colo. 531; *Farmers' H. L. C. & R. Co. v. Southworth*, 13 Colo. 115.

FILLEY, impleaded, etc., v. CODY.

There is no authority of law for giving judgment in vacation, and such a judgment is absolutely void. An objection to such a judgment is jurisdictional in its character and cannot be removed by stipulation.

Error to District Court of Gilpin County.

Mr. HUGH BUTLER, for plaintiff in error.

Messrs. H. M. & W. TELLER, for defendant in error.

Per Curiam. In the case of *Cooper v. The American, etc., Insurance Co.*, 3 Col. 318, we held that a judgment rendered in vacation was void.

In the case at bar, however, the parties stipulated that the motion for a new trial should be heard by the judge in vacation ; and, in case the motion was denied, that judgment should be rendered and entered as of the trial term, and should have the same force and effect as if made and entered of record during that term.

Undoubtedly, if such a stipulation can avail to give validity to the judgment, the litigant parties should be held to its terms.

It is but just to the counsel for the plaintiff in error to say that this objection to the judgment was not raised by them, but by the court *sua sponte*, and submitted for argument.

By the Organic Act, the judicial power of the Territory was vested in certain *courts* therein named.

The distinction between the act of a judge and the act of a court is well understood.

The numerous decisions which hold, in the absence of statute authorizing it, that a judgment rendered in vacation is void, are based upon the proposition that the authority to hear and determine is vested by law in the *court*, sitting at stated times and places, and not in the judge.

In vacation, the judge is not clothed with the character of a court. Hence in this interval between the terms fixed or authorized by law, he has no power to hear and determine. Freeman on Judgments, § 121. In other words, in his character as judge, acting in vacation, he has no jurisdiction, which is but the power to hear and determine.

As the objection, then, to such a judgment is jurisdictional in its character, it is obvious that it cannot be removed by stipulation. It is a well-settled principle that jurisdiction cannot be conferred by consent. *Molandin v. Colorado Central R. R. Co.*, 3 Col. 173.

There was no authority of law for the hearing and judgment in vacation, and the judgment was absolutely void. The agreement by the litigant parties that the judgment so rendered should be treated (contrary to the fact) as having

been rendered and entered as of the trial term, is substantially, notwithstanding the terms in which it is couched, an attempt to confer, by consent, a jurisdiction which the law did not authorize or afford.

The failure of the proceedings under the stipulation, however, does not affect the status of the verdict which appears of record. The motion for a new trial may still be heard, and if denied, the judgment may be rendered upon the verdict. *Kansas Pacific R. R. Co. v. Twombly*, 2 Col. 559; *Sheppard v. Wilson*, 6 How. 260; *Gray, Adm., etc. v. Thomas et al.*, 12 S. & M. (Miss.) 113.

The judgment of the court below is reversed with costs, and the cause remanded, with directions to proceed in accordance with the views herein expressed. *Reversed.*

JUDGMENT BECOMES EFFECTIVE ONLY FROM TIME it is given in open court: *Schuster v. Bader*, 13 Colo. 334.

AFTER DENIAL OF NEW TRIAL, JUDGMENT MAY BE RENDERED ON VERDICT: *Alvord v. McGaughey*, 5 Colo. 245.

JUDGE COULD NOT RENDER DECREE IN VACATION under the old system of practice (*Kirtley v. Marshall S. M. Co.* 4 Colo. 112; *Francis v. Wells*, 4 Colo. 275; *McGan v. O'Neil*, 5 Colo. 435; *Terpening v. Holton*, 9 Colo. 316); and this includes settling the essential provisions of a decree: *McGan v. O'Neil*, 5 Colo. 435.

KIRTLEY et al. v. MARSHALL SILVER MINING COMPANY.

Under the old system of practice, the judge had no authority to render a decree in vacation.

Appeal from District Court of Clear Creek County.

Messrs. POST & COULTER, for appellants.

Mr. W. R. GORSLINE and Mr. W. S. ROOKWELL, for appellee.

Per Curiam. In this cause, a demurrer was interposed to the bill, which, by stipulation of parties, was heard in vacation. The demurrer was sustained, and the complainants failing to plead over, a decree dismissing the bill was entered up in vacation. This was error. In vacation, under the old system of practice, the judge had no authority to render the decree. The court alone had power to hear and determine the issue raised by the demurrer. To hold that the decree is valid would be to assert that parties may

confer jurisdiction by consent, which cannot be admitted.
Filley v. Cody, ante, p. 109.

The decree is reversed and the cause remanded for further proceedings. *Reversed.*

JUDGE COULD NOT RENDER DECREE IN VACATION under old system of practice (*Francis v. Wells*, 4 Colo. 275; *Terpening v. Holton*, 9 Colo. 315); and the same rule applies to settling the essential provisions of the decree: *McGraw v. O'Neil*, 5 Colo. 455.

WOLFLEY et al. v. LEBANON MINING CO., OF NEW YORK.

1. Section two of the act of Congress of July 26, 1866, clearly permits the patentee of a lode mining claim to follow the lode in its descending course to any *depth*, although in its downward trend it is carried by dips, angles and variations, into the adjoining land.
2. The surface ground and the lode are not independent grants. It is not the purpose of the act to grant surface ground without a discovered lode. The lode is the principal thing, and the surface ground incident thereto.
3. A lode claim is to be fixed by reference to the plat or survey of the location, and although the lode in its descending course may be followed to any depth with its dips, angles and variations, into the premises adjoining, yet in its onward course or strike it may not depart from the line of its location, and the patentee is not entitled to its possession beyond the lateral boundaries, as against one who has subsequently located and patented it. If the patent is broader than the law, it is to that extent nugatory.
4. The notice required by the statute, to be given by the register of the Land Office, as well as by the claimant, is in effect a summons to all adverse claimants.
5. As long as the local laws are not in conflict with the laws of the United States, they are of binding force and must be observed, but the act of Congress cannot be subordinated to the local laws, rules or customs, and it is in the light of the provisions of the act of Congress that every patent issued in pursuance thereof must be construed.

Appeal from District Court of Clear Creek County.

At the trial in the court below the appellee relied on title derived by discovery, pre-emption and several mesne conveyances from the alleged pre-emptors, to Harris, the discoverer, and from him to Brown. Brown obtained a patent from the government and conveyed his interest to the appellee. The patent contains the following language: "it being the express intent and meaning of these presents

to convey to the said J. Warren Brown, his heirs and assigns, only the eight hundred (800) linear feet of the Ben Harding lode, with surface ground hereinbefore described, *commencing at the center of discovery shaft on said lode and extending thence westerly eight hundred (800) linear feet, along the course of the vein*, the same being known as claims Nos. 1, "etc., * * * * *" "with the right to follow said Ben Harding lode or vein, to the distance of eight hundred (800) linear feet, with its dips, angles and variations, to any depth, although it may enter the land adjoining."

Mr. L. C. ROCKWELL and Mr. JAMES B. BELFORD, for appellants.

Messrs. H. M. & W. TELLER, for appellee.

THATCHER, C. J. This was an action of ejectment brought by appellees against appellants to recover the possession of eight hundred feet of the Ben Harding lode. The declaration contained three counts, in the first of which the appellee claimed title in fee, and in the second and third it claimed title by pre-emption, occupation, possession and purchase under and by virtue of the local laws, customs and usages of miners in Griffith mining district, the laws of Colorado and those of the United States. In support of the second and third counts, much evidence was introduced, which, however, the court charged the jury to disregard in the following instruction:

"After the issuing of the patent, all previously acquired rights by the patentee under the local laws, usages and customs of the particular district in which the claim is located, are merged in the patent, and the plaintiff having put in evidence a patent from the United States, you must not consider the right or title acquired prior to the issuing of the patent, such rights being merged in the patent."

Whether this instruction correctly lays down the law we need not now decide. It could not prejudice the defendant.

It is enough to say that by this instruction the jury was necessarily confined to the issue made upon the first count. By their verdict they found that the plaintiff was the owner in fee of the property described in the declaration. This verdict was responsive only to the first count.

The evidence tended to show that the Ben Harding lode in its onward course or strike departed from the vertical side lines of the location as described in the patent and represented by the plat incorporated therein, and entered the Bell tunnel lode location, which was patented under the act of Congress of May 10, A. D. 1872. That the plaintiff had the right to so follow the patented lode was affirmed in the instructions of the court. Upon this theory the case was tried. To determine its correctness reference must be had to the act of Congress of July 26, 1866, under which the Ben Harding lode was patented.

At common law a grant of land carries with it all that lies beneath the surface down to the center of the earth. At his pleasure the owner of the soil may apply to his own purposes whatever is included in the segment of the earth carved out by his descending exterior boundary lines. Says Sir WILLIAM BLACKSTONE (Book 2, page 18): "*Cujus est solum, ejus est usque ad coelum* is the maxium of the law ; upwards therefore no man may erect any building or the like to overhang another's land ; and downward whatever is in a direct line, between the surface of any land and the center of the earth, belongs to the owner of the surface, *as is every day's experience in the mining countries.*" By the rules of the common law, except so far as such rules have been modified by statute, must the extent of the plaintiff's patented grant be determined. That there may however be a grant of mineral separate from the grant of the circumjacent land, and *vice versa*, where the grantor manifestly intends that each shall form a distinct possession and different inheritance, admits of no doubt. The question recurs : What did Congress, by its declared will in the act of 1866, authorize the United States to grant ? In the light

of a just interpretation of this act, must the Ben Harding patent be construed. If the patent is broader than the law, it is to that extent ineffectual. Based upon the statute, its validity, and the extent to which it operates as a conveyance, must be determined by reference to the statute.

Section two provides that it shall be lawful for the claimant of a vein or lode "to file in the local land office a diagram of the same so extended laterally or otherwise as to conform to the local laws, customs and rules of miners, and to enter such tract and receive a patent therefor, granting such mine together with the right to follow such vein or lode, with its dips, angles and variations *to any depth*, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

This section clearly permits the patentee to follow the lode in its descending course to any depth, although in its downward trend it is carried by its dips, angles and variations into the adjoining land. Here is a departure from the common-law doctrine. The qualifying words, however, "to any depth," limit the direction in which the mine may be pursued beyond the side lines. The claimant is required to file in the land office a diagram of his vein or lode. This is his own act. The law contemplates that before he prepares his diagram he shall so far expose and develop the lode as to be able to trace its course. The position that if the plat made by the surveyor does not cover the lode, the patentee should be permitted to so shift the lines of his patent as to include the lode which he before, through inadvertence or ignorance, failed to properly locate, is, it is conceived, without force. The error is not the mistake of a government officer, but the mistake of the claimant, and others ought not to be permitted to suffer by it. It is not the province of the surveyor to either discover or determine the course of the vein. He acts under the directions of the claimant of the mine who has already furnished a diagram of his lode. His duties are to survey the located premises and make a plat thereof, indorsed with his approval, desig-

nating the number and description of the location, the value of the labor and improvements and the *character of the vein exposed*, See § 3. However tortuous might be the course of the lode, the claimant had a perfect right to follow it up and prepare his diagram so as to include it, together with the surface ground on each side thereof allowed by local laws. There is no language in the act that requires the diagram to be in the form of a parallelogram, or in any other particular form.

From an examination of the entire act it seems to us that the central idea of a mining location under its provisions is, that there must be a discovered lode within it whose *locus* in its onward course or strike is embraced by its boundaries.

An assumed mining location, which, in fact, contains no mine, would be wholly false, and would contravene the law. Until a patent issues, to the extent only in its onward course that a discovered lode is within the prescribed exterior boundaries of the claim, is the location itself unsalable. *Patterson v. Hitchcock*, 3 Col. 533. The surface ground and the lode are not independent grants. It is not the purpose of the act to grant surface ground without a discovered lode. The lode is the principal thing and the surface ground incident thereto. In conveying a segment of the earth located under the provisions of the act it is the intention of Congress to convey a mine contained within that segment as the substance of the grant.

The act appeals to the industry and enterprise of the miner to make sure that the lode is within his location. The higher his diligence in this respect the greater will be his reward. If by lack of assiduity and energy he makes an untrue location — a location not embracing the lode he seeks to secure — he cannot be heard to complain that others have explored and occupied the adjacent territory and discovered therein a lode which might have been embraced in his diagram. If, as the evidence tends to show, the Bell tunnel lode is but a continuation of the Ben Hard-

ing lode (after its departure from the vertical side lines), extending through the adjacent location, upon what principle of justice or of law in the absence of an express statutory provision, can the patentee of the lode last named, claim the right to encroach upon the premises embraced by the Bell tunnel lode location and deprive the owner thereof of the fruits of his discovery?

Before a claimant is entitled to a patent under the act of 1866 a compliance with its provisions is indispensable. It is necessary that a diagram of the lode claimed shall be filed in the local land office. Notice of the extent of the claim must be given to the world by posting such diagram in a conspicuous place thereon, together with the declaration of the claimant's intention to apply for a patent. The register of the land office is required to give a like notice by publication in a newspaper and by posting in his office for a period of ninety days, which is in effect a summons to all persons whose interests may be affected by the issuance of a patent in conformity with the diagram, to appear and file an adverse claim.

If, after the expiration of ninety days, no one appears to contest, the surveyor-general, upon application of the claimant, is required to survey the location and make an approved plat thereof, and designate the number and description of the lode, the value of the labor and improvements, and the character of the vein exposed. For what purpose must these several acts be done? Do they not point with certainty to a segregation from the public domain of a described tract embracing a lode? If they have any significance, we are constrained to the conclusion that one of their leading objects is to require that the claimant shall, before applying for a patent, ascertain the exact location of his lode, and fix that location by his diagram so that the public may be apprised of the limits of the lode location, and may thereafter, with safety, explore and occupy adjacent tracts.

It is apparent that within the meaning of the act the lode

claimed is to be fixed by reference to the "plat and survey" of the location, and although in pursuance of its provisions the lode in its descending course may be followed *to any depth*, with its dips, angles and variations, into the premises adjoining, yet, in its onward course or strike, it may not depart from the line of its location.

It is, however, insisted that if not by the literal terms of the act of July, 1866, then by virtue of territorial legislation and local customs and rules of miners, the patentee was entitled to follow the course of the discovered lode, whether it was comprised within his location or not; that one of the purposes of the act of Congress was to recognize and confirm mining rights and titles as they existed under local laws and customs; that whatever may be the true construction of the act as to locations made subsequent to its passage, as to locations made prior thereto, it authorized the issuance of a patent for a lode located in conformity with the rules and customs of the mining district in which it was situated, even though it might depart in its linear course from the lateral boundaries of the described premises.

The act declares that the mineral lands of the public domain are free and open to exploration and occupation, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, *so far as the same may not be in conflict with the laws of the United States*. Before the passage of this act, with the view to protect the miner in the occupation of the public domain, although he was technically a trespasser as against the United States, the courts held that as between him and a third person, he might be considered as being in possession, with the assumed assent of the owner. But by that act the assent of the United States to the exploration, occupation and purchase of mineral lands of the public domain, is expressly declared. Under its provisions, the miner having located his claim, is to be treated as an express licensee of the United States,

and, independent of a purchase from the government of his mining claim, he has, upon compliance with the terms of the act, a right to appropriate the minerals therein contained. A title in fee, by patent, is offered him, which he may, at his pleasure, accept or reject. By the statute, his rights are circumscribed and determined. The act of Congress, from which they spring, is paramount to all local laws, rules and customs. The first section of the act, we think, leaves no room for doubt on this point. As long as they are not in conflict with the laws of the United States, they are of binding force and must be observed. But the act of Congress cannot be subordinated to the local laws, rules and customs. It is in the light of its provisions that every patent issued in pursuance thereof must be construed, and we cannot, therefore, admit that any such patent can, by virtue of local laws and customs, transfer to the patentee any greater interest or estate than that which the paramount law warrants.

In the case of *Chapman v. Toy Long*, 4 Saw. 34, the court commenting upon the rights of the miner upon the public domain, since the passage of the act of 1866, and subsequent acts upon the same subject, says: "But under the mining laws of the United States now in force, the locator of a mining claim, as to the right to the possession of the premises and to appropriate minerals therein, becomes and is the assignee, [licensee], of the United States so long as the law remains in force and he complies with the conditions imposed by it. Until Congress withdraws this license by a repeal of the law, the right of the locator to the possession of his claim and to appropriate to his own use the mineral deposits therein, is full and complete, and he need not take any steps to purchase the land or obtain a patent for it. That is a matter left to his own option or sense of self-interest."

There is no time prescribed within which he shall apply for a patent. Ample opportunity to ascertain the precise *situs* of his lode with reference to the contiguous land is

given him. The surface and the lode are both the subject of the grant. The patent operates to convey not only the circumscribed tract of land which, under the claimant's direction, has been platted, but also the lode contained therein, with the right to follow the same in its downward course into adjoining premises, but not to follow it when, in its onward course or strike, it departs from the vertical side lines. In the latter case, after its departure, it is the subject of location by whomsoever it may be discovered.

If then, as the evidence tends to show, the ledge, on which the Ben Harding lode was located, deflected in its onward course or strike from the patented side lines, the patentee is not entitled to its possession beyond his lateral boundaries, as against one who has subsequently located and patented it.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion. *Reversed.*

LODE CLAIM IS FIXED BY PLAT OR SURVEY OF LOCATION, and the lode may be followed in its descending course to any depth, with its dips, angles, and variations, into the adjoining premises; but in its onward course or strike it may not depart from the lines of the location: *Streeter v. Marshall S. M. Co.* 4 Colo. 557; *Lebanon Mfg. Co. v. Rogers*, 8 Colo. 38; *Marshall S. M. Co. v. Kirtley*, 12 Colo. 416.

WILLOUGHBY v. BROWN.

1. Section 340 of the Code leaves it optional with the party seeking an appeal to prepare and file "a statement on appeal," yet in the absence of the statutory statement the appellant can only rely upon errors apparent upon the face of the judgment roll.
2. A notice of appeal served upon the attorney of the opposite party and five minutes later filed in the office of the clerk; *held*, to be substantially contemporaneous, and a compliance with the requirement of the Code in this particular.
3. Where an appeal is dismissed "without prejudice" by this court, the appellant is not precluded from taking another appeal within the statutory period.
4. Where an undertaking on appeal is properly entitled of the cause, reference may be had in the recital to the title to designate the obligee.

Appeal from District Court of Arapahoe County.

Messrs. FRANCE & ROGERS, for appellee, now moved to dismiss the appeal.

Messrs. SYMES & DECKER, *contra*.

Per Curiam. It is insisted that, in the absence of such a statement as is contemplated by section 340 of the Code, no appeal can be taken. If this objection is valid, it is urged in apt time. The appellee confines his motion to the dismissal of the appeal, and limits his appearance accordingly.

The section of the Code just mentioned is as follows: "When the party who has a right to appeal *wishes* a statement of the evidence and exceptions saved of the case to be annexed to the record of the judgment or order, he shall within twenty days after the entry of such judgment or order, or within such further time as the court or judge thereof may grant, prepare such statement, which shall state specifically the particular errors or grounds upon which he intends to rely on the appeal, and shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and file the same with the clerk of the court, and give notice to the opposite party or his attorneys of such filing."

The statement contemplated by this section takes the place of a bill of exceptions under our former system of practice, but it is more comprehensive. It performs an office unknown to the bill of exceptions. In the statement must be set forth the errors upon which therein the appellant intends to rely. But the appellant is not bound to prepare a statement. The language of the section makes it optional. Yet in the absence of the statutory statement he can rely only upon errors apparent upon the face of the judgment roll.

The appeal will not, therefore, be dismissed for the failure of the appellant to file his statement.

In *Jones v. City of Petaluma*, 36 Cal. 232, the court says: "In reply to the suggestion of the respondents, that the appeal ought not to be entertained, because there is no statement of the grounds upon which the appel-

lants rely for a reversal, it is sufficient to say that the grounds appear upon the judgment roll, and that where such is the case, no statement is required." - In the case of *Hutton v. Reed*, 25 Cal. 478, the court held, if appended to the judgment roll there is what purports to be a statement which fails to set out the errors relied on for reversal, and the appellee interposes his objection in apt time, such statement will be disregarded, and only such errors as are apparent upon the judgment roll will be considered. See, also, *Solomon v. Reese*, 34 Cal. 34; *Brown v. Heacock*, 9 How. Pr. 345; *Conolly v. Conolly*, 16 id. 228; *Rankin v. Pine*, 4 Abbott's Pr. 310

The record discloses that the notice of appeal was served upon Willoughby's attorneys on the 16th day of April, A. D. 1878, at 9:50 A. M., and that service having been accepted by them, the notice was filed in the clerk's office five minutes later. It is urged this is error; that the notice of appeal should not have been served until after it was filed.

In the case of *McGoughy v. Alvord*, decided this term, this court held that the filing of the notice of appeal must either precede or be cotemporaneous with the service thereof. The filing and service of notice in the case under consideration were substantially cotemporaneous. To declare that when the service of the notice precedes its filing *only five minutes*, the acts are not cotemporaneous, is to indulge in an unwarranted refinement. Except for the purpose of guarding against injustice, the court will not, as a general rule, inquire into the fractions of a day. *Blydenburgh v. Cotheal*, 4 N. Y. 418; *Bliss v. Kingdon*, 46 Cal. 651.

It is insisted that as an appeal was taken to this court from the same judgment, and dismissed upon appellant's own motion, that the effect of such dismissal was to affirm the judgment of the lower court.

This position is, we think, not tenable. The judgment of this court was, that the appeal be dismissed "without preju-

dice." The effect of such a dismissal cannot be to preclude the appellant from taking another appeal within the statutory period.

It is objected that the undertaking is defective, in that it departs from the usual common-law form in failing to name the obligee. The cause is properly entitled. The undertaking, by its recitals, if reference be had to the title of the cause, designated the obligee. The obligors jointly and severally undertake and promise on the part of the appellant that he will pay all damages and costs which may be awarded against him on the appeal. Who the obligee is, sufficiently appears. The form of the undertaking in this respect accords with Code precedents. 3 Estee's Pleadings and Forms, 667.

The motion to dismiss the appeal will be denied.

Motion denied.

STATEMENT ON APPEAL TAKE PLACE OF BILL OF EXCEPTIONS which obtained under the former practice: *Blatchley v. Chiles*, 5 Colo. 83.

MILLS v. BUTTRICK et al.

1. That a defendant in a suit in equity cannot have affirmative relief in the absence of a cross-bill is a familiar rule in equity practice.
2. Where a defendant by demurrer, answer or plea, contests the case made by the complainant in his bill, he may ask this court to reverse the decree because of defective allegations in the bill, or proofs, and in such case the record may be examined and the decree either reversed or affirmed.
3. In a bill of complaint to quiet title under the town site act of 1864, all adverse claimants should be made parties to the suit; yet a decree rendered upon a bill to which all adverse claimants were not made parties, may still be good as between those who were parties thereto.

Error to Probate Court of Clear Creek County.

At the December term, 1877, the writ of error in this cause was dismissed (*ante*, p. 53), and thereupon

Mr. L. C. ROCKWELL, for plaintiff in error, filed the following petition for a rehearing:

"Your petitioner, George A. Mills, respectfully represents and shows to this honorable court that in failing to pass upon the merits of this case, and in dismissing the writ, error has intervened in this :

1st. Because this case was regularly and properly pending in this court on a writ of error, and the entire record should have been examined as challenged by the assignment of errors.

2d. Because the court should not have dismissed the writ, but should have affirmed or reversed the decree.

3d. Because the writ could only be dismissed because of some defects in the proceedings in bringing the case up, or where it is shown this court has no jurisdiction.

For the foregoing reasons petitioner asks that a rehearing be granted, and the cause considered on the merits."

Per Curiam. The act of 1864, prescribing rules and regulations, for the execution of the trust, arising under the act of Congress of 1844, authorizing the entry of town sites upon public lands, was made applicable to the town of Georgetown, and provides, that "in case there shall be adverse claimants to such lands, or to any part, parcel or share thereof, either party may bring a suit in chancery, against the adverse claimants in the district court," etc., etc. It further provides that "pleadings and proceedings in such actions shall be as in cases in chancery."

By force of these provisions, it was held in the case of *Tucker et al. v. McCoy*, 3 Col. 284, that a defendant to a bill filed under this act, in order to obtain affirmative relief, must file his cross-bill. That no affirmative decree could be rendered in his favor on his answer. This rule of equity pleading and practice is so familiar, that we cannot think the claim well founded, "that its announcement in the case of *Tucker v. McCoy* took the profession by surprise."

Notwithstanding a defendant in a suit brought under this act, who has failed to file his cross-bill, may not be entitled to affirmative relief, we are of the opinion, that when he

has, in the court below, by demurrer, plea or answer, contested the case made by the complaint, he may, in the appellate court, ask that a decree rendered in the complainant's favor be reversed, for any substantial defect in the allegations of the bill or proofs. This follows from the fact, that the complainant in the court below would not be entitled to a decree, notwithstanding the failure of the defendant to file his cross-bill, except upon a sufficient showing that he was entitled under the provisions of the act. In this view, the record in such a case may be examined by this court, and the decree either reversed or affirmed.

In the case of *Tucker et al. v. McCoy*, cited *supra*, it is said that, to entitle the complainant to maintain his suit under this act, it is necessary *inter alia* * * * "Fourth—that all the adverse claimants, who filed their statements within the time limited, should be made parties to the suit. For aught that appears in this bill, McCoy may not have been the only adverse claimant."

That such an allegation would be proper, there can be no question. That if all adverse claimants, who have filed upon the premises in controversy, are not made parties defendant, no impregnable decree can be entered, is also clear; but that a bill, wanting in this allegation, would be fatally defective, and would not justify a decree in the complainant's behalf, was not what the court intended to say.

It is clearly apparent, from the terms and provisions of the town site act of 1864, that it was intended that, upon the entry of a town site by the proper authorities, all adverse claims to any part of the lands so entered should at once be adjudicated and determined, by the courts vested with jurisdiction. This was with a view of enabling the authorities, in whom the trust was vested, to rightfully, finally and speedily execute the trust. An adjudication was contemplated, that should determine the right of all claimants, and bind all by its decree.

Notwithstanding this view of the statute, a decree rendered upon a bill to which all adverse claimants were not

made parties would still be good as between those who were parties thereto. This averment, therefore, while it is proper, cannot be regarded as essential.

With this modification, an examination of the allegations of the bill shows a substantial compliance with the requisites of a bill, as stated in the case of *Tucker et al. v. McCoy*.

The allegations are general, it is true, and for that reason might have been obnoxious to demurrer; but in the absence of any objection so taken, they are sufficient if supported by evidence, showing the facts which should have been more specifically alleged.

Upon the evidence disclosed by the record, we think the complainant was entitled to the lands in controversy. The petition for rehearing upon the merits is denied; but the judgment of dismissal heretofore rendered is vacated, and the decree of the court below is affirmed with costs.

Rehearing denied.

DUNN v. THE PEOPLE.

1. In an indictment for making or passing a forged check, the act of making or passing the check with knowledge of its fictitious character, together with the *intent* to defraud, are the essential elements of the crime. When these concur, the crime is complete.
2. A forged check was passed in consideration of illicit intercourse, and cigars and liquors sold without license at a house of prostitution; that the law was violated in selling liquors and cigars without license in nowise affected or modified the criminal character of the act.

Error to District Court of Arapahoe County.

THE facts are sufficiently stated in the opinion.

Mr. W. W. COOK and Mr. DANIEL SAYER, for plaintiff in error.

Mr. A. J. SAMPSON, attorney-general, for defendant in error.

ELBERT, J. The plaintiff in error was tried and convicted upon two counts of the indictment. The first charged him, in substance, with feloniously making a fictitious check, for the payment of money, with intent to defraud Sarah J. Duell; the second, with the felonious passing of a fictitious check to Sarah J. Duell, knowing the same to be fictitious, and with intent to defraud her. There is no dispute about the facts. The check was passed in consideration of illicit intercourse, and cigars and liquors, sold without license, at a house of prostitution. The only claim made in behalf of the plaintiff is that prostitution is prohibited by statute, that the sale of liquors and cigars without license is also prohibited by law; that the consideration for which the check was passed was in part immoral and in whole illegal; that no recovery could have been had in a civil action, by Sarah J. Duell; that the act of passing the fictitious check did not, and could not, therefore, result in defrauding the said Duell, and that, therefore, no conviction should have been had.

It is not essential to the offenses charged, that the party receiving the fictitious check shall be, in fact, defrauded. The criminality of the act does not depend on the *result* of the act, but the *intent*. The act of making or passing the check, with knowledge of its fictitious character, together with the *intent* to defraud, are the essential elements of the crimes charged. When these concur the crime is complete.

“If the statute forbids the putting off of a forged bank note, with intent to defraud the bank, and one with this intent puts off the note to an agent of the bank, employed, unknown to him, to detect offenders, and so not imposed upon, he commits the offense; because the law leaves it unimportant whether or not a fraud is effected, provided it is attempted, and the putting off is complete.” 1 Bishop’s Crim. Law, § 437.

This illustrates the case at bar.

Whether the intent to defraud could have existed, in so

far as prostitution constituted the consideration, we need not say. The liquors and cigars received, were of the value of twenty dollars; they were property, under the law, and could constitute the subject-matter of lawful trade and barter. In so far as they constituted the consideration, there is no difficulty in saying that the intent to defraud could and did exist, notwithstanding Sarah J. Duell had no license to sell them. In this respect, then, all the essential elements of the offenses charged were proven. That Sarah J. Duell, concurrently, and in the same transaction, also violated the law, in selling the liquors and cigars without license, in nowise affects or modifies the criminal character of the acts of the plaintiff in error.

There is no other error assigned that demands our attention. The judgment of the court below is affirmed with costs.

Affirmed.

BOARD OF COUNTY COMMISSIONERS v. SLOAN et al.

Under the former system of practice an appeal would not lie to this court from a judgment for costs only, unless it related to a franchise or freehold.

Appeal from District Court of Pueblo County.

Messrs. WELLS, SMITH & MACON, for appellees.

Per Curiam. The appeal in this cause was taken from the judgment of the court below before the Code went into effect. Under our former system of practice, an appeal would not lie from a judgment for costs only, unless it related to a franchise or freehold. *Peabody v. Thatcher et al.*, 3 Col. 275.

As this judgment relates neither to a franchise nor freehold, and is for costs only, we are without jurisdiction to hear the cause on appeal.

The appeal will be dismissed.

Appeal dismissed.

Mr. Justice STONE did not sit in this case.

THE PEOPLE, ex rel., etc., v. KEELING et al.

1. The Constitution confers upon this court the power to issue the writ of *quo warranto*.
2. A change in the time merely of holding its annual election neither affects the corporate existence of an incorporated city nor in any way changes or abridges its powers or duties within the meaning of section 2745 of the General Laws.
3. Where a municipal corporation held its election on the first Monday of April, as provided by Revised Statutes (1868), instead of the first Tuesday of April, as provided by the General Laws (1877), and the corporation had not reorganized under the general law, *held*, in the absence of averments to the contrary, that the action of the authorities was free from design or fraud.
4. It is an established doctrine that granting or refusing the writ to test the right to an office or franchise is a matter of sound discretion, notwithstanding there may exist a substantial defect of title. The sole ground that the election in this case was held on a wrong day, *held* insufficient to put the respondents upon a defense of their title.

INFORMATION in the nature of a *quo warranto*. The respondents demurred.

Messrs. RICHMOND & STANTON, for relators.

Messrs. WELLS, SMITH & MACON, for respondents.

ELBERT, J. The Constitution confers upon this court the power to issue the writ of *quo warranto*.

This is an information in the nature of a *quo warranto*, and in taking jurisdiction of it, it is perhaps proper that we should say, in view of some conflict of decisions in other States upon similar constitutional provisions, that in our view the framers of the Constitution used the words, "writs of *quo warranto*" as synonymous with "information in the nature of a *quo warranto*," or as including that proceeding which had substantially the same end, and which had both in England and America largely usurped the place of the ancient writ. High on Extraordinary Remedies, § 619 *et seq.*, and cases cited.

Section 2691, General Laws, p. 903, provides that "the Vol. IV — 17.

first Tuesday in April shall be the regular annual period for the election of municipal officers," and "all officers whose election is provided for in this act or may be provided for by ordinance, shall be elected on that day."

This provision is applicable to all municipalities within the State, whether organized under the provisions of the act referred to or existing under organizations had under the general law prior to the passage of the act. This is not intended to apply to municipalities acting under special charters fixing a different day.

There are obvious reasons why the annual municipal elections within a State should be held upon one and the same day, and we think such was the intention of the legislature. Nor is this view in conflict with section 2745, General Laws, which provides that the existence of cities and towns heretofore incorporated within the State, which shall choose to retain their present organization, shall not be affected, nor the power or duties thereof in any manner changed or abridged by the provisions of this act."

A change in the time of holding its annual election neither affects the corporate existence of an incorporated city, nor in any way changes or abridges its powers or duties within the meaning of the act.

The provision, therefore, of the Revised Statutes (§ 1, art. 2, ch. 84, p. 605), fixing the first Monday of April of each year for annual municipal elections, is repealed so far as it relates to the time of holding the election.

That the annual election of municipal officers for the city of Pueblo was held upon the first Monday of April as provided by the Revised Statutes, and not upon the first Tuesday of April, as provided by the General Laws is the only defect alleged against the title of the respondents as mayor and aldermen of the said city.

There is no allegation in the petition that the election was held on the wrong day knowingly or for any fraudulent purpose. It doubtless was the mistake of the officers by whom the preliminary steps for holding an election on that

day must have been necessarily taken. As the city of Pueblo had not chosen to reorganize under the provisions of the General Law, it was by no means free from doubt that the time for holding their annual election had been changed. It was a mistake upon a question of law which gave the officers of many of our cities trouble. In the absence of averments to the contrary, we are at liberty to say that their action was free from design or fraud. There is no allegation that the election was not in all other respects regular and in accordance with the provisions of the laws governing elections. It does not appear that any elector objected to the holding the election on that day, nor was in any way prevented or deterred from casting his vote for the candidates of his choice. There is no allegation, nor is there any reason to believe that the election was not called and held in good faith, or that it was not participated in generally by the qualified electors of the city. There is no claim or pretense that the respondents do not discharge their duties as officers with fidelity, or that the public interests of the municipality are in any way jeopardized. The prayer for the writ in this case is based upon the one averment, that the election upon that day "was without warrant of law." That it was so, is not necessarily conclusive upon our action.

It is an established doctrine that granting or refusing the writ to test the right to an office or franchise is a matter of sound discretion, notwithstanding there may exist a substantial defect of title. In the exercise of this discretion the court may take into consideration the necessity and policy of allowing the proceedings, as well as the position and motives of the relators. It may weigh the considerations of public convenience involved, and compare them with the injury complained of. High on Extraordinary Remedies, § 605, and cases cited.

The case of *The State ex rel. v. Tolan*. 4 Vroom, 195, is a leading case upon the question involved. Its facts are analogous, and we see no reason why this case does not

come within the rule there laid down. DEPUE, J., says: "It is not alleged that the holding of the election on a day different from the day fixed by law was induced by any corrupt, fraudulent or indirect motive. It is shown that it was the result purely of a mistake; the number of votes cast at the election shows that the election was largely attended by the qualified voters. There is no complaint that it was not fairly conducted, nor that a single voter was prevented from exercising his franchise of voting because of the time of holding the election. In all other respects except as to the day the election was held in complete accordance with law. In this respect the non-compliance was due to an honest mistake; circumstances, such as these here stated, induced the court of King's Bench, in the case of *King v. Parry*, to refuse leave to file the information, where the title of the defendants was clearly defective." The case of the *Commonwealth v. Jones*, 12 Penn. 365, C. J. GIBSON delivering the opinion, is an instance of the exercise of this discretion in refusing the writ. There the respondent sought to be ousted was clearly ineligible. We have been unable to find any authorities in conflict with these views, nor do counsel cite any.

The consideration, that a successful prosecution of the proceedings would result in the suspension of all municipal government in the city, largely controlled the discretion of the court in refusing the writ in the case first cited. The same consideration, we think, obtains in the case at bar. The ouster of these respondents would not result in reinstating the former mayor and aldermen.

It is not claimed but that the respondents were regularly and peaceably inducted into office upon the certificates of election issued by the clerk under the provisions of the statute. No municipal officers were elected upon the day fixed by law, nor are the outgoing mayor and aldermen here, or elsewhere, so far as it appears, contesting the title of the respondents; nor does it appear but what they voluntarily surrendered their respective offices to the respond-

ents at the time of their induction into office. This is a fair presumption, and in the absence of averments to the contrary, this court cannot safely act upon any other.

The result of the proceeding, so far as we can determine from the information, would be to leave the city of Pueblo without a municipal government for the coming year. The former mayor and aldermen, having voluntarily surrendered their offices, cannot at will resume them, or rehabilitate themselves with powers and duties which they in effect have resigned. The provision of the law, that they shall hold their offices until their successors are elected and qualified, is without force to avoid the consequences of their voluntary surrender.

If it were conceded in accordance with the doctrine of some of the decisions (*Coles Co. v. Alison*, 23 Ill. 437; *People v. The Town of Fairbury*, 51 id. 149), that the annual election, by mistake not having been held on the day fixed by law, might still be legally called and held, we are met with the difficulty that there would be no one with power or authority to call a special election to fill the vacancies.

In the absence then of any fraudulent design or practice demanding our interference for its defeat; in the absence of any usurpation of offices, in any but a technical sense, the title of the respondents, having for its foundation *substantially* the expressed will of the people, so far as we are able to determine; with a view to the demands of the public interests; looking to the stability and repose of the municipality concerned, we do not feel at liberty to put the respondents upon a defense of their title upon the sole ground that the election was holden upon a wrong day. Nor can we see that any confusion can arise, or any interests, public or private, be prejudiced by this refusal of the writ. The acts of an officer, *de facto*, are valid so far as the rights of the public or third persons are concerned, and neither the title of such officer nor the validity of his acts as such can be

indirectly called in question in a proceeding to which he is not a party. *State v. Tolan, supra.*

The demurrer to the information is sustained, and the rule to show cause is discharged with costs.

Demurrer sustained.

QUO WARRANTO.—POWER TO ISSUE, hear, and determine writ of *quo warranto* includes an information in the nature of a *quo warranto*: *People v. Boughton*, 3 Colo. 480.

CONNOR v. THE PEOPLE.

The statute (R. S. 1868, p. 417, § 96) requires that a forfeited recognizance, taken before a justice of the peace, be certified into the district court that an action of debt may be brought for the penalty; such certification is essential to the maintenance of the action. The declaration must count upon it as a record of the court to which by law it is to be certified; an allegation of loss will not avail to cure the defect, or excuse the absence of certification.

Appeal from District Court of Bent County.

DEBT upon a forfeited recognizance. One Keene was arrested on a charge of grand larceny in Bent county, and taken before a justice of the peace on the 2d day of February, 1877. The justice took his recognizance with Connor and others, as sureties for his further appearance on February 8th. Keene failed to appear upon the day designated, and the justice noted the default upon his docket. In the declaration filed in the district court, it was alleged that the recognizance "having been feloniously stolen, taken and carried away by some person or persons whose name or names are to the said plaintiff unknown, the said plaintiff is unable to produce the same to the said court." and also, that "after default had been made in the appearance of the said bounden Worth Keene, according to the tenor and effect of said recognizance and writing obligatory, the said justice then and there made note upon the record in his docket of the default in the appearance of the said Worth Keene, in conformity with the provisions of the statute," etc. The defendants served, interposed a demur-

rer, the demurrer was overruled and the defendants declined to plead over; judgment thereupon went in favor of the plaintiff in the penalty of the bond. The defendant Connor appealed to this court. One of the errors assigned is that "the court erred in overruling appellant's demurrer to plaintiff's declaration, and in giving judgment thereon against the appellant."

Mr. CHAS. S. THOMAS and Mr. JOHN F. BOSTWICK, for appellant.

A. J. CAMPSON, attorney general, for the people.

ELBERT, J. The recognizance in this case was taken under § 95, R. S., p. 417, for the appearance of the accused at a future day for further examination before the justice. The accused made default. In such case, § 96, R. S., p. 417, provides that it shall be the duty of the justice "to note the default upon the record and certify the recognizance with the record of the default in the performance of the conditions thereof, to the district court of his county, that a *scire facias* may issue thereon, or an action of debt be brought for the penalty."

It is claimed that this certification of the recognizance by the justice to the district court is an indispensable pre-requisite to an action of debt on the bond, that the declaration was fatally defective in not averring it, and that the court below erred in overruling the defendant's demurrer.

At common law all recognizances in criminal matters were returnable to the court having jurisdiction of the offense charged. It was not perfect as a record until it was enrolled in some court of record. It is defined to be an obligation of record entered into before a court of record, or officers duly authorized for that purpose, with a condition to do some act. 2 Tidd's Practice, 1,083.*

Section 234 of the Criminal Code, R. S., provides, "that all recognizances that have any relation to criminal matters

* * * shall be certified by the judge, justice of the peace

or other officer taking the same, and delivered to the clerk of the district court on or before the day mentioned therein for the appearance of the witness or accused therein bound."

Sections 203 and 204 of the Criminal Code, R. S., p. 239, provide that officers taking recognizances in certain cases shall certify and return them into the district court.

From these several provisions it is evident that the legislature intended to continue the common-law character of a recognizance as a debt of record, upon which debt should lie or the writ of *scire facias* issue as at common law.

Where the proceeding is by writ of *scire facias*, there are numerous decisions under similar statutes, that the certification to a court of record is essential.

In the case of *Noble et al. v. The People*, 4 Gilm. 435, PURPLE, J., says: "It is the opinion of this court that the *scire facias* is clearly defective in not containing an averment that the recognizance was returned into the circuit court and had become a matter of record in such court. This principle is distinctly recognized in all of the authorities upon this question. Whenever a recognizance is taken or entered into out of a court of record, a *scire facias* issued upon the same must contain sufficient averments to show the jurisdiction or authority of the officer taking the same, and also that it was returned and filed of record in the proper court."

Again, in *Lawrence v. The People*, 17 Ill. 174, SKINNER, J., says: "The certificate of the justice is a part of the recognizance, and essential to its validity."

There are also numerous cases where the declaration is in debt, where it is held that the certification is essential.

In the leading case of *The People v. Van Eps*, 4 Wend. 393, SUTHERLAND, J., says: "The declaration appears to me to be defective in not averring that the recognizance was ever filed in, or made a record of any court. It does not, strictly speaking, become a recognizance or a debt of record until it is filed or recorded in the court in which it is return-

able. All the precedents of declarations in debt on recognizances of bail contain this averment."

In *Bridge v. Ford*, 4 Mass. 641, PARSONS, C. J., says: "The recognizance does not appear to have been delivered to and entered of record in the common pleas. Debt as well as *scire facias* will lie on a recognizance to a party, but this recognizance must be matter of record, and in debt upon it, the defendant may plead *nul tiel record*. Whenever, therefore, a justice recognizes a party to appear at any court of record, it is his duty to transmit the recognizance to that court, that it may be entered of record."

The same doctrine is elaborately stated by Chief Justice BEASLEY, in the case of *State v. Kruse et al.*, 3 Vroom, 314. This case is an authority for saying that the power of a justice to take a recognizance for the appearance of the accused at a future day for further examination, is purely statutory and does not exist *virtute officii*. Our statute, however, clearly stamps it with the character of a recognizance at common law.

It cannot be treated as an ordinary contract. Its validity depends upon a compliance with the statute, and in an action of debt the declaration must count upon it as a record of the court to which, by law, it is to be certified. The declaration in this respect was fatally defective and obnoxious to the general demurrer interposed.

The allegation of the loss of the recognizance does not avail to cure this defect, or excuse the absence of certification. As to the mode of supplying the lost paper, we are not now called upon to express an opinion.

The judgment of the court below is reversed with costs.

Reversed.

FORFEITED RECOGNIZANCE MUST BE CERTIFIED by justice of the peace into the district court, in order that an action of debt may be brought for the penalty, and it then becomes a contract of record: *Haney v. People*, 12 Colo. 347, 349

COLLINS et al. v. DAWLEY.

1. A policy of insurance upon the life of the husband for the benefit of the wife may be assigned or pledged by her as collateral security for the debt of her husband, unless prohibited by statute.
2. The renewal of a note for which collateral is pledged is not an extinguishment of the debt, and is not payment in that sense so as to discharge the claim of the creditor on the collateral security, without an agreement to that effect.

Error to Probate Court of Arapahoe County.

THE plaintiff below had judgment for \$606.94. The facts are stated in the opinion.

Messrs. SAYRE, BUTLER & WRIGHT, for plaintiffs in error.

Messrs. BELDEN & POWERS, for defendant in error.

STONE, J. The principal error assigned is that the court below erred in finding the issues for the defendant in error contrary to the law of the case under the given state of facts.

I. N. Dawley, the husband of the defendant in error, borrowed \$600 from the First National Bank of Denver, and gave his promissory note for the amount, payable to J. H. Morrison who indorsed the same to the bank.

In order to indemnify the said Morrison, as well as to secure the bank in the payment of the note, he deposited with the said bank a policy of insurance on his life for the sum of \$2,000, for the benefit of his wife, and also an agreement signed by his wife, the defendant in error, in the nature of an assignment of the said policy, which agreement was in the following words :

“Agreement : It is hereby understood and agreed, by and between Olive P. Dawley and J. H. Morrison, that in the event that the amount of the life policy, No. 37,389, of the Mutual Life Insurance Company of New York, on the life of Isaac N. Dawley, for \$2,000, should be realized before

the payment of a certain note for \$600 made by Isaac N. Dawley and payable to the said J. H. Morrison due March 30, 1873, then and in that case, so much of the amount sufficient to cancel the said note shall be retained and paid to the said Morrison, or to the payee or payees of said note whomsoever they may be.

(Signed)

OLIVE P. DAWLEY.

Attest. I. N. DAWLEY.

DENVER, *January 18, 1878.*"

About fifteen months after the maturity of the note, the said Dawley made a payment to the bank of \$100 and gave a renewal note for the balance due, which was \$500, his brother J. M. Dawley signing the note as surety, the policy of insurance still remaining at the bank as collateral security for the amount due according to the understanding of the parties. The rate of interest on this note was the same as on the first note. No payment had been made on this note when the said I. N. Dawley died. After his death, the defendant in error obtained a loan of \$1,000, from the plaintiffs in error upon assigning to them the policy with authority to collect the amount due thereon.

She represented that the policy was lost, and gave, as she was required to do, an indemnity bond to the insurance company, who thereupon agreed to pay the policy within a year and a day. Plaintiffs in error soon afterward found that the policy was in the hands of the First National Bank, the cashier of which offered to deliver it on condition that the plaintiffs in error would pay the amount of the note yet due. This was agreed to, and the policy forwarded and paid in full, from the proceeds of which the plaintiffs in error deducted the amount which they had paid the First National Bank in discharge of the note, and also deducted the amount of their loan to Mrs. Dawley, and remitted her the balance. She brought suit in assumpsit against the plaintiffs in error to recover the amount so paid to the First National Bank. The declaration contained the common counts

only for \$2,000, and the defendants below pleaded *non assumpsit* and set-off of the full amount declared for. The trial was to the court below, which rendered judgment against the plaintiffs in error for the amount paid to the First National Bank, and to reverse that judgment the said plaintiffs prosecute their writ to this court.

Two questions arise for consideration upon the facts in this case:

First. Could the wife assign, or pledge as collateral, the insurance policy, to secure the debt of her husband? and,

Second. Did the renewal of the first note operate to release such security?

That a policy of insurance upon the life of the husband for the benefit of the wife, may be assigned or pledged as collateral security by her for the debt of her husband, unless prohibited by local statute, is, we think, settled by the great weight of authority. The policy was a writing obligatory for the payment of money, and may be assigned at law as well as in equity. *DeRouge v. Elliott*, 23 N. J. Eq. 486; *Charter Oak Ins. Co. v. Brant*, 47 Mo. 419; *Chapin v. Fellows*, 36 Conn. 132; *Merrill v. N. E. Mut. L. Ins. Co.*, 103 Mass. 245; 1 Schouler's Pers. Prop. 709-710; 2 id. 672-3; Bliss on Ins., §§ 341-349. And the assignment may be for a moiety of the sum due upon the policy. *Pomeroy v. Manhattan L. Ins. Co.*, 40 Ill. 398.

A point is raised by counsel for defendant in error, that by the laws of the State of New York, where the policy was executed, it was not assignable, but since the laws of New York touching this point are not set out in the record before us, we are unable to pass upon this point, and must allow the usual presumption to govern in such case. *Kline v. Baker*, 99 Mass. 254.

The laws of Colorado, placing a married woman upon the same footing as a *femme sole* with respect to her own property, must, to that extent, govern in this case.

As to the second point, we think the security afforded the First National Bank by the policy as collateral, was

unimpaired by the renewal of the first note. It is claimed by counsel for defendant in error, that she stood in the position of a surety, and that the payment of the \$100 mentioned, and the giving of the new note for the balance due, was a payment of the first note, and therefore operated to discharge her liability as such surety. Had the policy not been deposited with the bank, the assignment being made technically to Morrison, and for whose personal indemnity it was not necessary to actually deliver the policy (1 Schouler's Pers. Prop. 710), a very different question would be presented. But in addition to the assignment for the indemnity of Morrison, the policy was delivered to the bank and by it retained. The bank was the real creditor, Morrison being merely an accommodation indorser, and his indorsement, which is shown by the testimony of Moffat, who says: "The note was signed by I. N. Dawley and J. H. Morrison," made the bank the payee of the note. We must, therefore, take this delivery of the policy to have been, by intendment, a deposit in the nature of a pledge as collateral security for the payment of the debt. This intention is further evidenced by the fact that no demand was made for the re-delivery of the policy to the assignor until after the death of I. N. Dawley, the assured. Such was plainly the intention of the parties to the transaction. *Norwood v. Guerdon*, 60 Ill. 253.

The renewal of a note for which collateral is pledged is not an extinguishment of the debt, and is not payment in that sense so as to discharge the claim of the creditor on the collateral security, unless there is an agreement to this effect. *Pinney v. Kingston*, 46 Vt. 83.

A note in renewal is a continuation of the debt merely. *Moses v. Trice*, 21 Gratt. 556; 1 Schouler's Pers. Prop. 514.

The transaction is to be governed by the real intent of the parties. True, the defendant in error deposes that she never deposited the policy with the bank, nor authorized any one to do so for her, but she also deposes that she never assigned the policy, nor signed any instrument or

agreement of any kind whatever, relating to the policy, and in this statement she is contradicted by Moffat, the cashier of the First National Bank, and by Collins, her own witness, who also swears to the genuineness of her signature to the agreement: She evidently knew that the policy was at the First National Bank, and must also have known how it came to be there, for although when she assigned it to Collins, Snider & Co., for collection to secure her loan, she represented it as lost or mislaid, yet in her deposition she contradicts this by stating that after her husband's death she repeatedly sent to the bank to get the policy.

Upon the whole evidence we must hold that it was competent for the plaintiffs in error, as defendants below, to plead set-off, as they did, of the amount they had paid to the First National Bank, and show such payment in discharge of the last note, as so much money paid to the use of the defendant in error, the plaintiff below. She was paid out of the proceeds of the policy, all that was due her as assignor. The plaintiffs in error, as her agents to collect the policy, though not specially authorized to pay this note, were, nevertheless, under their general authority, invested with all medium powers necessary to be used for the accomplishment of the object of the principal power. 1 Chitty's Contr. (11th ed.) 140.

In paying the note they were discharging a valid lien upon the policy, and were, therefore, warranted in acting to avoid litigation to the detriment of their principal, and in such act they should be protected by the courts.

The judgment of the court below was not warranted by the law applicable to the facts in the case, and must be reversed.

Judgment reversed.

PAYMENT—GIVING OWN NOTE, BILL, OR CHECK IS NOT PAYMENT or discharge of a debt unless so agreed: *First Nat. Bank v. Newton*, 10 Colo. 171.

DUNCAN v. WHEDBEE.

1. In the probate courts of certain counties named in the statute (R. S., p. 527, § 32) a party failing to demand a trial by jury will be deemed to have waived it.
2. A declaration describing the plaintiff in its commencement in a representative capacity, but concluding the *ad damnum* averment to himself personally, *held*, fatally defective on error after plea pleaded.
3. Where a judgment exceeds the *ad damnum* laid in the declaration, a remittitur of the excess may be entered in this court.

Error to Probate Court of Weld County.

ASSUMPSIT. The declaration was as follows:

“Benjamin F. Whedbee, administrator of all and singular the goods and chattels, rights and credits, which were of M. R. Wills, deceased, at the time of his death, who died intestate complains of Frank E. Moyer and Elisha Duncan, the defendants, in a plea of trespass on the case on promises; For that whereas the defendants on the 14th day of February, A. D. 1868, at Fort Lupton, Weld county, Colorado Territory, aforesaid, made their promissory note in writing, and delivered the same to the plaintiff and thereby promised to pay the plaintiff the sum of eight hundred and eighty-two dollars and fifty cents, on or before the first day of January, A. D. 1869, after date thereof, which period has now elapsed, and the defendant then and there, in consideration of the premises, promised to pay the amount of said note to the plaintiff, according to the tenor and effect thereof. Yet they have disregarded their promises and have not paid the said note, to the damage of the said plaintiff of nine hundred and fifty dollars. and he therefore brings suit, etc.

By J. M. SMITH, *Plaintiff's Attorney.*

Copy of note attached to declaration for \$882.50, payable first day of January, 1869, to Hugh T. Munson, administrator,” etc. Plea of non-assumpsit.

It appears by the record that the cause was continued

from April, 1872, to June following, and again continued to the October term, 1872, at which time the defendant, failing to appear, the issue was tried by the court and the following order made of record :

“And now on this day comes again the said plaintiff, by Jesse M. Sherwood, Esq., none appearing for said defendant, and the court having heretofore heard and considered the evidence produced to maintain the said issues, and the court being now sufficiently advised in the premises, doth find the said defendant is justly indebted to the said plaintiff in the sum of eleven hundred and fifty-two dollars and forty-nine cents. Therefore it is considered that the said plaintiff have and recover of and from said defendants eleven hundred and fifty-two dollars and forty-nine cents, together with his costs in this behalf, expended, taxed at — and have execution therefor.”

To reverse this judgment Duncan sued out this writ of error.

Messrs. MILLER & CLOUGH, for plaintiffs in error.

Messrs. BERKLEY & PRICE, for defendant in error.

THATCHER, C. J. In July, A. D. 1871, the plaintiff below sued as administrator, etc., of M. R. Wills. The defendants appeared by their attorneys and filed the general issue. When the cause was called for trial the defendants failed to respond. But defendants' attorneys had neither withdrawn their plea, nor by leave of court, their appearance. The court, without the intervention of a jury, tried the issue of fact raised by the pleadings. As the damages rested in computation, in our opinion the defendants by withdrawing from the field when the case was called for trial may be deemed to have consented, as it was competent for them to do, to a submission of the issue to the court alone. Section 32, of chapter 71, R. S., provides that no petit jurors shall be summoned to attend the terms of the *probate* courts in certain counties (Weld county among the number) therein

named as provided in relation to the district courts, but in all causes in the said probate courts, if either party shall demand a jury, the clerk of such court shall issue a *venire* therefor. No such demand was made, and it is fairly inferable from the conduct of the defendants that a jury was waived.

The declaration is defective, in that the plaintiff therein sues in his representative capacity, but concludes the *ad damnum* averment to himself personally, and not in his representative capacity. It is impossible to determine whether the recovery is sought by him as administrator, or in his own right. It departs in other respects from approved precedents. The plaintiff will have leave to amend his declaration as he may be advised.

The judgment of the court below was for eleven hundred and forty-two dollars and forty-nine cents. The plaintiff claimed in the *ad damnum* only nine hundred and fifty dollars. The defendant in error has filed a remittitur for so much of the judgment as is in excess of the *ad damnum*.

This court has frequently sanctioned this practice. *Winne, Cooper, et al., v. Colorado Spring Co.*, 3 Col. 155; *City of Central v. Wilcozen*, id. 655.

The judgment of the court below will be reversed with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

DAVIDSON v. THE PEOPLE.

1. In a trial for murder, it having been shown that a feud of several years' standing existed between the parties, and that threats had been repeatedly made by deceased to take the life of the prisoner, which had been communicated to the latter, *held*, that evidence of threats under such circumstances, made by deceased immediately before the killing but uncommunicated to the prisoner, were improperly excluded from the jury, as they tended to show the attitude of deceased toward the prisoner at the time of the killing.

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3. Before admitting evidence of an uncommunicated threat it is for the judge to say whether there is any evidence of a hostile act or movement on the part of the deceased, but his decision in this behalf is subject to review.
8. It is the province of the jury to judge of the credibility of witnesses; to judge of the character of the acts on the part of the deceased testified to, as hostile or not, and it is the right of a prisoner to have the jury consider the acts of deceased in the light of recent threats made by him.
4. It is for the prisoner first to show an attack, then it is competent for him to show the violent and dangerous character of the deceased, as a ground for belief that the attack was felonious.

Error to District Court of El Paso County.

THE plaintiff in error was indicted for the crime of murder at the February term, 1877, of the district court of El Paso county, and at the same term tried and convicted of manslaughter. On the trial the plaintiff in error set up as defense: *First*, that, at the time of the homicide, the deceased, Francis M. Brown, intended by violence or surprise then and there to kill the plaintiff in error. *Second*, that if deceased did not so intend the plaintiff in error honestly so believed, and upon reasonable grounds, and acting upon such fears he shot and killed the deceased.

Mr. G. G. SYMES, and Messrs. WELLS. SMITH & MACON, for plaintiff in error.

A. J. SAMPSON, attorney-general, for defendant in error.

ELBERT. J. The rule respecting the admissibility of threats of the deceased against the prisoner in a case of homicide where the threats have not been communicated to the prisoner is stated by Mr. Wharton (*Crim. Law*, 1027*) as follows:

“Where the question is as to what was deceased’s attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to

show that at the time of the meeting the deceased was seeking the defendant's life."

This statement of the rule is cited and approved by the Supreme Court of the United States in the case of *Wiggins v. The People, etc.*, 3 Otto, 467. The reasons upon which the rule is founded are ably and clearly stated by Mr. Justice GROVER in the case of *Stokes v. The People*, 53 N. Y. 174. He says: "Evidence of threats made by the deceased which had been communicated to the accused were received by the court. Proof of the latter facts was competent as tending to create a belief in the mind of the accused that his life was in danger, or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased, when in the absence of such threats such acts and motions would cause no such belief. But why admissible upon this ground? For the reason that threats made would show an attempt to execute them probable, when an opportunity occurred, and the more ready belief of the accused would be justified to the precise extent of this probability. But an attempt to execute threats is equally probable when not communicated to the party threatened as when they are so; and when, as in this case, the question is whether the attempt was in fact made, we can see no reason for excluding them in the former that would not be equally cogent for the exclusion of the latter, the latter being admissible for the reason that the person threatened would the more readily believe himself endangered by the probability of an attempt to execute such threats." See, also, *Campbell v. The People*, 16 Ill. 18; *Holler v. The State*, 37 Ind. 57; *People v. Scroggins*, 37 Cal. 676.

The case at bar illustrates the rule.

The witness Jackson Martin testified: "D. was at the west side of room; main entrance about five or six feet from where D. stood; B. proceeded to stove at east end of room, about eight feet from the counter; didn't see anybody enter the room with B.; B. passed behind D.; B. lifted his hand when he reached the stove; fire in stove;

I was standing about nine or ten feet from D. ; B. east of D. about fifteen or twenty feet ; D. said he did not steal Rule's cattle ; D. was standing at counter, his face toward B. ; turned his face toward B. at the time he spoke ; he said also, 'anybody who said that, was a liar ;' quick as D. said that, B. turned toward D., and put his right hand in his pocket ; saw butt of a revolver sticking out of B.'s pocket ; could see it sticking out ; was in B.'s right hand ; then a shot was fired ; must have been D. who fired ; shot hit B. ; another shot fired about a minute and a half after first shot ; * * * * B.'s right side was facing me ; more toward D. than toward me ; saw butt of revolver before first shot was fired, at time of D.'s making remark ; after D.'s saying he didn't steal those cattle ; about a minute or minute and a half after D. had said, ' You. Brown, have said it ' ; it was only a little way out ; pretty sure it was a revolver ; plain enough it was the butt of a revolver ; had a better look at him than any one else ; closer than H. Simpson ; people watching close could have seen it ; could see the wood and the iron strap that goes over the breech ; can't tell kind of wood, nor calibre, nor size ; it was in right pants pocket ; put his hand in pocket right at stove, and before he turned ; can't tell if he took his hand out in turning ; after second shot B. put hands to stomach ; pistol was under hand ; can't tell how far B.'s hand was in pocket ; might have been half way down ; certain half hand in ; saw butt of pistol under the hand when he turned and side square toward me.' * *

Aside from this there was no evidence showing any thing in Brown's attitude that could be regarded as hostile, or that there was any act or movement on his part indicating that he expected or sought a rencontre with the prisoner.

The other witnesses of the killing testified, in substance, that the deceased was standing quietly by the stove, with his back to the prisoner, when the fatal shot was fired.

The witness A. B. Simpson testified, among other things, that he had a conversation with the deceased at the horse-

rack in front of the store, a few minutes before the shooting, and that the deceased then, and "as he was going into the store where the prisoner was standing," said, "there is that son of a bitch, now, and I have got him."

This evidence was excluded by the court, because the threat was uncommunicated. In view of Martin's testimony, this was error. Before admitting evidence of an uncommunicated threat, it is for the judge to say whether there is any evidence of a hostile act or movement on the part of the deceased, but his decision in this behalf is the subject of review.

There had been a feud between the deceased and the prisoner of several years' standing. Repeated threats of the deceased to take the life of the prisoner, which had been communicated to him, were in evidence. The witness Martin testified that just prior to the first shot the deceased turned toward Davidson and put his hand in his pocket — and on a pistol, the butt of which he saw projecting from his pocket. The jury were the judges of the credibility of the witnesses. If they should believe the testimony of Martin, then the character of this movement of the deceased in putting his hand in his pocket would become the subject of inquiry. The prisoner had the right to have the act viewed and considered by the jury in the light of the threat made but a few minutes before. Under ordinary circumstances the act would be without significance. In view of the feud existing between the parties, and in the light of the threat made by the deceased a few minutes before, it might have appeared to the jury to have been, and might in fact have been, an act of deadly significance. We do not say that the act was established as a fact, or if established, that it was of any significance; all we say is, that it was for the jury to judge of the credibility of Martin's testimony, and if they believed it, then it was for them to determine the character of the acts testified to as hostile or not, and it was the right of the prisoner to have them consider the act of the deceased in the light of the recent

threats made by the deceased against the prisoner's life. Otherwise they would judge of the act, not in a full and true light, but in a partial and false light.

The evidence offered to show the character of the deceased, as a violent, turbulent and desperate man, was excluded by the court, and exception taken.

The fact that a man is a violent, turbulent and dangerous character, does not justify or excuse another in coolly and deliberately taking his life. He is equally under the protection of the law as the most inoffensive.

"No one has the right to take the law in his own hands * * * to clear society of dangerous persons." Hence the rule is, that evidence offered *generally* on a trial for homicide to prove the dangerous character of the deceased is not admissible. While this is plain, we think it equally plain that the moment one person attacks another, the character of the attacking party as a violent, dangerous man, or the reverse, becomes an important factor for consideration, and indispensable to a correct and fair administration of justice. Such evidence bears directly upon the *status* of the defendant at the time of the killing. Were the circumstances sufficient to excite the fears of a reasonable person, and did the prisoner act under the influence of these fears? were questions to be inquired of by the jury. How could they intelligently, or with fairness to either the prisoner or the State, pass upon these questions without reference to the character of the attacking party?

It is for the prisoner to first show an attack, and then it is competent for him to show the violent and dangerous character of the deceased, as a ground for his belief that the attack was felonious. 1 Wharton's Crim. Law, 641.*

Martin's testimony, we think, fairly laid the ground for the introduction of the evidence rejected.

An attack is an opening or commencing act of hostility. The turning of the deceased toward the prisoner, putting his hand in his pocket upon his pistol, which so far projected, or which was so far withdrawn from his pocket as to

be visible, were acts testified to by Martin. Whether they were acts manifesting a felonious intent, was a question for the jury. They may not have occurred, nor have had any existence, except in the imagination of the witness Martin. This was a question for the jury. They may have been without significance, or they may have constituted the first act of hostility, between which and a fatal shot but one other act intervened. Of this the jury were the judges, and of this, and of the prisoner's belief, they could not intelligently or fairly judge, except as the evidence should enlighten them as to Brown's character as a quiet, peaceable, law-abiding citizen, or the reverse—and except as further the prisoner was shown to be acquainted with this character.

There are other questions raised by this record, but the printed abstract is so imperfect and unsatisfactory, that we do not feel called upon to consider them.

The judgment of the court below is reversed, and the cause remanded for a new trial.

Reversed.

Mr. Justice STONE, having been of counsel, did not sit in this cause.

DANGEROUS CHARACTER OF DECEASED cannot be shown in prosecution for homicide, until ground is laid therefor by showing an attack upon the prisoner: *Jones v. People*, 6 Colo. 458; *Redus v. People*, 10 Colo. 215. Where such a basis is laid, evidence of an uncommunicated threat has been held admissible: *Babcock v. People*, 13 Colo. 522.

DEAN v. HOOK.

Contest for the office of County Judge of Grand County.

Mr. L. C. ROCKWELL, for the contestor.

Mr. E. L. CAMPBELL, for the contestee.

STONE, J. The petition of Thomas J. Dean, the contestor, avers that at the general election of Oct. 2, 1877, he received for the office of county judge of Grand county twenty-five votes in said county of Grand, exclusive of Precinct No. 3, called Troublesome Precinct; and that Charles H. Hook re-

ceived, exclusive of said precinct, thirty-one votes; that in said Precinct No. 3 the petitioner received twenty votes and Hook twelve, giving to the petitioner a majority of two votes in the whole county, and that he was, therefore, legally elected to said office; that the canvassing board of the county wrongfully rejected, and refused to count the entire vote of said Precinct No. 3, and issued a certificate of election to said Hook.

The answer of the contestee sets up fraud and various illegalities and irregularities in the mode and manner of conducting the election in said Precinct No. 3, as justification of the acts of the county canvassers in rejecting the votes of said precinct, but after disposing of such portions of the answer as were held obnoxious to the demurrer thereto, there remained, as the issue to be tried, the question as to the number of legal votes cast in Precinct No. 3, for the contestor and contestee respectively, no question as to the election being raised outside of said precinct.

The testimony, taken in the case and brought up to this court, shows that the whole number of votes cast in the county for the office of county judge, was eighty-eight, of which Thomas J. Dean, the contestor, received forty-five, and Charles H. Hook, the contestee, received forty-three.

The votes cast by precincts, as certified to by the respective judges of election, were as follows, to wit:

Precinct No. 1,	Dean	received	20	votes,	Hook	20	votes
" 2,	"	"	2	"	"	3	"
" 3,	"	"	20	"	"	12	"
" 4,	"	"	3	"	"	8	"
Total.....			Dean..45	Hook.....	43		

This testimony is undisputed, and hence it is established that Dean received a majority of two votes in the county, for the office in question.

In the testimony before us there is nothing showing fraud in any respect in the election, nor is there any evidence

showing illegality in conducting the election, or in any vote cast in said Precinct No. 3, nor even irregularity which would in any particular vitiate the result of the election as declared by the certified return of the election judges of the precinct in dispute.

All three of the judges of election in said precinct depose that they were present during the whole time that the votes were cast, except that one of the judges stepped out of the room for a few moments at one time, during which one or two votes were polled, that each ballot was duly numbered to correspond with the names of the respective voters, on the tally sheets, that they were regularly deposited in the ballot-box as they were cast, that the ballot-box was a tin box with a hasp, staple and padlock, that the judges were all present at the counting of the votes, that the ballots after counting were locked in the box, which was taken by one of the judges, and the key by another, and that a certified return of the votes was duly made out and delivered to the clerk of the county.

The county clerk himself testifies that he received such returns, and that upon the canvass it showed that there were thirty-two votes cast in said precinct, of which Dean received twenty and Hook twelve, thus corroborating in every particular the testimony of the judges of the election of that precinct, as to the number cast for the contestants respectively.

These indisputable facts leave no room for discussion or comment, but we cannot forbear remarking that such averments in the answer of the contestee, as that "the respondent is informed and believes, and so charges the fact to be, that the ballot-box used by the said judges of election of said Precinct No. 3, was an insecure wooden box, improvised by said judges for that purpose, and was not provided with any lock or key"; and that the ballots cast "were not numbered," display a singularly reckless failure to obtain information offered to this court in a sworn answer, when the sources of correct information as to the facts were so

accessible, that the obliquity of personal interest or partisan zeal may scarcely excuse their disregard.

Upon the testimony the finding of the court is: that Thomas J. Dean, the contestor, was duly elected to the office of county judge of Grand county at the general election held in said county, on the 2d day of October, A. D. 1877, and entitled to hold the same for and during the term for which he was so elected; and the judgment of the court is, that the said Dean have and hold said office accordingly, upon his qualifying therefor according to law; and that he have and recover of Charles H. Hook, the contestee, his costs of the contest in this proceeding.

Judgment for Contestor.

COLORADO CENTRAL R. R. CO. v. MOLLANDIN.

1. Where the general issue is pleaded and special pleas are also interposed, setting up a defense available under the general issue, the sustaining a demurrer to the special pleas is no ground for reversal.
2. Where a railroad company is authorized by municipal law to construct and operate its road through and across a street under such municipal control, it is in the exercise of a lawful right, and is not liable in a common-law action, except for injuries done wantonly or without reasonable care.
3. The defendant offered in evidence the ordinance of the city authorizing it to locate, construct, maintain and operate its railroad through and across a particular street, also offered to prove compliance with the ordinance in every respect. The rejection of such evidence held to be erroneous.

Error to County Court of Arapahoe County.

THE facts are sufficiently stated in the opinion.

Mr. V. D. MARKHAM, for plaintiff in error.

Mr. H. M. TELLER, for defendant in error.

STONE, J. The defendant in error brought suit in the court below against the Colorado Central Railroad Company to recover damages in trespass on the case for alleged

injuries to the property and business of the plaintiff below, arising from the construction and operation of a branch or side track of said railroad, along and across Nineteenth street, in the city of Denver, whereon engines and freight cars passed in front of and in close proximity to the lots and buildings of the plaintiff fronting on and abutting said street.

The principal building of plaintiff was used by him for a hotel and saloon as well as residence, and the averments in the declaration respecting the cause of the alleged damage are, that "the trains of cars passing over and along said track have jarred, shaken, cracked and injured the plastering, walls, and other parts of said building, and damaged the same in the sum of, etc., * * * * that by building said track so near said premises, and by running its trains over the said track, as well as by the smoke, cinders and ashes emitted from the engines, upon, against and into said buildings, the defendant has materially interfered with the easements belonging to said lots, and impeded ingress and egress to and from the same, and thereby lessened the value of the said premises to the amount of, etc., * * * * that by reason of the committing of said grievance, the plaintiff has been greatly injured in his said business, and has sustained damages in and about his said business in the sum of," etc. * * * *

To the declaration the defendant pleaded the general issue, and two special pleas. The second plea sets up the fee of the street in the city of Denver, and permission of the city, by an ordinance duly passed, to the defendant to construct and operate its railroad through the street in question. The third plea also avers the fee in the city, permission of the city to the defendant to build its railroad through the street, and sets out in full the ordinance authorizing the company to construct a single track upon, and to run its cars along and across said Nineteenth street, together with certain other streets in that vicinity; to grade the street on a line with the railroad track, and that the

work of grading and laying down the track be done under the direction and supervision of the city surveyor.

The plea further avers compliance with said ordinance, and that thereby, "the defendant became and was entitled and fully authorized and empowered at the time of constructing its said track and running its said trains over and through said street in plaintiff's declaration mentioned, to locate and construct, maintain and operate the same over, across and through said street, in accordance with its charter, and the said ordinance of the city of Denver; which are the said supposed grievances in said plaintiff's declaration mentioned."

To these special pleas the plaintiff below interposed a general demurrer, which was sustained by the court, the exception to which is one of the principal grounds of error assigned in this court.

In the case of the *Colorado Central Railroad Co. v. Blake*, 3 Col. 417, the same question was presented. The action was of the same character as the one before us; the same ordinance was set up by special pleas, to which a general demurrer was sustained, and this court held that the defense sought to be interposed by the special pleas was equally available under the general issue.

While as a question of form in pleading, we can see no good objection to the use of special pleas in setting up a defense of this character, and the demurrer being general, must be presumed to have been directed to the subject-matter of the pleas, but since such defense could, under the rule laid down in the *Colorado Central Railroad Co. v. Blake, supra*, be made available to the defendant as well under the general issue as by special plea, we must hold that the defendant was not prejudiced by the ruling of the court below in sustaining the demurrer, and, therefore, the error in such ruling is not sufficient ground for reversal.

Upon the trial of the case, the defendant offered in evidence, as a defense to the action, the ordinance referred to, of the city of Denver, which in terms authorized the de-

fendant—the Colorado Central Railroad Company—to locate, construct, maintain and operate its railroad along and across the street in question, and providing that the work of construction, so as to conform to the street grade, should be done under the direction and supervision of the engineer of said city; the defendant further offering to prove compliance in every respect with said ordinance on the part of the defendant.

To the introduction of this ordinance as evidence the plaintiff objected, and the court sustained the objection, which ruling of the court is assigned for error.

Much apparent conflict of authority exists as to the right of recovery in cases like this, but such conflict is more apparent than real, since upon examination it will be found that the decided cases are governed, to a great extent, by the particular facts of each given case, and the general or local law applicable thereto; such as whether the construction of the road in the street is authorized by competent legislative power of the State or municipality; the character of such legislation in respect to compensation for damages; whether the fee of such street is in the municipality granting the authority to construct, or in the abutting lot owner; whether there is an obstruction of the street such as to destroy or impair its use as a public highway; whether the track is laid upon the grade of the street, or makes a cut or embankment; whether the injury complained of arises from a necessary or an unnecessary and injudicious mode of construction; whether such injury is peculiar to the plaintiff, or common to the public, and whether it is a direct physical injury to the property of the plaintiff, or so remotely consequential as to be regarded *damnum absque injuria*.

Considerations founded upon these variant circumstances affect the right of recovery in every case, and were we to concede a right of recovery in this case, it might be pertinent to review the leading cases upon this subject in order to determine the extent of such right upon the facts pre-

sent by the record, but in the view which we are led to take of the case, we conceive that the assignment of error based upon the exceptions to the ruling of the court rejecting the ordinance offered in evidence, raises the question squarely, as to whether, under the admitted facts in the case, the ordinance is an admissible defense in bar of the plaintiff's right of recovery in this action.

It is admitted that the railway company was duly chartered by the legislative assembly of Colorado, and authorized to construct its road to the city of Denver, that the title in fee of the streets of said city, including the street in question, is in the city and under the entire control of the municipal authority of said city; that under the ordinances of the city in force at and prior to the date of the construction of said road, the city council of Denver were empowered "to open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve or keep in repair, streets, avenues, lanes, alleys, sidewalks, drains and sewers of said city * * * * * to direct and control the location of railroad tracks * * * * * and to regulate the rates of speed of all railroad trains."

Upon these facts we think that proof of the ordinance in question, as the same is set out in the record, was admissible as a valid defense to the action as against the railroad company, and should have been admitted in evidence.

Where there is nothing in the charter of the railroad company or statute requiring compensation for such damages, and where the fee of the street is in the town or city authorizing the construction and operation of such railroad, the latter is not liable for damages resulting to the premises of abutting lot owners not actually taken by the railroad company in the construction and lawful operation of the road.

The fee of the streets being in the city of Denver, the municipal authorities of the city, by virtue of their ordinances under the legislative power of the State conferred upon such municipality, are empowered to exercise complete control over such streets.

When, therefore, a railroad company is authorized by municipal law to construct and operate its road through and across a street under such control, it is in the exercise of a lawful right, and so long as it keeps within the bounds of such lawful authority is not liable in a common-law action, except for injuries done wantonly or without reasonable care.

It may be said, however, that the fee of the streets and other public grounds of incorporated towns and cities under the laws of Colorado is in such towns and cities in trust for the public. This is doubtless true, yet for that trust the municipal authorities are alone responsible. They are empowered in their discretion to alter, vacate and abolish any street altogether, and if in the exercise of that discretion they abuse their trust, whatever liability arises thereby, attaches to them as such trustees and agents of the public. But the authority given the railroad company in a case such as the one at bar, is a license to such company under which the latter may justify for all damages resulting from a lawful exercise of the acts authorized by such license. In the case of *Stack v. The City of East Saint Louis*, 5 Central Law Journal, 385, which is the latest decided case we have been able to find upon the questions here involved, the supreme court of Illinois hold that the city, having authorized the construction of the bridge embankment and the railroad thereon in the street fronting the premises of the plaintiff, whereby damage accrued to said plaintiff, since the city would have been liable had it made the structures causing the injury itself, was liable for the structure which it had authorized the company to make, upon the familiar principle *qui facit per alium facit per se*.

In support of this decision the court cites the following cases with a review of the doctrine laid down by the court and as modified and applied in the earlier and later cases. *Nevins v. The City of Peoria*, 41 Ill. 502; *City of Aurora v. Gillett*, 50 id. 132; *City of Aurora v. Reed*, 57 id. 29; *City of Dixon v. Baker*, 65 id. 518; *City of Pekin v. Brereton*, 67 id. 477; *City of Alton v. Hope*, 68 id. 167.

If then, in any such case where there is a right of recovery at all, the liability attaches to the municipality which permits and directs the doing of that which causes the damage, it follows *eo converso*, that the party which constructs and operates under such license and direction, is in no such case liable. One cannot be held liable for the consequences of an act which is lawful, and that is surely lawful which has been authorized by law.

The only case we have found directly opposed to this view is the case of the *S. C. R. R. Co. v. Steiner*, 44 Ga. 547.

In that case the fee of the street was in the State, which had, by its legislature, authorized the construction of the road, and the court, two judges concurring, and one dissenting, *held*, that the company was liable, restricting the damages, however, to certain only of the injuries alleged. Without stepping aside to criticise what appears to us the illogical conclusions deduced from the premises laid down in the reasoning of the majority of the court in that case, we are content to follow the decisions of the Illinois cases cited as resting upon tenable grounds and well established principles of law.

In thus disposing of this case, we must not be understood as indicating an opinion that the doctrine of *respondet superior* applies to the city of Denver so as to attach a liability to the municipality upon the facts in this case; such decision being uncalled for, and relating to a question *de hors* the record; it is pertinent only that we take the law as we find it and hold it to be an immunity fully protecting the railroad company against the damages sought to be recovered in this case.

The case of *Fletcher v. The Auburn & Syracuse R. R.*, 25 Wend. 462, cited by counsel for the defendant in error, in support of the position that neither legislative nor municipal authority can so license a railroad company as to afford protection to the latter against claims for damages in a case like this, was substantially overruled in *Radcliffe's*

Executors v. The Mayor, etc., of Brooklyn, 4 Comstock, 195, and by the New York Court of Appeals in the cases of *Bellinger v. The N. Y. Central R. R.*, and *People v. Kerr*, cited, *post*.

In the case cited in 41 Cal. (*Reed v. S. P. R. R. Co.*) 256, the proceeding was a statutory one for the condemnation of a street, the fee of which was in the abutting lot owners.

The Wisconsin cases cited all proceed on the proposition, that the fee of the streets in that State is not in the municipality permitting the construction of the roads, but in the adjoining lot owners.

In further support of the principles upon which we rest our decision of this case, we cite, in addition to the authorities given above, the following well-considered cases: *Hatch v. Vt. Cent. R. R.*, 25 Vt. 58. (Opinion by REDFIELD, C. J., and given in 1 Redf. Am. Railway Cases, 285.) *Tenn. & Ala. R. R. v. Adams*, 3 Head (Tenn.), 596; *A. & N. R. R. v. Garside*, 10 Kans. 563; *Bellinger v. N. Y. Cent. R. R.*, 23 N. Y. 42; *People v. Kerr*, 27 id. 188; *Killinger v. Forty-second Street*, 50 id. 206; *C. & P. R. R. v. Speer*, 56 Penn. 325; *Wolff v. Cov. & Lex. R. R.*, 15 B. Munroe, 404; *Slatten v. Des Moines Valley R. R.*, 29 Iowa, 148; *City of Danenport v. Stevenson*, 34 id. 225; *Porter v. North Mo. R. R.*, 33 Mo. 128; *C. B. & Q. R. R. v. McGinnis* (Sup. Court Ill.), 4 Cent. Law Jour. 11 [and note elaborately reviewing the English and American cases on the subject]. See, also, Dillon on Mun. Corp., § 556; Cooley on Const. Lim., §§ 552-5.

The errors assigned in respect to the measure of damages, and excess of the verdict, we need not pass upon, inasmuch as for the error in rejecting the evidence in question, offered by the defendant below, the judgment must be reversed.

Judgment reversed.

EASEMENT IN STREET IS PRIVATE PROPERTY OF ABUTTING OWNERS which cannot be taken or injured without compensation: *Denver v. Bayer*, 7 Colo. 120.
CITY COUNCIL MAY AUTHORIZE CONSTRUCTION AND OPERATION OF RAILROAD through its streets: *Denver & S. F. R. Co. v. Donke*, 11 Colo. 250.

DENVER, SOUTH PARK & PACIFIC RAILWAY CO. v. WOODWARD, Ad'r.

1. The Constitution of Colorado (§ 11, Bill of Rights) provides that no *ex post facto* law, nor law impairing the obligation of contracts, or *retrospective* in its operation," shall be passed by the general assembly.
2. The statute (1872, p. 117) upon which this action was based, is not to be regarded in any proper sense as a penal statute. Under this act, when an injury was done by the default of a railroad company, resulting in the death of the party injured, the personal representative was entitled to recover damages, not as a penalty, but as a *compensation* for the loss sustained, and neither an affirmative enactment nor a repealing statute can be so construed under our Constitution as to retroact and impair or take away any accrued right which by the authority of law, and in the manner pointed out by the statute, had been previously asserted.
3. The prohibition of retrospective legislation in the Constitution operates as a saving clause incorporated into the repealing section.

UPON petition for rehearing in this case (*ante*, p. 1) the following opinion was delivered by

THATCHER, C. J. Suit was brought by the personal representative of James Smith, in the district court of Arapahoe county, October 5th, A. D. 1875. The right to recover was founded upon a statute, the material parts of which are set out in the opinion in chief. On the 20th day of February, A. D. 1877, judgment was entered in favor of the plaintiff, and on the same day an appeal was prayed by the defendant to this court. On the fifth of April of the same year, a transcript of the record was filed with the clerk of this court.

But for the statute, in pursuance of which the suit was brought, no recovery could have been had. At common law the right did not exist. Had the accident not resulted in the death of Smith, he might, at common law, have recovered for the bodily injury sustained by him; but as the action was personal, it died with the person.

The statute, however, intervened and gave to the personal representative of the deceased the right to maintain an action, in a case, where the deceased, had he lived, might

have maintained it. Whether the cause of action, when the injury results in death, arises before or after the homicide, is a question upon which the authorities are not agreed. *Fowlkes v. Nashville & Decatur R. R. Co.*, 9 Heisk. 829, and cases cited.

To our inquiry in this case, whether it arose before or after death is not material. When death resulted there was a subsisting cause of action.

After the defendant had taken an appeal to this court, and while it was pending here, the State legislature—March 7th, 1877—repealed the statute of February 8th, 1872, upon which this action was founded. The repealing statute went into effect ninety days after its passage.

Our Constitution provides (§ 11 of the Bill of Rights), “that no *ex post facto* law, nor law impairing the obligation of contracts or *retrospective in its operation* * * * shall be passed by the general assembly.” The phrase *ex post facto*, as used in the Constitution of the United States, and the Constitutions of the several States, does not apply to civil laws. Such laws only are *ex post facto* as provide for the punishment of a party for acts antecedently done which were not punishable at all, or not punishable to the extent or in the manner prescribed. *Watson v. Mercer*, 8 Peters, 88; *Carpenter v. Commonwealth of Penn.*, 17 How. 456; *Locke, Adm’r, v. Dane et al.*, 9 Mass 362.

Retrospective laws, except such as are *ex post facto* in the sense above indicated, and such as impair the obligation of contracts, are not in terms inhibited by the Constitution of the United States. Although such laws are often oppressive and unjust, amounting to a practical denial of justice, the courts have frequently asserted the right of the legislature to enact them, when not prohibited by the Constitution. But when legislatures, even in the absence of a constitutional interdict, pass laws which might be so construed as to give them a retrospective effect, courts will not so interpret them unless the intention of the law-making power is clearly declared. With caution and distrust,

courts give retrospective statutes effect, even where the law giver has a constitutional power to enact them. But here no such power exists. It was wrested from the legislature by the framers of the Constitution.

Our Constitution, as we have seen, prohibits the general assembly from enacting: *First, ex post facto laws*; *second*, laws impairing the obligation of contracts; *third*, laws retrospective in their operation.

The fundamental law could not well have been more comprehensive. The term *retrospective* was intended to apply to laws which could not properly be said to be included in the description of *ex post facto*, or laws impairing the obligation of contracts. *DeCordova v. Galveston*, 4 Tex. 474; *Bender v. Crawford*, 33 id. 745.

New Hampshire was, we believe, the first State to adopt a Constitution expressly prohibiting retrospective laws applicable to civil causes. The twenty-third article of the New Hampshire bill of rights is as follows: "Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of *civil* causes, or the punishment of offenses."

Adjudications upon this article are numerous. The holding of the courts in that State is, that it is not within the constitutional competency of the legislature to annul by statute any legal ground on which a pending action is founded. In *Woarts v. Winnick*, 3 N. H. 473, Chief Justice RICHARDSON, after a careful consideration of the question before him, says: "The most attentive examination we have been able to give to the clause in the Constitution we are now considering, has satisfied us that it was intended to prohibit the making of any law prescribing new rules for the decision of existing causes so as to change the ground of the action or the nature of the defense." In the case of *Dow v. Norris*, 4 N. H. 17, it was held that where a statute gives a penalty incurred under it to an individual, the right of the individual to the penalty cannot be taken away by a repeal of the statute; that so far as the repeal-

ing statute might be construed to affect past transactions, it was repugnant to the Constitution and wholly inoperative. This case is cited approvingly in *DeCordova v. The City of Galveston*, 3 Tex. 477. The Constitution of Texas contains a similar provision to our own. In the case of *Clark v. Clark*, 10 N. H. 380, it was decided that a statute which attempts to confer authority upon the court to grant a divorce for matters already past, and which at the time they occurred were not a recognized ground of divorce, was a retrospective law within the meaning of the Constitution. In that case the court says: "A law may be retrospective in its operation, if it affect an existing cause of action, or an existing right of defense, by taking away or abrogating a perfect existing right, although no suit or legal proceeding then exists. Of course it is not intended to deny the right of the legislature to vary the mode of enforcing the remedy; or to provide for the more effectual security of existing rights. * * * The statute of limitations may be changed by an extension of the time, or by an entire repeal, and affect existing causes of action, which by the existing law would soon be barred. In such case the right of action is perfect, and no right of defense has accrued from the time already elapsed. But if a right has become vested and perfect, a law, which afterward annuls or takes it away, is retrospective."

In *Rich v. Flanders*, 39 N. H. 307, the court asserts that the term *retrospective*, like the term *ex post facto*, is a technical term, and that while the latter applies only to criminal cases, and to those only in a particular way, so the former technically applies only to civil cases, and to those only in a particular way; that if a statute in *form* affects the remedy only, yet *substantially* takes away accrued rights, it is unconstitutional and void. The court in this case recognizes the authority of the legislature to modify the remedy if the right be preserved. Although the decisions of the supreme court of New Hampshire clash somewhat with each other upon the question as to the extent to

which a remedy may be varied, we have been unable to find a single case that maintains that a perfect right of action, exercised by commencing a suit, can be taken away by the legislature. For a further discussion of this question by the supreme court of that State, see *Merrill v. Sherburn et al.*, 1 N. H. 199; *Greenlaw v. Greenlaw*, 12 id. 200; *Gilman v. Cutts*, 23 id. 376; *Willard v. Harvey*, 24 id. 344; *Colony v. Dublin*, 32 id. 432; *Rich v. Flanders*, 39 id. 304; *Kent v. Gray*, 53 id. 576; *Simpson v. Savings Bank*, 56 id. 468.

Nor are we confined to the State courts of New Hampshire alone for the interpretation of this important constitutional provision. As early as A. D. 1814, Judge STORY, in the celebrated case of *The Society, etc., v. Wheeler et al.*, 2 Gallison, 105, had occasion to expound its meaning. The question before the circuit court was, whether a statute of New Hampshire, allowing to tenants the value of improvements on recoveries against them, could be constitutionally construed to apply to past improvements. Judge STORY says: "In respect also to the Constitution of the United States, the statute in question cannot be considered as void. The only article which bears on the subject is that which declares that no State shall pass 'any *ex post facto* law, or law impairing the obligation of contracts.' There is no pretense of any contract being impaired between the parties before the court. The compensation is for a tort, in respect to which the legislature have created and not destroyed an obligation. Nor is this an *ex post facto* law within this clause of this Constitution, for it has been solemnly adjudged that it applied only to laws which render an act punishable in a manner in which it was not punishable when it was committed. The clause does not touch civil rights or civil remedies. The remaining question then is, whether the act is contrary to the Constitution of New Hampshire. Various clauses of that Constitution have been cited; but that which seems most directly pointed to the case, and which must (if any one can) govern it, is the

23d article of the bill of rights, which declares, that 'retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made either for the decision of *civil causes* or the punishment of offenses.' What is a retrospective law within the true intent and meaning of this article? Is it not confined to statutes which are enacted to take effect from a time anterior to their passage? or does it embrace all statutes, which though operating only from their passage affect vested rights and past transactions? It would be a construction utterly subversive of all the objects of the provision to adhere to the former definition. It would enable the legislature to accomplish that indirectly, which it could not do directly. Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities. *Dash v. VanKleeck*, 7 Johns. 477; *Calder v. Bull*, 3 Dal. 386. The reasoning in these authorities as to the nature, effect and injustice in general, of retrospective laws, is exceedingly able and cogent; and in a fit case, depending upon elementary principles, I should be disposed to go a great way with the learned argument of Chief Justice KENT."

It will be seen that the construction of the State and Federal courts is substantially the same.

In Missouri the legislature is under the same constitutional restraint in regard to retrospective legislation as is the legislature of this State. The prohibitory clauses in both Constitutions are identical. In *Hope Mutual Insurance Co. v. Flynn*, 38 Mo. 483, the question before the court was, whether it was competent for the legislature to enact a statute amendatory of the charter of an insurance company making the company's certificate of indebtedness conclusive evidence, in all suits, of the facts therein stated. The court held that the statute as to all causes of action origi-

nating prior to its passage was not retrospective in its operation, and, therefore, to that extent unconstitutional.

The definition of a retrospective law is given by the court in almost the exact language employed by Judge STORY in the case cited, *supra*. In the light of these authorities, the construction of the repealing section is freed from some of its difficulties.

Whatever may be said of the act approved March 7, 1877, the act of February 8, 1872, is not to be regarded in any proper sense as a penal statute. When, under the act repealed, an injury was done to any person by the default of a railroad company, resulting in the death of the injured party, the personal representative of such person was entitled to recover damages, not as a penalty, but as a compensation for the loss sustained. The recovery was in the nature of satisfaction for the injury. That the damages recoverable under the old act were designed to be compensatory, see *Kansas Pacific Railway Co. v. John Lundin, Administrator, etc.*, 3 Col. 94. The amount of the recovery was not restricted by the act, but entirely dependent upon proof. The statute itself was founded upon principles of right and justice, and it is fairly inferable, even independent of the constitutional restriction, that the legislature did not intend, by the repeal of the former statute, to affect rights which had grown up under it and been prosecuted to judgment. The later act recognizes the justice of the former one by re-affirming the right of recovery in all like cases in the future, limiting, however, the amount of damages to \$5,000. No new rule is prescribed for past injuries committed by railroad companies. The position taken by appellant's counsel that considering the later act as a whole, it may reasonably be deduced that the repealing section was not designed to interfere with existing causes of action is not without force. But we prefer to rest our decision upon what we conceive to be the proper construction of the restraining clause in the Constitution under consideration. The prohibition of retrospective legislation in the Constitu-

tion operates as a saving clause incorporated into the repealing section. In our opinion, neither an affirmative enactment nor a repealing statute can be so construed under our Constitution as to retroact upon and impair or take away accrued rights, which by the authority of law, and in the manner pointed out by it, had been previously asserted. And especially is this true when such rights have been carried into judgment.

The petition for rehearing will be denied.

Rehearing denied.

Mr. Justice ELBERT did not sit in this case.

PROHIBITION OF RETROSPECTIVE LEGISLATION in the constitution operates as a saving clause incorporated into the repealing section: *Elcholls v. Wilbur*, 4 Colo. 431.

HITTSOON v. DAVENPORT.

1. Where the loss of a record, though of another State, is shown, its contents may be proved like any other document, by any secondary evidence where the case does not, from its nature, disclose the existence of other and better evidence.
2. Where a contract is to pay so many dollars in gold, in the absence of any waiver of this condition, payment in gold would alone satisfy the contract.
3. Where payments upon such a contract were made in currency, *held*, that such payments discharged the contract to the amount of the gold value at the dates of the payments.
4. Where it was in proof that the price of gold at the Gold Exchange in New York regulated the price of gold in the United States and Territories, evidence of the value of currency and gold in New York at the time of payments made, *held* admissible for the purpose of determining the gold value.
5. It being the clear intent of a contract for the payment of money, that the payment should be in gold, the indebtedness may be found in "gold dollars," and judgment entered accordingly.
6. Any error or defect in a record which occurs through the act or omission of the clerk in entering or *failing* to enter of record a judgment, and is not an error in the express judgment pronounced by the court in the exercise of its judicial discretion, is a clerical error and amendable.

Appeal from District Court of Arapahoe County.

THE judgment rendered by the district court was, at the December term, 1877, of this court, reversed with an order

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of dismissal, upon the ground that a new promise was not good by way of replication to a plea of the statute of limitations in an action of debt upon a specialty. As the opinion of this court, upon the rehearing, reverses its former finding and affirms the judgment of the district court, a statement of the facts in this place may prove convenient.

Davenport, the appellee, brought an action of debt in the district court of Arapahoe county, against Hittson, the appellant, upon the following instruments :

“\$5,000 gold. PALO PINTO, TEXAS, *March 14th*, 1871.

On the first day of September next, I promise to pay to C. G. Davenport, five thousand dollars in gold, the same being in part consideration of cattle this day bought of said C. G. Davenport, this obligation to bear interest at ten per cent after maturity.

It is understood that this obligation is not collectible until the final termination of all litigation, now pending in the district court of Parker county, Texas, between T. C. Snailum and wife, Mary A. Snailum, and the said C. G. Davenport, in regard to a portion of said cattle, for which this note is executed. And this note not collectible at the termination of said litigation, if a judgment go against the said C. G. Davenport, in favor of said T. C. Snailum and M. A. Snailum, until said judgment shall be fully settled, paid off and discharged by the said C. G. Davenport. The object of these limitations upon the payment of this note being to save harmless the said John Hittson, in the purchase of said cattle from said litigation, or the final result of the same. Witness my hand and scroll for seal this day and year above written.

(Signed) JOHN HITTSON, [SEAL.]

\$10,000 gold. PALO PINTO, TEXAS, *March 14th*, 1871.

On the first day of May, 1872, I promise to pay to C. G. Davenport, ten thousand dollars gold, the same being in part consideration of cattle this day bought of said C. G.

Davenport, and this obligation to bear interest at ten per cent after maturity. Six thousand and fifty dollars of the amount of this note collectible at maturity, the balance of this note, three thousand nine hundred and fifty dollars not collectible until after the final termination of all litigation now pending in the district court of Parker county, Texas, between T. C. Snailum and wife, Mary A. Snailum, and the said C. G. Davenport, in regard to a portion of said cattle for which this note is executed. And the said last-mentioned amount also not collectible at the termination of said litigation, if a judgment shall go against the said C. G. Davenport, in favor of the said T. C. and Mary A. Snailum, until said judgment shall be fully settled, paid off and discharged by the said C. G. Davenport. The object of these limitations upon the payment of said last-mentioned amount of this note, being to secure and save harmless the said John Hittson, in the purchase of said cattle from said litigation or the final result of the same. Witness my hand and scroll for a seal the day and year above written.

Signed)

JOHN HITTSON. [SEAL]"

A number of pleas were interposed by the defendant, but the sixth plea only requires to be noticed, to wit: "That the cause of action accrued without the Territory of Colorado more than three years next preceding the commencement of this suit." Replication, that the cause of action accrued within three years.

Upon the trial Davenport obtained a verdict, which was rendered by the jury in the following terms:

"We the jury find the issues herein joined for the said plaintiff, and assess his damages by occasion of the premises in his declaration mentioned in the sum of thirty-eight hundred and twenty-four dollars and thirty-five cents (\$3,824.35) in gold dollars."

The judgment of the court rendered was that the "plaintiff recover of, and from the defendant, the sum of \$3,824.35, for his debt, by occasion of the premises in the

declaration mentioned in form aforesaid found to be due, and his damages, by occasion to the detention thereof, assessed at one cent and his costs," etc.

The court subsequently entered an order correcting the judgment by adding the words, "in gold dollars," after \$3,824.35, and "to be paid in lawful money," after the word "costs."

The verdict was corrected to conform to the action.

Messrs. MILLER & CLOUGH, for appellant.

Messrs. WELLS, SMITH & MACON, and Mr. G. B. REED, for appellee.

Upon rehearing the following opinion was rendered by

ELBERT, J. The record in this case recites that the action was commenced on the 16th day of February, 1876. This was the date accepted as the true date, and if it is to be so regarded, there is nothing further to add to our former opinion.

The petition for a rehearing, however, claims that the suit was commenced on March 16, 1875, and an examination of the copy of the writ in the record discloses that date.

This conflict of dates did not appear in the printed abstracts, nor was it adverted to by counsel in their briefs on file. After filing the petition for a rehearing, leave was given to file briefs upon the question as to which date on the record was to control.

After an examination of the transcript, we are satisfied that the recital showing the commencement of the suit in the year 1876 is a misprision of the clerk. The other recitals of the record indicate the date of the writ as the true date.

Accepting then March 16, 1875, as the date of the commencement of the suit, it becomes necessary to inquire whether the issue presented by the plaintiff's first replication to the sixth plea, to wit: "that the cause of action accrued within three years, etc.," was supported by the evidence.

The notes were not due and payable until the determination of the suit of *Snailum v. Davenport*, pending in the district court of Parker county, Texas.

It sufficiently appears that the litigation mentioned in the notes was terminated in June, 1872, provided that the objections taken to the evidence by the defendant be not valid.

It is objected: 1st. That there was no sufficient proof of the destruction of the records of the court where the suit was pending; 2d. That parol evidence was not admissible to show their contents.

The objections are not well taken. A. J. Ball testifies: "There was but one suit pending; was an attorney-at-law at that time in said court; think that record was destroyed at the burning of the court-house, Parker county, Texas, on the 13th of May, 1874; there was a suit pending in said court between Mary A. Snailum and C. G. Davenport, in regard to a stock of cattle; judgment has been rendered in said cause; it was rendered in favor of Davenport; I represented Hittson in the cause."

J. L. L. McCall testifies: "There was but one suit pending in the district court of Parker county, Texas, regarding Snailum cattle; I was an attorney at the time, and employed by Mrs. Snailum; I suppose the records were destroyed at the burning of the court-house of Parker county, Texas, the 13th of May, 1874."

P. F. Brannan testifies: "The court-house was destroyed in May, 1874, and I suppose the records were destroyed at the same time."

Samuel H. Milliken testifies: "The court-house of Parker county was destroyed May 13th, 1874, and I suppose the records of said case were destroyed * * * was clerk of the district court at the time the suit of *Snailum v. Davenport* was disposed of."

James E. Adams testifies: "There was but the suit pending at the time spoken of, in the district court of Parker

county, Texas ; the style of the suit was *Mary A. Snailum v. C. G. Davenport* ; the reason I know, I was deputy clerk ; the court-house of Parker county was destroyed by fire May 13th, 1874, and I presume the said records and papers in this suit were destroyed."

For the admission of secondary evidence, we think this testimony sufficiently establishes the burning of the court-house and the loss of the records, including the record in question.

When the loss of a record is shown, its contents may be proved like any other document, by any secondary evidence, where the case does not, from its nature, disclose the existence of other and better evidence. 1 Greenleaf's Ev., § 509, and cases there cited.

The record was not the basis of the action, but the object of the evidence was simply to establish the *fact* of the termination of the litigation mentioned in the notes.

There is nothing in the fact that the record was that of a court of another State to take it out of the rule above stated.

The termination of the litigation in June, 1872, we think was established by competent and sufficient evidence.

These notes were payable in gold. Several payments were made thereon in currency, and the amounts thereof indorsed on the notes at the date of the respective payments as having been made in currency.

Evidence was admitted to show the value of currency in gold in New York at the date of these respective payments, for the purpose of determining the gold value of such currency payments. This is assigned for error.

The contract was to pay so many dollars in gold. In the absence of any waiver of this condition, payment in gold would alone satisfy the contract. *Branson v. Rhodes*, 7 Wall. 229 ; *Butler v. Horwitz*, id. 258 ; *Downing v. Sears*, 11 id. 379 ; *Trebilcock v. Wilson*, 12 id. 637.

Each payment in currency indorsed on the notes, only discharged its contract to the amount of the gold value at the date of payment. *Walkup v. Huston*, 65 N. C. 501.

The court correctly instructed the jury "that if the defendant claims that there was a subsequent parol agreement between parties whereby the written contracts were modified, and plaintiff agreed to accept currency at par instead of gold, that the burden of proving such agreement is on the defendant, and he must establish the same by a preponderance of evidence. * * * * As to the manner in which payments of currency were accepted, whether in full satisfaction of a like number of dollars due upon the writings or at the value of the paper dollars in gold, you should judge by all that took place between the parties. If the money was paid and received as equivalent to gold coin, then it should be so regarded. But this must have been the understanding of both parties, that is to say, of the party paying and party receiving the money, and it is not enough that the defendant so intended, unless the plaintiff or his agent received the money as equivalent to gold coin."

"As to the value of paper money in gold coin, if you believe, from the evidence, that such value is regulated throughout the country at large by the price in New York, the price in New York at the date of each payment respectively affords a sufficient standard. * * * * It was in proof that the price of gold at the Gold Exchange in New York regulated the price of gold in the United States and Territories."

This last instruction was based upon this evidence, and was properly given.

The objection that the judgment was for "gold dollars," instead of for so many dollars generally, is not well taken.

The cases cited *supra* are sufficient authority for saying, that as it was the clear intent of the contract that payment should be in gold, the indebtedness should have been found in gold dollars, and the judgment entered accordingly.

It is claimed that the verdict was in *assumpsit*, and the judgment in debt.

It is unnecessary to enter into the discussion of this objection.

It appears from the bill of exceptions that the verdict as originally rendered was corrected, and put in form by the court so as to obviate the objection made, but through what must be presumed to have been a default of the clerk, this corrected verdict does not appear to have been entered upon the record proper.

Any error or defect in a record which occurs through the act or omission of the clerk of the court in entering, or *failing* to enter of record, its judgment or proceedings, and is not an error in the express judgments pronounced by the court in the exercise of its judicial discretion, is a clerical error and amendable. Freeman on Judgments, §§ 71-72.

The foregoing comprises all the assignments of error that we regard as claiming our attention.

The judgment of reversal heretofore entered in this cause is vacated, and the judgment of the court below is affirmed, with leave to amend the record by an entry of the verdict as corrected and put in form by the court, and presented in the bill of exceptions.

Affirmed.

LOSS OF RECORD MAY BE PROVED by evidence of search by the custodian through the place of custody (*Briggs v. Chase*, 9 Colo. 227), and oral testimony of its contents is then admissible: *Conway v. John*, 14 Colo. 34.

BOYLE et al. v. THE PEOPLE.

1. Application for change of venue, or notice thereof, must be made at the earliest possible moment after the cause for the change becomes known to the party seeking such change.
2. An application for a continuance must show that due diligence has been exercised in preparing for trial, and when a continuance was asked on the day set for trial, the day having been fixed by consent, on the ground of the absence of witnesses, and it appearing that subpoenas for such witnesses had not been issued until the day fixed for the trial; *held*, that a denial of the application was not error.
8. Members of an association combined to check a certain crime are not *per se* incompetent as jurors in a trial of such crime. In such cases there is a discretion vested in the judge which under the facts of each case should always be exercised so as to insure the accused a trial by impartial jurors.

Error to District Court of Elbert County.

THE facts are stated in the opinion.

Messrs. HAYNES & BARNUM, for plaintiffs in error.

A. J. SAMPSON, attorney-general, for defendant in error.

STONE, J. The chief errors assigned are: *First.* The court refused the application for change of venue. *Second.* The court refused to grant a continuance; and *Third.* The court overruled the challenge for cause to certain of the petit jurors at the trial.

The indictment against the defendants in the court below for the larceny of cattle was presented by the grand jury on the 8th day of March. On the 10th a continuance was asked by defendants, and the motion therefor coming on to be heard by "consent of all parties," the cause was set down for trial on the 23d of March, and the court thereupon adjourned to that date. On the 14th of March the defendants presented to the judge at chambers an application for change of venue upon the ground of prejudice of the inhabitants of the county of Elbert against said defendants. This application, upon hearing, the judge denied. Upon the meeting of the court on the 23d inst., the motion for change of venue was renewed upon the same petition and affidavits that had been presented to the judge at chambers, and upon motion of the district attorney, the petition and affidavits were stricken from the files. Error is assigned for denial of the petition both at chambers and in court.

We think there was no error in either case. The application to the judge at chambers was not made in apt season. The petition and affidavits were sworn to the day before their presentation on the 14th, and so far as the record shows, without notice to the district attorney of the intended application. Such notice, unless expressly waived, is essential. *Marble v. Bonhotel*, 35 Ill. 249.

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Upon the hearing it was expressly admitted by the defendants and their attorneys, that the facts set forth in their petition for a change of venue were as well known to said defendants and their attorneys on the 10th of March when they consented that the case should be set down for trial on the 23d, as at the time of making and presenting said petition.

This is a plain admission of neglect to make the application in seasonable time. The statute contemplates that applications for change of venue, or notice therefor, must be made at the earliest possible moment after the cause for the change becomes known to the party seeking such change. The reasons for this are well known, and the application can be made to the judge at chambers, or to the court in term regardless of the state of the pleadings. *Gilson v. Powers*, 16 Ill. 355; *Moss v. Johnson*, 22 id. 639; *Bryson v. Crawford*, 68 id. 366.

The renewal of the application on the 23d, the day set for trial, was properly denied. This second application was based on no new facts. It was in fact the same petition, supported by the same affidavits which had been a few days previously denied by the judge at chambers, and the former application not having been made in apt time, the latter certainly was not.

The motion for continuance made on the 23d was properly denied. The case had been continued from the 10th to the 23d, and by consent of defendants set for trial on the latter day. The subpoenas were not issued for the witnesses whose absence was made the ground of the last application, until the very day the application was made, and that was the day upon which the defendants had consented to go to trial, and it was evident from the statement set out in the affidavit for the continuance that the defendants must have known all the facts averred in the affidavits as well on the 10th when they consented to go to trial on the 23d, as on the latter day when the motion for continuance was made.

These facts show a clear want of the diligence required to entitle a party to a continuance on such grounds as this motion was based upon.

The challenges to the four jurors, for the overruling of which error is assigned, were for the reason that said jurors were "members of the Cattle Association." The examination of several jurors upon the *voir dire* disclosed the fact that many of the citizens of the county engaged in the business of raising cattle belonged to an association having for its general objects the promotion of the interests of stock growing, and in furtherance of such interests, under the constitution or written compact of the association, it became the duty of any member "knowing of a person stealing cattle from a member of the association, or from any one else, to report it," after which it became the duty of the executive committee to prosecute such cases. It also appeared that the executive committee had employed an attorney to assist the district attorney in the prosecution of this case, and had paid the expenses necessary in procuring the attendance of two witnesses from the adjoining State of Kansas. It was further testified that the organization was not a secret one, and that the prosecution of cattle thieves was only done through the legally constituted mode of trial in the courts, and with no attempt to procure the conviction of any except guilty parties.

One juror who stated that he was an officer of the association was set aside by the court. Of the four jurors challenged, which challenge was overruled, three were members of the association. These all stated in answer to a question by the court, that they had each done nothing, nor had been called upon to do any thing, by virtue of being members of the association, toward the prosecution of the defendants.

Nothing was elicited to show that these jurors had agreed to contribute any thing toward the expense of the prosecution, nor that they were liable or bound in any way to such contribution, or were affected by any pecuniary interest

whatever in the case, present or future. In all other respects they had shown themselves by their answers to be impartial jurors, and indifferent as they stood sworn.

The question then to be determined under this assignment of error is, were these jurors disqualified (they having been challenged for principal cause) from the mere fact of their belonging to such association?

The cases we find most nearly in point are the case of *The State v. Wilson*, 8 Iowa, 407, and the Massachusetts case cited by the attorney-general.

In the Iowa case the juror was asked if he was "a member of an association or organized company for the prosecution of persons generally, arrested for horse stealing." This question was objected to, and the objection being sustained, the supreme court held it no error, on the ground that such fact, if shown, would not have disqualified the juror. The lower court ruled that the question might be asked in the following form: "Whether he was a member of any organization existing in the county or elsewhere, engaged in prosecuting the present cause."

It does not appear from the report of the case whether this latter question was answered or not, but the supreme court held that no prejudice resulted to the defendant from the change made in the form of the question by the court below. This case is cited in Hilliard on New Trials, § 66, and in Proffat on Jury Trials, § 169, in support of the doctrine that members of an association, combined to check a certain crime, are not therefore incompetent as jurors in a trial for such crime, "because that is an interest that ought to be common to every citizen."

In the case of *The Commonwealth v. Livermore*, 4 Gray, 18, the court says: "The defendant excepted to the competency of a juror because he was a member of an association called the Carson League. But as the court has no knowledge of the assumed obligations of the members of that association, besides what the juror stated to be his understanding of them, we are not prepared to decide that in

this instance a new trial should be granted because the juror was not set aside. We deem it to be our duty, however, to say that in our judgment, the members of any association of men, combined for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for such purpose, cannot be held to be indifferent, and therefore ought not to be permitted to sit as jurors in the trial of a cause in which the question is, whether the defendant shall be found guilty of violating that law."

The same question afterward arose in the case of *The Commonwealth v. O'Neil*, 6 Gray, 343, in which the court, in overruling the exceptions, say: "We are of opinion that sufficient does not appear on these exceptions to warrant us in deciding that the three jurors who were objected to were legally incompetent to sit on the trial of the defendant. It does not appear that either of them was under any obligations, legal or honorary, to contribute any thing for the prosecution of this case. For aught that is shown, each of them may have paid before this prosecution commenced, the full sum he had subscribed as a member of the Carson League. It therefore does not appear that either of them had any, even the smallest pecuniary interest in the event of the prosecution; and the court, without evidence, cannot presume that they had. * * * * As the exceptions are framed, we cannot find in them enough to show that the judge at the trial was legally bound to set these jurors aside, although it might have been well if, in his discretion, he had done so."

To the same effect is *The Commonwealth v. Thresher*, 11 Gray, 57, and *The People v. Graham*, 21 Cal. 262, essentially modifying the decision in the case of *The People v. Lee*, 5 Cal. 353, cited by counsel for defendants.

Applying the doctrine of these decisions to the facts in the case before us, we are of opinion that these jurors were not disqualified. We think that in all such cases there is vested in the judge trying the case a discretion which,

under the facts in each case, should always be exercised so as to insure that fairness in criminal trials to which the defendant is justly entitled—a trial by impartial jurors, and as intimated by the court in the case of *The Commonwealth v. O'Neil, supra*, it would be well if in the exercise of a sound discretion, jurors belonging to such associations should be excused in all cases where an intelligent and impartial jury can be impaneled in the community without the pale of such organizations.

But the bare fact that one is a member of an organization which is under no obligation or duty to unduly prosecute criminals, or persons charged with a particular crime, is not *per se* a legal disqualification affecting his competency to sit as a juror in the trial of such a case.

From all that is presented in the record before us, the jurors objected to were under no obligation, legally or honorary, to do more in the prosecution of this case than the law of the land imposes upon every good citizen in his duty to the State, and in the protection of his own and his neighbor's rights.

Judgment affirmed.

MILLER v. THE PEOPLE.

In a charge of larceny, if the *animus furandi* is wanting, the act is not larcenous.

Error to District Court of Gilpin County.

THE facts are sufficiently stated in the opinion.

MR. HUGH BUTLER and MESSRS. MORRISON & WHITE, for plaintiff in error.

A. J. SAMPSON, attorney-general, for defendant in error.

THATCHER, C. J. The defendant was found guilty, as charged in the third count of the indictment. By the third count he was charged with feloniously stealing, taking, and

carrying away two thousand feet of clear lumber, twenty thousand feet of mixed lumber, one Dodge quartz crusher, one steam boiler and engine, two large iron pulleys, four pieces of iron shafting, being the goods and chattels of Nicholas B. Brown, mortgagee of the Argentine Company. The court instructed the jury *inter alia* :

"To constitute the defendant guilty of larceny in this case, you must find that he wrongfully or fraudulently took and carried away the property of the Argentine Company or of the mortgagee, Nicholas B. Brown, mentioned in the indictment, to the amount of twenty dollars or more, with the intent to convert the same to his own use, or to convert the proceeds thereof to his own use."

This instruction is erroneous. Not every *wrongful* taking of property with intent to convert the same to one's own use is larceny. If the *animus furandi* is wanting, the act is not larcenous, but a trespass only.

The evidence tended to show that under a claim of right as agent of the Argentine Company, the defendant removed the machinery above described from the mill (located on a public road) owned by the Argentine Company, the distance of a hundred or a hundred and fifty yards, and set it up in the Sukey mill; that the Sukey mill is on the same road as, and in plain view from, the Argentine Company's mill; that he had sold certain old lumber which had formed part of the Argentine Company's mill. There was no attempt at concealment. The several acts which it is alleged constitute the larceny were done in daylight. Almost a week was consumed in removing the property. In view of this evidence, the instruction of the court, above set out, and of which the defendant below now complains, we are constrained to conclude may have influenced the verdict to his prejudice. Whether, in view of all the evidence, the defendant's claim of right was a mere pretense, not asserted in good faith, should, under proper instructions, have been submitted to the jury. 3 Greenl. Ev., § 157; 2 Bishop's Cr. Law, § 561.

Judgment reversed and cause remanded.

Reversed.

THE CORNING TUNNEL CO. v. PELL et al.

1. An involuntary nonsuit was unknown to the common law. Under our practice the right of the court to nonsuit a plaintiff where the evidence produced is not sufficient to support a verdict, is expressly declared by statute. (Laws 1872, p. 99.)
2. A judgment of nonsuit under the statute is final within the meaning of the statute concerning appeals.

Appeal from District Court of Arapahoe County.

Messrs. BELFORD & REED, for appellant.

Messrs. H. M. & W. TELLER and Mr. G. B. REED, for appellees, now moved to dismiss the appeal upon the ground that an appeal did not lie from a judgment of nonsuit.

Per Curiam. This motion rests upon the single proposition that no appeal lies from a judgment of nonsuit.

At common law a judgment of nonsuit was not reviewable for the obvious reason that it was founded on the assent of the plaintiff. An involuntary nonsuit was unknown to the common law. Under our practice, the right of court to nonsuit a plaintiff, where the evidence produced is not sufficient to sustain a verdict, is expressly declared by statute. 9 Sess. Laws, p. 99.

A judgment of nonsuit rendered by the court in the exercise of this power is, as to the defendant, *in invitum*; is a complete disposition of the case, and is final within the meaning of the statute concerning appeals. *Voorhies v. Woodkall et al.*, 4 Vroom, 482; *English et al. v. Devarro*, 5 Blackf. 589; *Stoppenbach v. Zohrlant*, 21 Wis. 390.

Any other view might operate to preclude a plaintiff from having his right of action considered by the appellate court. Motion to dismiss is

Overruled.

LEE, impl., etc., v. GRIMES, WHO SUES, etc.

Appeal from District Court of Gilpin County.

ELBERT, J. The parties, pleadings, and evidence presented by the record in this case are so nearly identical with the case of *Lee, impleaded, etc. v. Grimes et al.*, decided at the present term, that it is unnecessary to do more than to refer to the opinion therein delivered, for a decision of the question presented by this record.

The record does not disclose any error prejudicial to the appellant, and the judgment of the court below is

Affirmed.

LEE, impl., etc. v. GRIMES FOR USE OF HAHN et al.

1. In an action of debt on a replevin bond where the merits have not been tried in the replevin suit under the statute (R. S. 1868, p. 540, § 14), the defendant may plead such fact, and his title to the property in dispute, but the plea must show upon its face that the right of property had not been determined in the replevin suit.
2. Where the parties to a replevin suit submit to an arbitration and that the award shall be final, and the arbitrators, after examination of the matters in controversy, find for the defendant, and that the property is in him, in an action afterward on the replevin bond, the principal therein will be estopped to say the action was not determined on the merits; and the sureties, although not parties to that action, are concluded by the judgment therein by force of their undertaking. And in such action on the bond, evidence of the relation of mortgagor and mortgagee having existed between the parties is not admissible in mitigation of damages.
3. Where one would question the authority of an agent to execute a bond he should do so by verified plea under the statute (R. S. 1868, p. 506, § 14), and in the absence of such plea it is not necessary to prove the agent's authority.
4. It is within the general powers of an attorney-at-law to submit the suit of his client to arbitration.

Appeal from District Court of Gilpin County.

THE facts are stated in the opinion.

Mr. L. C. ROCKWELL, for appellant.

Messrs. H. M. & W. TELLER, and Mr. S. B. HAHN, for appellees.

ELBERT, J. This case was an action of debt on a replevin bond, commenced in the district court of Gilpin county by the appellees, against the appellant and others. The third and fourth pleas are substantially alike. As issue was joined on the third plea, the appellant was not prejudiced by the ruling of the court respecting the fourth. Section 14 of the Replevin Act (R. S., p. 540) provides, that in an action upon a replevin bond, "where the merits of the case have not been tried in the action of replevin in which such bond was given, the defendants may plead such fact, and also their title or the title of any one or more of them, to the property in dispute in such action of replevin." Under this section, the appellant, Lee, who was a surety on the replevin bond, interposed two pleas (sixth and eighth) alleging that the merits of the case were not tried or determined, in the action of replevin in which the bond sued on was given, and also alleging title to the property in controversy in the Perigo Gold Mining and Tunnel Company, plaintiff in the replevin suit, and principal upon the bond sued upon. The essential allegations in support of this defense are, that after the commencement of the replevin suit, the parties thereto submitted the matters in controversy to arbitrators, under an agreement that provided that the award of the arbitrators should have the same force and effect as the verdict of a jury; that it should be final, and be made the basis of a judgment in said action. That under this agreement the issues were found by the arbitrators for the defendants therein, and judgment entered in the replevin suit upon their award. In the case of *The Perigo Gold Mining and Tunnel Company v. Grimes et al.*, 2 Col. 651, where

this same submission was under consideration, it was held that such a reference to arbitrators would not operate to discontinue the action of replevin, or discharge the sureties on the replevin bond. The question here presented, however, was not decided in terms, and perhaps not inferentially. A plea under this section of the Replevin Act should show on its face that the right of property had not been determined upon the merits in the action of replevin. *King v. Ramsey*, 13 Ill. 622. Upon the facts disclosed by the pleas mentioned, we see no foundation for this defense. In order to a judgment on the merits "it is sufficient that the status of the action was such that the parties might have had their lawsuit disposed of according to their respective rights if they had presented all their evidence and the court had properly understood the facts and correctly applied the law." Freeman on Judgments, § 280, and cases there cited. Within this definition 'here was clearly a trial on the merits in the action of replevin.

The two pleas under consideration are substantially alike, and the demurrer should have been sustained to the eighth as well as the sixth plea.

With a view to the application of the rule of damages as between mortgagor and mortgagee, the appellant, Lee, offered evidence to show that the appellees, Hahn and Clark, were but mortgagees, and that the Perigo Company was the general owner of the property replevied. In view of the issues found in the award, this evidence was not competent. The relations of the parties to the property were determined in the replevin suit. "Having heard the proofs and allegations of the parties, and having examined the matters in controversy," the arbitrators found "the issues in said cause for the defendants. That the defendants are entitled to the return and possession of the property described in the plaintiff's complaint. That the title to the property in controversy is in Silas B. Hahn, and that said Hahn is the owner of the same. That the plaintiff is not the owner of,

and is not entitled to the possession of the property described in its said complaint."

This award was conclusive between the parties thereto as an estoppel. Bigelow on Estoppel, 17; *Lloyd v. Barr*, 11 Penn. St. 51.

The appellant, as surety on the replevin bond, undertook on behalf of the Perigo Gold Mining and Tunnel Company, that it would prosecute its suit with effect and without delay, and that it would make return of the goods and chattels, if return thereof should be awarded, etc., etc., and although not a party to the action, he is concluded by the judgment therein, by force of his undertaking. Freeman on Judgments, § 180; *Sweeney v. Lomme*, 22 Wall. 209; *Heard v. Lodge*, 20 Pick. 59.

The ownership of the replevied property was put in issue, and found to be in Hahn, and not in the Perigo Company. This appears by the record of the replevin suit, put in evidence by the plaintiff; and while it was competent for the appellant to dispute the existence of the record under his plea of *nul tiel record*, it was not competent for him to retry the issues therein found and adjudged. Nor is this in conflict with any thing said in the case of *The Perigo Gold Mining and Tunnel Company v. Grimes*, *supra*. The court there expressly states that it *did not appear* but what the Perigo Company was the general owner of the property. So, too, in the case of *Warren v. Matthews*, 18 Ill. 83, cited by the learned judge in the case of *Perigo Co. v. Grimes*, the general ownership of the property had not been tried or determined in the replevin suit. These authorities go no further than to say that where the general ownership has not been found in the action of replevin, in an action upon the replevin bond, evidence is admissible to show that the relation of mortgagor and mortgagee existed between the parties to the original action.

The offer of the appellant to show want of authority in the agent Darby, to execute on behalf of the Perigo Company the several instruments under which Hahn and Clark

claimed the property in dispute, was not competent, and should have been refused by the court as to Clark as well as Hahn. If their right to the property rested on Darby's authority as agent, the question of his agency was necessarily passed upon and determined in the action of replevin. As between the parties to the suit on the bond, it was *res judicata*.

If the appellant desired to question the authority of the agent Cowenhoven to execute the replevin bond, he should have done so by verified plea under the provisions of section 14 of the Practice Act (R. S., p. 506). In the absence of such a plea it was not necessary to prove the agent's authority. *Delahay v. Clemants*, 2 Scam. 575; *City of Central v. Wilcoxon*, 3 Col. 566.

It is within the general powers of an attorney at law to submit the suit of his client to arbitration. *Halker v. Parker*, 7 Cranch, 449. Butler was the attorney of record of the Perigo Company, and the objection to the agreement of submission, of his want of authority to so submit the replevin suit, was properly overruled by the court.

The foregoing are all the questions raised which we deem it necessary to pass upon. It will be observed that the errors adverted to were all in favor of the appellant, and did not operate to his prejudice.

The judgment of the court below is affirmed with costs.

Affirmed.

JORDAN v. FINLEY.

In the absence of a stipulation between the parties, and in the absence of an order of court permitting a bill of exceptions to be signed out of term, a bill of exceptions signed in vacation is properly no part of the record.

Error to District Court of Hinsdale County.

Mr. M. S. TAYLOR, for defendant in error, now moved to strike the bill of exceptions from the files.

Mr. A. W. BRAZEE, *contra*.

Per Curiam. This is a motion to expunge from the record the bill of exceptions, on the ground that there appears of record no order of court fixing a time within which the bill might be prepared and filed. In the absence of a stipulation between the parties (*Rhodes v. Drummond*, 3 Col. 374), and in the absence of an order of court permitting the bill of exceptions to be signed out of term, a bill of exceptions, so called, signed in vacation, is properly no part of the record. As held in the case above cited, agreement of counsel or parties might supply the absence of an order of court; but here no such agreement is shown.

A cross motion, however, was made and time allowed within which to amend the record to conform to the alleged fact, showing that the court had made the necessary order. The time allowed by this court expired three months ago, but no amended record has been produced.

The motion to strike the bill of exceptions from the record must be allowed.

Motion allowed.

BILL OF EXCEPTIONS SIGNED IN VACATION is no part of the record, in the absence of a stipulation or an order of court: *Fuley v. Cady*, 4 Colo. 458.

CARNAHAN v. PELL.

1. Although the Constitution requires that "all process shall run in the name of the people of the State of Colorado," yet the insertion of the word "Territory" instead of State in a writ of execution, held to be a clerical misprision and amendable.
2. Under the statute (R. S. 1868, p. 524, § 18), a constable has the same authority as a sheriff to execute a writ of *fi. fa.*, issued out of a probate court.
3. If an instrument, whether it calls for money or property, be not payable *unconditionally and at all events*, it is not negotiable under the statute (R. S., chap. 10.)

Error to County Court of Boulder County.

THE facts are stated in the opinion.

Mr. BEN. LANE POSEY and Mr. JOHN M. MAXWELL, for plaintiff in error.

Mr. ORRIS BLAKE & Mr. R. H. WHITELY, for defendant in error.

THATCHER, C. J. This was an action in replevin, with a count in trover added, as authorized by statute. The suit was brought by Pell against Carnahan, to recover a certain quantity of wheat or its value.

The plaintiff first offered and read in evidence a record of the probate court of Boulder county setting out a judgment of said court, entered on the 23d day of February, A. D. 1876, in a cause in assumpsit in which William G. Pell was plaintiff and John C. Morehead and Samuel Hayden were defendants. Judgment was given for the plaintiff in the sum of \$472.50. An alias execution having been issued upon said judgment, was then offered in evidence, which was in the following form :

“STATE OF COLORADO, {
BOULDER COUNTY, { ss.:

The People of the Territory of Colorado to the Sheriff or any Constable of Boulder county,—Greeting :

We command you, as we have heretofore commanded you, that of the lands and tenements, goods and chattels and chattels real of John C Morehead and Samuel Hayden, defendants in your county, you cause to be made the sum of four hundred and seventy-two dollars and fifty cents, which William G. Pell, plaintiff, lately in the probate court of said Boulder county, at a term thereof begun and holden at Boulder, in said county, on the 14th day of February, A. D. 1876, recovered a judgment against the said defendants, and which, by the said court, was adjudged to the said plaintiff for his damages in this behalf sustained.

Witness, Edward J. Morath, Clerk of the County Court, and the seal thereof, at Boulder in said county, this 12th day of August, A. D. 1876.

[L. S.]

EDWARD J. MORATH, *Clerk.*”

By the return on said writ it appears that Samuel B. Austin, as constable, did in virtue thereof on the 24th day of August, at the White Rock flouring mill, in Boulder county, levy upon ten thousand pounds of wheat as the property of the defendant Morehead, and on the 8th day of September, upon sixteen thousand and eighteen pounds of wheat as the property of the defendant Hayden; that pursuant to notice, on the 5th day of October, at public auction, he sold all of said wheat to William G. Pell.

The defendant below objected to the admission in evidence of the execution and the return thereon, chiefly on three grounds. First, because the execution runs in the name of the People of the Territory and not of the State of Colorado; and, second, because the levy and sale in pursuance of the writ were made by a constable and not by a sheriff; third, that no valid judgment had been shown or proven upon which to found the execution.

The judgment upon which the execution had been issued was a judgment of a court of record, of competent jurisdiction, and pronounced in due form of law. It is insisted that the execution is absolutely void for the reason that it does not run in the name of the People of the State of Colorado. On the 1st day of August, A. D. 1876, the president of the United States issued his proclamation declaring "the admission of Colorado as a State into the Union complete." Section 30, article 6th, of our Constitution directs that "All processes shall run in the name of the People of the State of Colorado." Eleven days intervened between the president's proclamation and the issuance of the execution. Is the writ void? We think not. By the schedule to the same Constitution, it is provided that all laws in force at the adoption of the Constitution should remain of the same force as if the Constitution had not been adopted, until they should expire by their own limitation, or should be altered or repealed by the general assembly. Under the statute of Amendments and Jeofails (R. S. 1868, p. 46), which was in force when this case was tried, and remained

in force until repealed by the Code (Code, p. 161), the *clerical misprision* — as the insertion of the word *Territory* instead of *State*, clearly was — would not invalidate the writ. In this respect the writ was amendable.

Even if we were to leave out of view the statute concerning amendments and jeofails, we are inclined to the opinion that the mere omission of the style of the writ would not make it a nullity. Says Freeman on Executions, § 39: "Although it has been the custom in England to issue the writ in the name of the reigning sovereign, and in the greater portion of the United States in the name of the State or the People of the State, we have met with no decision determining the effect of an omission or variance in this respect. We are inclined to regard these words as a formal rather than as a substantial part of the writ. The parts which follow sufficiently show the authority under which the writ is issued."

The writ was regularly directed to the sheriff or any constable of Boulder county. Under the law a constable had the same authority as the sheriff to execute a writ of *fi. fa.* issued out of a probate court. R. S. 1868, p. 524, § 13.

By reference to the constable's return to the alias execution, it appears that the levy upon the wheat—26,018 pounds—was complete on the 8th day of September. On the 14th day of the same month Carnahan executed and delivered to the constable the following receipt:

"Received of S. B. Austin, a constable of Boulder county, 26,018 pounds of wheat, which I agree to hold and keep for said Austin, unless taken from me by law. This wheat, said wheat being in litigation.

J. M. CARNAHAN.

WHITE ROCK MILLS, *Sept.* 14, 1876."

This receipt bore the following indorsement:

"For value received, I transfer and assign the within receipt, and all the wheat therein mentioned, to William G. Pell.
S. B. AUSTIN."

Carnahan, by the delivery of this receipt, became in law the receptor of the property. A receptor occupies the position of bailee. To the officer, he is required to respond. Over the receipt and the stipulation it contains, the creditor has no control. The agreement incorporated into the receipt is for the private security of the constable. *Barron v. Cobleigh*, 11 N. H. 564; *Phillips v. Bridge*, 11 Mass. 247; *Learned, adm'r, v. Bryant et al.*, 13 id. 225.

The receptor is but the servant of the constable.

What was the effect of the assignment of the receipt to Pell? The plaintiff below insists that Austin's indorsement passed the legal title to the instrument itself and the wheat therein mentioned to Pell, and gave him the right to demand and recover the same, or its value, of Carnahan; that by the assignment Pell succeeded to all the rights of the constable.

In our view the receipt was neither at common law, by the law merchant, nor is it under our statute negotiable. By section three, of chapter X, R. S. 1868, it is enacted: "All promissory notes, bonds, due bills and other instruments in writing, made by any person, whereby such person promises or agrees to pay any sum of money or article of personal property, or any sum of money in personal property, or acknowledges any sum of money or article of personal property to be due to any other person or persons, shall be taken to be due and payable to the person or persons to whom the said note, bond, bill or other instrument in writing is made."

Section four provides that all such instruments shall be assignable by indorsement in the same manner as bills of exchange, so as absolutely to transfer and vest the property thereof in the assignee.

Section five authorizes the assignee to sue in his own name.

It will be observed that in order to negotiability, the money or property must be payable absolutely. *Kelly v. Hemmenway*, 13 Ill. 604; *Eldred v. Malloy*, 2 Col. 320.

Before this statute this was true of a promissory note. Daniels on Negotiable Instruments, § 41.

If an instrument, whether it calls for money or property, be not payable *unconditionally and at all events*, it is not negotiable under the statute. The property described in the instrument in question is only to be held and kept, provided it be not taken from Carnahan by law. There is no unconditional agreement or promise to deliver the property to Austin. There is an express declaration that it is in litigation. It contains no direct admission as to ownership of the property. It is not, in our opinion, such an instrument as section three contemplates, and is therefore not negotiable.

Although the instrument differs in some respects from the ordinary form of a receiptor's receipt, in that it omits the usual acknowledgment that the property was under levy, it was evidently intended to perform that office. It is more akin to that than to any other instrument. Carnahan became the keeper of the property for the constable. Austin as constable asserted his right to it before delivery to Carnahan, in virtue of a levy, as the evidence discloses. Accepting his return to the execution as true, he had, as an officer, special property in the wheat. Carnahan, by reason of any transaction between him and the constable, in his capacity as receiptor, had no property, either general or special, in the wheat. If Carnahan, at the date of the indorsement of the receipt to Pell, had delivered the wheat to him, it would have operated *at most* as a substitution of receiptors (and we do not decide that it would have that effect), and even for the conversion of property a receiptor has no action. The custody of the receiptor is but the custody of the law. "If the property is destroyed or converted, whether by the receiptor, or by the defendant, or by a stranger to the writ, the officer, by virtue of his special property, may maintain an action of trespass or trover, or for the possession of the property, in case its possession can be obtained. The receiptor, on the other hand, has no

property, general or special, in the goods in his custody. Having no right of property, it must follow that he can never, in his capacity as receptor, have any right of action for converting, injuring or destroying property." Freeman on Executions, § 265.

We are satisfied that so far as Pell bases his right to recover upon the receipt, it was not well founded. If the receipt is relied on, Austin, as its legal owner, was the proper person to bring the suit against Carnahan. For us to discuss the defenses available to Carnahan in such a suit, would in this cause be fruitless.

Pell also bases his right to recover upon his alleged title acquired at the execution sale, as is shown by the officer's return. As the cause must be sent back for a new trial, we deem it unnecessary to comment upon the rather unsatisfactory testimony touching the validity of the levy and sale of the wheat.

Judgment reversed with costs and cause remanded.

Reversed.

INSTRUMENT NOT PAYABLE AT ALL EVENTS and unconditionally is not negotiable: *Jennings v. First Nat. Bank*, 13 Colo. 420.

CRATER v. McCORMICK.

1. In articles of agreement to erect a party wall it was stipulated, That if the lot of A (then incumbered by trust deed) should be sold under the trust deed before the wall was completed, and if the purchaser should elect to, and should finish the wall, the payment (one-half) provided for to be made to A, should be made to the purchaser. *Held*, in an action of covenant, that the covenant was in its nature personal and did not pass with the land of A to subsequent owners; also, that, under the facts in this case, A having procured the completion of the wall, could maintain his action on the covenant although he had parted with his title to the land.
2. The finding of a referee as to its conclusive effect stands as the verdict of a jury, and will not be disturbed if there is evidence to support it.
3. It is a rule of pleading that whatever has been admitted on both sides in the pleadings cannot be contradicted either by the subsequent pleadings or even by the verdict.

Appeal from District Court of Arapahoe County.

THE facts are sufficiently stated in the opinion.

MR. V. D. MARKHAM and MR. E. L. JOHNSON, for appellant.

MESARS. BROWNE & PUTNAM, for appellee.

THATCHER, C. J. This is an action of covenant upon an agreement between Isaac L. McCormick, owner of lot five, block forty-six, East Denver, Vincent D. Markham, trustee, and Helena L. Beck, beneficiary named in a deed of trust conveying said lot, all parties of the first part, and George E. Crater, owner of lot four in said block, party of the second part.

The agreement relates to the building of a brick wall on a line between said lots. The breach assigned is the failure of Crater to pay one-half of the value of the party wall in conformity with the agreement.

Before McCormick had entirely finished the party wall lot five was sold and conveyed by Markham as trustee to Helena L. Beck, the designated beneficiary, and by Helena L. Beck, six months after the trustee's sale, it was again sold and conveyed to John W. Rogers.

McCormick and wife, on the same day that Helena Beck conveyed lot five to Rogers, also made a deed to Rogers for the same premises. The several deeds executed respectively by Markham, Mrs. Beck and by McCormick and wife purported to convey the entire party wall, including that part which was on Crater's premises.

The agreement contained, *inter alia*, the following stipulations:

"If the said lot of the said McCormick shall be sold under the trust deed aforesaid, before the said wall is completed, then if the purchaser of said property shall elect to finish and does finish said wall, then and in that event the payment above provided for to be made to said McCormick

shall on the same terms be made to the purchaser of said property instead of said McCormick."

Clearly, the purchaser referred to in this stipulation is the purchaser at the trustee's sale. Mrs. Beck was such purchaser. But she did not elect to finish the wall. In fact she did nothing toward its completion, and therefore can claim no right by virtue of that stipulation. As Mrs. Beck failed to elect to finish the wall, McCormick, as we interpret the indenture, was at liberty to carry out the agreement according to its terms, after the premises had been conveyed to Rogers, he consenting thereto.

The referee must have found that McCormick, by an agreement between him and Rogers, procured the completion of the wall. That McCormick, through the agency of Rogers, caused the wall to be finished, we think is fairly deducible from the evidence. Whether McCormick carried out his agreement with Rogers is a question with which we now have nothing to do. It is enough to know that by the procurement of McCormick the wall was completed.

It is, however, insisted that the covenant between the adjoining lot owners runs with the land, and that therefore McCormick having sold his premises is not entitled to sue. Leaving out of view the clause in the agreement in relation to the purchaser under the trust deed, for the reason that under the evidence it need not be considered, we are of the opinion that the covenant is in its nature personal and did not pass with the lot to subsequent owners. Although the authorities are somewhat conflicting upon this point, this we think is the better doctrine. *Weld v. Nichols*, 17 Pick. 538; *Ingles v. Bringham*, 1 Dallas, 367; *Hart v. Kucher*, 5 Serg. & Rawle, 1; *Todd v. Stokes*, 10 Penn. St. 155; *Block v. Isham et al.*, 28 Ind. 37.

Upon completion of the wall, if built according to agreement, Crater became personally liable for one-half its value.

Crater's office was on lot four and within ten feet of the party wall. He also lived on the same lot. Under his eye from day to day the work advanced. The division line be-

tween the lots was located by the city engineer at the instance of McCormick, and with reference to that line the wall was constructed. If there was even a trifling departure from the terms of the agreement, the evidence tends to show that it was not willful nor intentional. There is no pretense that there was a careless or negligent omission of duty. "To the satisfaction and acceptance of Crater" the wall, it is testified, was completed. While the work was in progress, Crater never intimated that there was the slightest deviation in any particular from the terms of the contract. If credit be given to the testimony of McCormick, the agreement—reference being had to the issues formed—was carried out by him in all respects *substantially* according to its terms, and more than this cannot ordinarily be required.

There was a conflict of evidence as to the true location of the division line, and of the party wall thereon, but considered as a whole, the referee's finding cannot be said to be unsupported by evidence.

The finding of a referee as to its conclusive effect stands as the verdict of a jury.

The demurrer to the sixth plea was properly sustained. It was drafted on the assumption that the covenant run with the land. Even if a remote subsequent grantee should be entitled to recover one-half the value of the wall, such recovery could only be had in the event that he should under the indenture *elect* to finish, and should in fact finish the wall. But there is no such allegation in the plea.

Nor was there error in overruling the motion for a new trial. The chief ground of the motion relied on was newly-discovered evidence, which it is claimed came to the knowledge of the defendant during the progress of the trial. This evidence relates to the thickness of the party wall between the second and third floors.

The pleadings were such that no advantage could be taken of this alleged defect. The thickness of the wall from its base to its summit was not put in issue. It is a rule that

"whatever has been admitted on both sides in the pleadings cannot be contradicted either in the subsequent pleadings or even by the verdict. For neither party can retract what he has before conceded on the record; and the jury have no authority to find any other facts than such as are put in issue." Gould's Pleadings, § 168. Says Stephens on Pleadings, p. 217: "The effect of such admission is extremely strong, for, first, it concludes the party, even though the jury should improperly go out of the issue and find the contrary of what is there confessed on the record, and, in the next place, it is to be remarked that the confession operates not only to prevent the fact from being afterward brought into question in the same suit, but is equally conclusive as to the truth of that fact in any *subsequent action* between the same parties."

But it is insisted that as the alleged failure to construct the wall of the required thickness between the second and third floors was unknown to the defendant until it was disclosed at the trial, the motion should have been allowed to enable the defendant to interpose an additional plea raising an issue under which the newly-discovered evidence might have been available.

By the use of ordinary diligence before the trial, the defendant could have ascertained the thickness of the wall and formed the issues accordingly.

Had he been half as vigilant in this respect as he was in his effort to prove that the plaintiff had mistaken the true division line by the fraction of an inch, there would have been no occasion to raise this question by a motion for a new trial.

The judgment of the court below is

Affirmed.

DEFENDERS TO CROSS-COMPLAINT having been overruled, and plaintiff failing to answer or reply, every allegation must be taken as true: *Wilson v. Hawthorne*, 14 Colo. 532.

BOARD OF COUNTY COMMISSIONERS OF ARAPAHOE CO. v. GRAHAM.

1. The payment by the county of costs in preliminary examinations, is by the statute (Laws 1876, p. 58,) left to the discretion of the board of county commissioners, and their action in disallowing certain fees thereunder is not subject to review on appeal.
2. An indictment is not, strictly speaking, so called, until it has been found a "true bill," and the provision made in the statute (Laws 1874, p. 153,) for fees to the district attorney for drawing each "indictment" cannot be held to include compensation for drawing bills ignored by the grand jury.
3. Where there were several indictments against two jointly, and separate trials had and a conviction on each, *held*, under the statute (Laws 1874, p. 153), that the district attorney was entitled to his fee on conviction in each indictment, and, *also*, where two were jointly indicted, tried and convicted, that he was entitled to his fee for the conviction of each.

Appeal from District Court of Arapahoe County.

THE case is stated in the opinion.

MR. W. B. MILLS, for appellant.

MR. C. W. WRIGHT and MR. S. E. BROWN, for appellee.

ELBERT, J. There is no claim in this case that the district attorney is entitled to recover for his services independent of the statute fixing his fees. The act "relating to fees and salaries in Arapahoe county," Sess. Laws 1874, p. 146, provides for the district attorney "for every criminal trial or examination before a justice of the peace, a fee of five dollars." Touching preliminary examinations, we are of the opinion that this act must be taken to have been modified by the subsequent general law "concerning costs in criminal cases," approved February 11, 1876. Sess. Laws 1876, p. 53.

By the last act the legislature clearly intended to leave the payment of costs in preliminary examinations to the discretion of the county commissioners.

The language is, "the county commissioners of any county may, *in their discretion*, pay the costs of preliminary examinations," etc., etc.

The object of the provision may have been to correct an abuse arising from the arrest of parties on trivial charges when there was not any or sufficient evidence upon which to hold them to answer.

Whatever the reason of the law, or whatever may be thought of its propriety, the language is plain.

Being a matter of discretion, the action of the county commissioners in disallowing the claim of the district attorney for fees in the eleven cases of preliminary examination before the justices was not subject to review, and the court below erred in entertaining jurisdiction and allowing the claims.

The act of 1874, *supra*, also allows the district attorney "for drawing each indictment, five dollars."

There is a well-recognized distinction between a bill and an indictment. An indictment is defined to be "A written accusation of one or more persons, of a crime or misdemeanor, preferred to, *and presented upon oath by a grand jury.*" Burrell's Law Dict., title Indictment. 4 Bl. Com. 302.

"Strictly speaking, an indictment is not so called until it has been found 'a true bill' by the grand jury. *Before that it is termed a bill only.* 1 Arch. Crim. Pl. 230, note 1.

"A bill is a written accusation of one or more persons of a crime or misdemeanor lawfully presented to a grand jury." Bouvier's Dict., Indictment.

Section 11, R. S., p. 390, recognizes this distinction.

It is there made the duty of the foreman "to indorse upon every bill that may be presented to the grand jury, the finding of such jury, as, that the same is a 'true bill,' or 'not a true bill,' as the case may be, and sign his name thereto before the same shall be returned into court." Until the bill is indorsed "a true bill," and signed and presented, it is not an *indictment*.

While this section of the Revised Statutes seems to have contemplated that bills should be prepared and presented to the grand jury by the district attorney in the cases of persons under recognizance, and while as a matter of practice it is necessary, especially in the more populous districts, that such bills should be drawn up in advance of the finding of the grand jury, in order to the speedy dispatch of business, the legislature has not provided compensation for drawing bills that may be ignored.

If there was any reason for saying that the legislature used the term "indictment" in any broad sense that was intended to include a bill, we should be disposed to a liberal construction of the law. On the other hand, there is evidence in the law of an intent to compensate the district attorney only for *effective* labor, as for instance, in misdemeanors, felonies and capital cases, his fees are dependent upon conviction. By the Revised Statutes, p. 321, sec. 12, he is not allowed any fee for an indictment which may be quashed.

The omission to provide compensation for bills ignored by the grand jury is in keeping with the spirit of these provisions.

The court therefore erred in allowing the claim of the district attorney for drawing the eleven bills ignored by the grand jury.

The same act allows the district attorney for every conviction for felony in the district court, twenty dollars.

The allowance of the "conviction fee" of twenty dollars in each of the four cases against Reed, and in each of the four cases against Swan, and also a like fee in the case against Bickford, was authorized by the statute, which provides a fee of "twenty dollars for any conviction for felony in the district court."

There were five indictments against Reed and Swan jointly.

The trials were separate, and in the case of each there was a trial and a *conviction* on each indictment.

In the case of McMann and Bickford, they were jointly indicted and tried, and both were convicted. This was a conviction of two persons, and for each the district attorney was entitled to his fee of twenty dollars.

The judgment of the court below is reversed and remanded with instructions to enter judgment in accordance with the views herein expressed.

Reversed.

BYERS v. McPHEE et al.

An application for the continuance of a cause being addressed to the discretion of the court, nothing short of a plain and arbitrary abuse of right will justify an appellate court in reversing such discretionary judgment

Appeal from District Court of Arapahoe County.

THE facts are stated in the opinion.

Messrs. FRANCE & ROGERS, for appellant.

Messrs. PATTERSON & CAMPBELL, for appellees.

STONE, J. When this cause was called for trial in the court below, on the 20th of June, 1877, application was made on behalf of the appellant for a continuance, or at least, a postponement of the case until certain cases then on trial in the county court, in which both attorneys for appellant were then engaged for the defendants, should be disposed of. The affidavit in support of the motion shows that the case had been set down on the calendar of the district court, for hearing on the 12th of June, 1877; that owing to delay or protracted length of the trial of preceding cases, this cause could not be reached on the 12th, and was not reached until the 20th; that after the case had been set down for the 12th, the attorneys for appellant consented to enter upon the trial on the 18th, of five several cases in the county court, in each of which the defendant,

a corporation, was the same ; that neither the county court nor the plaintiffs in said suits would consent to delay the trials ; that the nature of the cases were such as to require the attendance of both the attorneys for the appellant ; that the nature of this case also was such as would necessitate the attendance of both said attorneys in its trial ; that other attorneys could not then be engaged to competently try any of the cases, and the court was therefore asked to delay the trial thereof until the said cases in the county court were disposed of, which affiant believed could be done by the 23d inst. The court thereupon delayed the trial of the case until the next day, the 21st, at which time the first of the said cases in the county court in which said attorneys were then engaged, was concluded, when this cause was called for trial, the attorneys being engaged in the trial of the other cases in the county court, and not appearing in the district court, it was heard *ex parte*, and upon the testimony of the appellees, a verdict of \$1,815.84 was given by the jury, and judgment rendered thereon.

On the 23d, the attorneys of appellant, having concluded the trial of their cases in the county court, moved to set aside the verdict, supporting the motion by affidavits setting up substantially the same facts as in support of the previous motion for continuance, and in addition thereto, the affidavit of appellant showing a meritorious defense to the action. Exceptions to the overruling of this motion, and to the denial of the continuance asked, are made the ground for reversal of the judgment in this court.

Two questions arise for consideration : 1st, was there sufficient ground for the continuance asked ; and 2d, may the appellate court interfere with a ruling made in the discretion of the court below ?

The second question being dependent upon the first, the two may fairly be considered together, since the application for the continuance not resting upon statutory grounds, was necessarily addressed to the discretion of the court purely.

We have examined the cases cited by counsel for appellant, as well as a number of others of like character, in support of the motion for continuance, but are unable to find a single case where such application was made when there was more than one attorney engaged in the case and competent to attend to it. Most of the cases in which the continuance has been allowed, or where a denial has been reversed, is where a single or leading counsel in the case was so ill as to be unable to attend to any business whatever, and other counsel could not be engaged to competently try the case. The case of *Hill v. Clark*, 51 Ga. 122, is the only case we have found similar to this, in that there was a conjunction of time of trial of cases in different courts. This had been brought about by an adjourned term of the supreme court. Hill was sole counsel in a case, in which he was also defendant in the superior court, and was also leading counsel, and the one on whom the client chiefly relied in an important case in the supreme court; and upon the adjournment for one month of the latter court, bringing the cases in the two courts together, Hill applied to the superior court for leave of absence to attend his cases in the supreme court, which leave was denied, and judgment taken against him in his absence.

This ruling the supreme court reversed, but it is to be observed that the superior court placed its denial of the application on the ground that it had no legal authority to grant it, and the supreme court placed its reversal on the ground that the superior court was vested by law with full discretion to grant the continuance under a provision of the State Code.

Counsel for appellant contends that there is no difference in principle between attorneys detained in bed by sickness, and being detained in another court in the legitimate discharge of duties, as in this case.

Undoubtedly the principle may apply where the cause of detention is equally unavoidable or excusable; but here the circumstances are quite different; there were two attor-

neys, shown to be equally conversant with cases in both courts, and equally competent to try any of them. The case was delayed one day, and until the first of the county court cases had been concluded, and it does not appear from all the circumstances that it was not possible for one of the attorneys then to have attended to the trial of this case, while the other was attending the next of the county court cases.

The case, as the record shows, was not of a complicated character, involving extraordinary skill and labor, but was an ordinary jury trial of an action for work and labor done and materials furnished in the building of a house. The attorneys in the case were law partners, each thoroughly conversant with the case, and the well-known skill and ability of each as a lawyer is a strong argument against their motion. We cannot say that with reasonable diligence neither of these attorneys, after the delay of one day granted them, could in justice to the respective clients in both courts have attended at the trial of this cause.

The court below, vested with discretionary powers in the premises, with all the facts and circumstances of the case before it, has usually the best opportunities to form a just judgment for the exercise of discretion, and nothing short of a plain and arbitrary abuse of right will justify an appellate court in reversing such discretionary judgment. The general rule is so well settled, that we need not cite authorities in its support, that a motion for continuance is addressed to the sound discretion of the court, under all the circumstances of the case, and though an appellate court will supervise the action of an inferior court in such a motion, it will not reverse a judgment on that ground unless such action is plainly erroneous and unjust. In the language of Judge SANDERSON, in *Baily v. Taffee*, 29 Cal. 424, this discretion is not a capricious or arbitrary exercise of will, but "an impartial discretion, guided and controlled in its exercise by fixed legal principles. * *

* In a plain case, this discretion has no office to perform,

and its exercise is limited to doubtful cases where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit *in foro legis*, when examined under those rules of law by which judges are guided to a conclusion, the judgment of the court below will not be disturbed."

That the appellant in this case may have been injured by failing to avail himself of a possibly meritorious defense to the action, is a matter which this court should certainly regret. In view of this and the fact that the conflict in the hearing of the cases in the two courts was probably owing to no fault of the appellant or his attorneys, and that the appellees could have been little if at all prejudiced by the delay asked, we think the district court might well have granted the application for continuance. Indeed we may go farther, and say, that had there been but one attorney in the case on whom his client relied in the trial, the denial of the motion would appear uncourteous, arbitrary, and an abuse of sound discretion. Members of the bar ought not to hold up the wrongs of their clients as a shield to their own want of diligence and industry; and on the other hand, courts should not hastily deny, *sic volo*, what is addressed to their sound discretion, when reasonably asked by a perhaps over-worked attorney of the court, perplexed with the multiplicity of the business of exacting clients.

In view of all the circumstances of this case, and considering that the abuse which would inevitably follow a precedent unlimited by fixed boundaries, would entail pernicious results in the practice and administration of the law, we cannot say that there was such an abusive or erroneous exercise of discretion in the district court as to justify a reversal of the judgment rendered therein.

There being no other question raised by the record that we deem essential or important to determine, the judgment will be

Affirmed.

WHERE MOTIONS ARE ADDRESSED TO DISCRETION OF COURT, nothing short of an absolute abuse will justify the appellate court in reversing the action of the lower court thereon: *Dyer v. McPhee*, 6 Colo. 195.

DOWNING v. FLORES et al.

The jurisdiction of a justice of the peace, the court being one of inferior jurisdiction, must affirmatively appear. The county court can only take cognizance by appeal of causes from justices of the peace which were rightfully commenced there.

Error to County Court of Arapahoe County.

FLORES and his copartner brought an action against Downing, the plaintiff in error, before a justice of the peace; judgment went against the defendant in that court by default, and he appealed to the county court. The county court, notwithstanding the objection of the defendant to its jurisdiction, proceeded with the cause and rendered judgment in favor of the appellees in that court. To reverse this judgment the plaintiff in error sued out this writ of error.

Messrs. FRANCE & ROGERS, for plaintiff in error.

Messrs. PATTERSON & CAMPBELL, for defendants in error.

ELBERT, J. Section 103 of the Justices Act, R. S., p. 418, provides that suit shall be commenced before justices in the township in which the debtor or person sued resides, unless the cause of action accrued in the township in which the plaintiff resides, in which case the suit may be commenced where the cause of action accrued or is specifically made payable.

In the case of *Melvin v. Latshaw*, 2 Col. 81, it was held that by this section, "the residence of the defendant in the township where the suit is brought, or in the absence of that, the fact that the cause of action accrued or the sum of money was payable in such township, is essential to the jurisdiction of the justice, and proof of these facts may be required." * * that "residence of the defendant in the township, or that being wanting, the fact that the

cause of action accrued there, is made a substantive ground of jurisdiction of which the defendant may demand proof in the district court as well as before the justice."

The county court can only take cognizance by appeal of causes from justices of the peace, which were rightfully commenced there. If the justice had no jurisdiction, the appellate court acquires none by appeal. *Allen v. Belcher*, 3 Gilm. 594; *People v. Skinner*, 13 Ill. 287.

The rule of jurisdiction is "that nothing shall be intended to be out of the jurisdiction of a superior court, but that which especially appears to be so, and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court, but that which is expressly alleged." *Peacock v. Bell*, 1 Saund. 74.

All the evidence taken before the appellate court purports to be preserved in the bill of exceptions, and there is nothing disclosing the existence of any of the jurisdictional facts specified in section 103. We cannot presume their existence in favor of the jurisdiction of the justice, and cannot therefore say that either the justice or appellate court had jurisdiction of the action. There was no submission, either express or implied, to the jurisdiction of the appellate court; on the other hand, the record shows that the defendant interposed the defense of want of jurisdiction. The objection being taken it was incumbent on the plaintiff to show affirmatively the jurisdiction of the justice. In the absence of such proof it was the duty of the court below to dismiss the cause.

The judgment of the court below is reversed with directions that the cause be dismissed without prejudice.

Reversed.

COUNTY COURT CANNOT TAKE JURISDICTION BY APPEAL of action of which the justice of the peace had no jurisdiction: *Denver & S. P. & P. E. R. Co. v. Roberts*, 6 Colo. 335; *Belanger v. Norilloh*, 12 Colo. 354.

NIPPEL v. HAMMOND AND HAMMOND, Executrix.

1. All written powers are to be somewhat strictly construed. An agent's authority to act must be found in express words or by necessary implication in the power. A general power to incumber real estate, without declaring for whose benefit it may be incumbered, will not warrant the attorney in incumbering it for the benefit of himself or any third person.
2. The statute (R. S., p. 111, § 17), concerning conveyances by married women, required that her acknowledgment should be taken "separate and apart" from her husband, and the officer "shall certify that the same was made upon examination separate and apart from and *out of the presence* of the husband, that the contents, meaning and *effect* of such deed were, by him, fully explained to her." *Held*, that a certificate of acknowledgment, containing the words "separate and apart," but omitting the words "out of the presence," was a substantial compliance with the statute. And that the "contents and meaning" being explained, the party could not be said to be ignorant of the effect of the deed.
3. It is not necessary to *prove* (R. S., p. 109, § 14), the identity to the certifying officer, of one making acknowledgment of the execution of a deed, when the officer has knowledge of the identity from a source that satisfies his conscience: as through introduction by a mutual friend.
4. Although the wife stands in the relation of a surety to her husband when her realty is mortgaged to secure his individual debt, yet if she unite with her husband in the execution of a mortgage, and makes due acknowledgment thereof, it will be upheld although no consideration passed to her.
5. It is a presumption of law, that the shares of several co-tenants, whether they be tenants in common or joint-tenants, are equal.
6. Where the parties to a trust deed stipulate that there shall be no equity of redemption, they are bound thereby; and that a court of equity prohibited a sale under such trust deed for a short time, is a matter of which neither the grantor, nor one holding under him, can complain.
7. To grant affirmative relief to a defendant in equity, in the absence of a cross-bill, is not in conformity with approved practice.

Error to District Court of Arapahoe County.

THE power of attorney mentioned in the opinion of the court, which was given by Hofstadt to Anthony Bohl-scheid, was as follows :

"Know all men by these presents, that I, Arnold Hof-

stadt, of the county of Park, in the Territory of Colorado, have made, constituted and appointed, and by these presents do make, constitute and appoint Anthony Bohlscheid, of the county of Arapahoe, in the Territory of Colorado, my true and lawful attorney for me and in my name, place and stead, to sell and convey by warranty deed, or deed of trust, or by deed of mortgage, or to lease for one or more years, not exceeding three, as my said attorney may deem most advisable or proper in the premises, all of that portion of lots numbered thirty (30) and thirty-one (31) and thirty-two (32), in block B, in the east division of Denver City, giving and granting unto my said attorney full power and authority to sell and convey the aforesaid described lands by warranty deed or deed of trust, or deed of mortgage, or to lease and rent for one or more years, not exceeding three, as my said attorney may deem most advisable or proper in the premises, and to that end to sign my name to any conveyance or lease he may make to said lands, and to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present with full power of substitution and revocation, and an attorney under him to appoint, if necessary, in the premises, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done, by virtue hereof.

In witness whereof I have hereunto set my hand and seal the 14th day of July, A. D. 1873.

(Signed) ARNOLD HOFSTADT."

"Signed, sealed and delivered in presence of A. M. James, and duly acknowledged before a notary."

THATCHER, C. J. In December, 1872, Adeline Groulough, being seized of the premises in dispute, united with her husband in conveying the same to Arnold Hofstadt and Zevirah Bohlscheid. The vendees paid \$1,300 cash, and executed a mortgage on said property to secure the payment of

\$900, being the balance of the purchase-money. This mortgage will hereafter be referred to as the Groulough mortgage. In July, 1873, Arnold Hofstadt, having removed from Denver, executed a power of attorney to Anthony Bohlscheid, the husband of his copurchaser, empowering him to sell and convey by warranty deed, or deed of trust, said premises. In August, 1873, Anthony Bohlscheid procured a loan of \$2,000 from Abraham A. Hammond for which sum he executed his individual note, the payment of which was secured by trust deed on said premises executed by Zevirah Bohlscheid and Anthony Bohlscheid, her husband, and by Arnold Hofstadt, through Anthony Bohlscheid, his attorney, in fact. Although the sum borrowed was \$2,000, Bohlscheid received but \$1,300, the remaining \$700 being placed in the hands of A. S. Blake, Esq., the trustee named in the deed, to be paid by him upon the Groulough mortgage, as soon as a certain suit against the premises then pending in the district court of Arapahoe county, in which Adeline Groulough and Joseph Groulough *et al.* were defendants, should be decided in their favor.

In January, 1874, Arnold Hofstadt and Zevirah Bohlscheid sold and conveyed said premises to Caroline Nippel, the incumbrances created by the mortgage and deed of trust not having theretofore been released. June 2d, A. D. 1875, the Groulough mortgage was foreclosed pursuant to a decree of court, and Mrs. Mary B. Hammond, relict of her husband, Abraham A. Hammond, being then dead, bought the property at the foreclosure sale and received from the master in chancery a certificate of sale therefor.

By her bill the complainant seeks the cancellation of the trust deed and the redemption of the property from the master's sale.

Our first inquiry will be directed to a consideration of the power of attorney under which Anthony Bohlscheid acted in executing the deed of trust.

By the power of attorney, Anthony Bohlscheid was authorized "in the name, place and stead" of his principal

"to sell and convey the premises by warranty deed, or deed of trust, or by deed of mortgage, as he might deem advisable." The trust deed was executed for the sole purpose of securing the individual note of Anthony Bohlscheid. It is recited in the deed that "Anthony Bohlscheid has executed one promissory note, payable to the order of A. A. Hammond."

All written powers are to be somewhat strictly construed. An agent's authority to act must be found in express words or by necessary implication in the power.

If the agent transcends the prescribed limits of his authority, the act is nugatory. By an inspection of the record, Mr. Hammond could have learned the extent to which and the purpose for which Anthony Bohlscheid was empowered to act by virtue of the letter of attorney, and of its legal effect he was bound to take notice at his peril. There is neither in terms nor by implication any delegation of authority to the attorney to incumber the property for the benefit of any other person than his constituent. The power conferred is clearly a power to act for, in the name and for the benefit of the principal. A general power to incumber real estate without declaring for whose benefit it may be incumbered, will not warrant the attorney in incumbering it for the benefit of himself or any third person. It hence results that the deed of trust was ineffectual to convey Arnold Hofstadt's interest in the premises described therein.

It is attempted to invalidate the trust deed as to Mrs. Bohlscheid's interest on the ground that the certificate of acknowledgment is defective. The objections necessary to consider are :

First—That the notary public did not make known to Zevirah Bohlscheid the "effect" of the trust deed.

Second—That said certificate does not state that the notary examined the said Zevirah Bohlscheid "out of the presence" of her husband.

Third—That the officer does not certify that Mrs. Bohl-

scheid was proved by the oath of some competent, credible witness to be the identical person who executed the deed.

The notary, after certifying that Zevirah Bohlscheid and Anthony Bohlscheid personally known to him as the persons whose names were subscribed to the trust deed, appeared before him in person and acknowledged that they signed, sealed and delivered the same as their free and voluntary act, proceeds in his certificate as follows: "And the said Zevirah, wife of the said Anthony Bohlscheid, having been by me examined separate and apart, and out of hearing of her husband, and the contents and meaning of said trust deed having been by me made known, and fully explained to her, acknowledged that she had freely and voluntarily executed the same and relinquished all her right, title and interest to the lands and tenements therein mentioned, without compulsion of her said husband, and that she does not wish to retract the same."

As will be observed, instead of the statutory words, "out of the presence," the certifying officer uses the word, "out of hearing," and omits the statutory word "effect" after the words "contents and meaning." R. S., p. 111, § 17.

The language of section 17 is: "Married women may convey their estate in lands by uniting with their husbands in any conveyance thereof, and acknowledging the same separate and apart from their husbands, and the officer hearing such acknowledgment shall certify that the same was made upon examination separate and apart from, and out of the presence of the husband of such woman, that the contents, meaning and effect of such deed were by him fully explained to her."

Is the omission of the words, "out of the presence of," fatal to the acknowledgment? There must be a *substantial*, though not necessarily a literal compliance with the statute. If the substituted words employed, considered in connection with the entire acknowledgment, do not reasonably import that Mrs. Bohlscheid was examined "out of the presence" of her husband, the acknowledgment would be

insufficient. Within the intent of the section just quoted the words, "separate and apart from," evidently include in their meaning "out of the presence." The section in terms declares that the married woman shall *acknowledge* the deed "separate and apart from her husband," omitting the words out of the presence. That the legislature intended by this language that the acknowledgment should be taken in the absence of the husband is apparent from the subsequent part of the section, which directs that the officer taking such acknowledgment shall certify that the same was made upon examination, separate and apart from, and *out of the presence of the husband*. By no rational construction can it be said that when a husband is in the presence of his wife, that she is separate and apart from him. Accordingly it is held, where an examination of the wife is required by statute to be made "separate and apart from her husband," that such examination must necessarily be out of the presence and hearing of the husband. *McCandless v. Engle*, 51 Penn. St. 309.

The supreme court of the United States, in the case of *Deery v. Cray*, 5 Wall. 807, held that a certificate to the effect that a married woman was examined *apart* from her husband, can mean nothing less than "that the husband was not present when she was examined." The officer certifies that the contents and meaning of the deed were made known and fully explained to Mrs. Bohlscheid. With knowledge and full explanation of the contents and meaning of the deed she executed, she could not be said to be ignorant of the *effect* of the deed. Considered as a whole we are satisfied that the certificate contains every *essential* requirement of the statute, and more than this the law does not exact. *Canal and Dock Co. v. Russell*, 68 Ill. 432, and cases there cited; *Morse v. Clayton*, 13 Smedes & Marshall, 381; *Davar v. Cardwell*, 27 Ind. 478.

Not only is the acknowledgment in substantial compliance with the statute, but the evidence, so far as it is responsive to the issues, shows the absence of fraud and

imposition ; that the husband was in fact not present when the wife acknowledged the deed ; that the officer, before taking her acknowledgment, performed his duty by making known and explaining to her the contents and meaning thereof.

The allegation in the bill that Zèvirah Bohlscheid did not personally appear before the certifying officer is wholly unsupported by evidence.

It is objected that even if Mrs. Bohlscheid did personally appear before the certifying officer, and acknowledge the deed of trust in compliance with the statute, the acknowledgment is without validity, for the reason that the officer failed to certify that Mrs. Bohlscheid was *proved* by the oath of some competent, credible witness to be the identical person who executed the deed. R. S., p. 109, § 14.

It is admitted that no one was examined on oath as to the identity of Mrs. Bohlscheid. By her husband, at his own house, the officer was introduced to her. The husband and the notary were well acquainted with each other. The statute of New York regulating the acknowledgment of deeds (1 R. S., N. Y., p. 758, § 9, 15, marginal), provides : "No acknowledgment of any conveyance having been executed shall be taken by any officer, unless the officer taking the same *shall know or have satisfactory evidence* that the person making such acknowledgment is the individual described in and who executed such conveyance." The courts in that State are agreed that "*satisfactory evidence*," within the intent of that section, means legal evidence to be taken *under oath*. When may the oath be dispensed with ? Under what circumstances is the officer justified, in the absence of such sworn evidence, in certifying an acknowledgment ? This question was very fully considered by the supreme court (General Term) of New York, in the case of *Wood v. Bach*, 54 Barb. 142. In that case, the court, repudiating the earlier doctrine laid down in *Watson v. Campbell*, 28 Barb. 422, and in *Jones et al. v. Bach et al.*, 48 id. 568, says : "Knowledge of persons

and their identity is most frequently acquired by introduction through mutual friends, and when such introduction has taken place, the parties certainly know each other. Every day men in social life thus become known to each other, and I never heard that such an introduction was not sufficient, or that any length of time after it must elapse to justify a statement or certificate that they were acquainted. When an introduction does not proceed from such a source as satisfies the officer's conscience, undoubtedly he should not certify that he knows the party, but should require 'evidence,' which, of course, must be on oath; but when the character of the introducer—whom the officer knows—conveys knowledge to the officer's conscience, he may well be satisfied and may properly give the certificate."

"In this case, the parties making the acknowledgment were introduced to the officer, the ordinary way of becoming known, by one in whom he had such confidence, that he had no doubt that they were the persons they purported to be. Upon that, in social life, he would have been regarded as knowing them, and knowing them in social life, he had the right, if his own conscience were convinced, from that knowledge of their identity, to take their acknowledgment in his official capacity. Suppose these persons had been introduced to the notary by the same gentleman a week before, and that they had gone to him when they made the assignment, and he had taken their acknowledgment, will anybody pretend that he could not certify that he knew them? That case does not differ in principle from this."

These views, we think, are a fair reflex of the intention of our legislature in enacting the statute under consideration. To adopt a different construction would, we think, be to depart from the reasonable purpose of the framers of the law, and to aim a dangerous blow at the stability of land titles in Colorado.

It is insisted that if this interpretation be enforced, that the certifying officer may be more easily imposed upon, than

if an oath be required. In answer to this objection, the court, in the case cited *supra*, further says: "If parties desire to personate others, there is much more probability of it being done through the medium of the oath of a stranger, experience having shown that persons willing to commit perjury for such purposes are not difficult to be found, than that it will be accomplished through the instrumentality of an introduction by a respectable friend to a reputable officer."

But it is urged that prior to the act of February 12, 1874 (Sess. Laws, p. 185), a married woman could not secure the debt of her husband by a mortgage or trust deed on her real estate. It is true that before the passage of that act she could neither alienate absolutely, nor mortgage her realty, without uniting with her husband. But here the provision of the former statute requiring husband and wife to join in the execution of a conveyance was observed. Although the wife stands in the light of a surety to her husband when her realty is mortgaged to secure the individual debt of her husband, and although her realty becomes thereby subject to absolute alienation by foreclosure of the mortgage, the better doctrine is, that if she unite with her husband in the execution of the mortgage and make due acknowledgment thereof, it will be upheld even though no consideration passed to her. *McFerren et al. v. White and wife*, 6 Coldwell, 499; *Swan v. Wiswall*, 15 Pick. 126; *Philbrook v. McEwen et al.*, 29 Ind. 347; *Hawley v. Bradford*, 9 Paige's Ch. 199; *Eaton v. Nason*, 47 Me. 132; *Demarest v. Wynkoop*, 3 Johns. Ch. 129.

It is assigned for error that the court, by its decree, held that the trust deed created a lien upon the undivided half of the premises in controversy. The bill alleges that the premises were conveyed by Adeline Groulough and Joseph Groulough "by deed jointly to Arnold Hofstadt and Zevirah Bohlscheid." It is a presumption of law, that the shares of several co-tenants, whether they be tenants in

common or joint-tenants, are equal. 1 Washburn on Real Property, * 407.

This presumption is not only not rebutted, but is strengthened by the evidence adduced. This specification of error is, therefore, not well founded.

The court found that there was due to Mary B. Hammond in her own right eleven hundred and two dollars and sixty-seven cents (being the sum for which the premises were sold to her at the foreclosure sale), with interest thereon at ten per cent per annum, from the 2d day of June, A. D. 1875, to the date of the finding, and that there was due to Mary B. Hammond as executrix of the estate of Abraham A. Hammond, deceased, upon the note mentioned in the deed of trust, the sum of eleven hundred dollars with interest thereon at the rate of one and one-half per cent per month, from the 22d day of January, A. D. 1875, to the date of the finding, and that for said sum with interest, the said deed of trust was an incumbrance and second lien upon the said undivided one-half of the premises in controversy. These findings were justified by the evidence. As of the \$2,000 purported to be loaned on the promissory note secured by the trust deed, only \$1,300 reached the hands of the borrower, \$700 having been returned by Mr. Blake, the trustee, the court properly computed the amount due on the basis of a \$1,300 loan.

It is assigned for error that the time limited—ten days—within which to redeem was oppressively short.

It is insisted that, following the rule laid down in *Packard v. King*, 3 Col. 211, "the time in which payment is to be made should not be limited to a shorter period than ninety days, the life-time of an execution." That rule does not apply to this case. From the foreclosure sale, Mrs. Nippel could have redeemed without a decree of court at any time within the period fixed by statute. That period had elapsed long before the rendition of the decree. Under the trust deed the parties thereto stipulated that there should be no equity of redemption. By their stipulation they are bound.

That the court, in the exercise of its equity discretion, prohibited a sale under the trust deed for a short space of time is not a matter of which the plaintiff in error can complain.

The court decreed *inter alia* as follows: "And it is further ordered, adjudged and decreed by the court, that in the event of the said Caroline Nippel failing to pay unto the said Mary B. Hammond in her own right or as executrix of the estate of the said Abraham A. Hammond, deceased, *either* the said sum of \$1,102.67, with interest *or* the said sum of \$1,100, with interest for the purposes, and in the time and manner herein provided, the same appearing to the court by the proofs and report of the said master to be taken and made in accordance with this decree, and in that event the said David W. Crater, master in chancery as aforesaid, shall make, execute and deliver unto the said Mary B. Hammond, a master's deed for the whole of the aforesaid premises described in said bill, and which deed shall convey to the said Hammond the absolute fee simple title to the said above-described premises, and shall forever bar any right, title, benefit and equity of redemption which the said Caroline Nippel, or her heirs or assigns, or her grantors, have or may have had in said premises. And upon the making, execution and delivery of said last-mentioned master's deed unto the said Mary B. Hammond, she, the said Mary B. Hammond, is adjudged to have full title to it, and full right to an immediate entry upon and full possession of said premises to the exclusion of said Caroline Nippel or any of her assigns, lessees or representatives, and to the exclusion of all other persons whatsoever."

It will be observed that the court decreed that upon failure of Mrs. Nippel to pay either the sum found due on the trust deed, or certificate of sale, the master should execute a deed to Mrs. Hammond for the entire premises. This was clearly error. Had she paid Mrs. Hammond the amount due her, in her own right, as purchaser at the foreclosure sale, upon no principle of law or equity, had Mrs. Hammond, either in her own right or in her representative

capacity, any interest in, or right to a deed of, the premises as an entirety. Only, after a duly advertised sale of the premises to satisfy the trust deed (in the event that the first lien had been discharged by redemption), could an undivided half of the premises have been sold and conveyed. This part of the decree is inconsistent with other parts, and it is claimed by defendant in error that it is a clerical mistake.

But we cannot say that it did not operate to Mrs. Nippel's prejudice. By what right did the court grant specific relief upon the defendant's answer? It was not only decreed that possession of the premises be surrendered to Mrs. Hammond, but also that an order of *habere facias* should be issued for the purpose of enforcing the decree. It was also decreed that upon a certain contingency named in the decree, Edmund A. Willoughby, who was sheriff of the county of Arapahoe when the trust deed was executed, should sell and convey an undivided half of the premises in controversy, in the manner as provided in the said trust deed. It is evident that the court, having all the parties in interest before it, and having, by the evidence adduced, acquainted itself with the facts, sought to adjust completely all the equities between the parties by its decree. This was undoubtedly the proper course if warranted by the pleadings. But to grant affirmative relief to defendant in the absence of a cross-bill is not in conformity with approved practice. In the case of *Stone v. Smoot*, 39 Ill. 409, which was a suit in chancery brought for the purpose of enjoining the further prosecution of an action of ejectment, the lower court rendered a decree, no cross-bill having been filed, that the plaintiff in error (being the defendant in the ejectment suit) surrender possession of the premises to defendant in error. The supreme court says: "The defendant only having answered the bill and failing to file a cross-bill, it was manifestly wrong to decree specific relief to the defendant. When the bill was dismissed, nothing remained upon which the court could act, except to render

a decree for costs. A decree requiring complainant to surrender possession was, in the absence of a cross-bill, no more authorized than to have rendered such a decree on a motion entered by defendant for such relief. This being affirmative relief, it could not have been properly granted, except on a bill filed for the purpose of obtaining it, either as an original or cross-bill." With a view to a complete adjustment of the equities between the parties, the court might have directed the filing of a cross-bill. But in its absence the court erroneously decreed specific relief. *Abbott v. Monti*, 3 Col. 561.

The decree of the lower court will be reversed, with leave to the defendants to file a cross-bill, without prejudice to the testimony already taken. *Reversed.*

EQUITY OF REDEMPTION.—Court of equity in its discretion may fix a short period for payment of amount due before sale under trust deed shall take effect, and neither party can complain of this: *Denver B. & M. Co. v. McAllister*, 6 Colo. 285.

DUGGAN v. BLISS.

A condition, in a deed of assignment, requiring the creditors to release the assignor from all claims before receiving any benefits under the deed, the surplus returning to the debtor and not to the non-releasing creditors, renders the deed fraudulent and void.

Error to County Court of Arapahoe County.

REPLEVIN.—Declaration in the *cepit* and *detinet*. Pleas *non cepit, non detinet*, property in defendant, and property in one J. H. Grout.

Bliss, the defendant in error, being the assignee of J. H. Grout, brought this action in replevin to recover certain property seized by Duggan, the plaintiff in error, a constable, under three writs of execution issuing out of a justice court against Grout in favor of A. Bradley & Co., creditors of Grout. The cause was tried without the intervention of a jury, and Bliss had judgment. The material portions of the deed of assignment under which Bliss claimed to recover are set out in the opinion.

Exceptions to the finding and judgment of the court were duly reserved, and the following errors are assigned in the record in this court :

“First — The county court erred in admitting in evidence the deed of assignment made by the said James H. Grout to the said William M. Bliss.

“Second — The said court erred in finding the property in the writ and declaration mentioned, to be in the defendant in error.

“Third — The said court erred in giving judgment in favor of the defendant in error, and against the plaintiff in error, for the said property and for costs.”

Mr. JOHN W. BLACKBURN, for plaintiff in error.

Mr. V. D. MARKHAM, and Messrs. PATTERSON & CAMPBELL, for defendant in error.

STONE, J. The sole question to be decided in this case is, whether the assignment made by James H. Grout is fraudulent and void on its face, as being calculated in law to hinder, delay and defraud his creditors for whose presumed benefit the assignment is made. The chief objection to the assignment arises out of a condition of release contained therein.

That portion of the deed providing for the execution of the trust by the assignee is as follows : * * * “out of the proceeds arising from the sale of the said property, goods, chattels and effects, as well as from collections, after paying the costs, charges, expenses and compensations aforesaid, he shall pay : *First* — All debts due by the said party of the first part to any of the following named persons : A. Bradley & Co. ; Hibbard, Spencer & Co. ; Adams & Westlake ; William Blair & Co. ; Thomas White ; Comstock Castle ; George Brond ; George Tritch ; Perry & Co. ; Tappan & Co. ; Manning, Bowman & Co. ; N. M. Simmons ; G. J. Cottrill ; Craig Brothers & Chandler, who shall, within sixty days from and after the date of these presents, that is

to say, on or before the first day of August of the present year, execute to the party of the first part a full release to the amount of their respective claims. The said debts to be paid in full, if there be sufficient proceeds for that purpose, otherwise to be ratably and in proportion to their respective amounts. The above-named creditors being a full list of the creditors of the said party of the first part who have claims against him for account of his business aforesaid. *Second* — After fully paying and satisfying all such creditors as may have executed the release and discharge specified, in the time specified, then to pay and satisfy any of the above-named creditors who have refused or neglected to execute such release and discharge. *Third* — The surplus, if any, to be paid to the party of the first part, his heirs, executors and administrators.” * * *

Does the condition of release affect the validity of the assignment?

This question, although raised for the first time in this State, is not a new question to the courts.

The innumerable business failures in the commercial world have, in the last fifty years, flooded the courts of this country and England with cases involving every conceivable question pertaining to the rights and liabilities of debtor and creditor under deeds and contracts growing out of bankruptcies, assignments of debtors and composition of creditors, among which the question raised in this case has, in our American courts, received its full share of discussion. We shall not attempt a full review of the cases involving this question, since it has been so frequently done in the leading cases, that a repetition here could add nothing to the stock of knowledge already possessed by the profession on this subject. Whether a condition of release in an assignment of the property of the debtor for the benefit of his creditors renders the deed fraudulent and void, either *per se* or as against objecting creditors under the statute of 13 Elizabeth, 5, has been variously held by the courts of last resort in the several States.

The English cases involving this precise question are so few and meagre, and so far modified by the policy of bankrupt laws, that they can scarcely be regarded as authoritative on the point in this country.

Counsel for defendant in error cite Burrill on Assignments (3d ed.), 232, as authority that "in England a stipulation in an assignment for the release of the debtor, as a condition of receiving the benefit of the deed, has been held valid even against a claim of the crown," but in support of this declaration the author of the text seems to rely solely upon the case of *The King v. Watson*, 3 Price (Exch.), 6, in which the principal question appears to have been, whether the assignment was not void under the bankrupt laws; and, indeed, most of the English decisions in cases of assignment are affected by considerations arising out of their bankrupt system.

Looking to the decisions in the courts of the United States, we find considerable conflict of opinions; some supporting such assignments, but in the majority of cases where the precise question raised here has been distinctly passed upon, uncontrolled by other considerations in the case, they have been held illegal. Where they have been sustained, has been generally in the first decisions on the subject in the earlier days of the republic, when our legal and commercial policy had but slightly departed from that of the mother country.

In Pennsylvania, Virginia and South Carolina, assignments for the benefit of such as shall release, are held valid, "being now too long established to be overthrown." 1 Am. Lead. Cas. (5th ed.) 83. In the leading Pennsylvania case, however, *Lippincott v. Barker*, 2 Binney, 174, Chief Justice TILGHMAN concludes, by saying: "I beg, however, to be distinctly understood, that my opinion is confined to the circumstances of the present case, for there are many and strong objections to deeds of assignment made without the privity of creditors, and excluding all who do not execute releases:" while Judge BROOKENRIDGE, in a dissenting

opinion, of ability and eloquence, pronounces the deed fraudulent and void.

The case of *Brashear v. West*, 7 Pet. 608, is strongly relied on in support of the validity of such assignments. But this case coming from Pennsylvania, the decision is based on the settled construction supposed to have been given to the law of that State by the case of *Lippincott v. Barker*, *supra*; and Chief Justice MARSHALL, who delivered the opinion, after stating that "the construction which the courts of that State have put upon a Pennsylvania statute of frauds, must be received in the courts of the United States," declares: "Yet we are far from being satisfied that upon general principles, such a deed ought to be sustained."

The case of *Halsey v. Whitney*, 4 Mason, 206, has also been relied upon as authoritative on this point; but the learned Justice STORY, in delivering the opinion, stated the grounds on which his judgment was pronounced to be, that the decisions in Massachusetts had left the question up to that time *in equilibrio*, but that taking into consideration the great length of time during which stipulations of this nature had prevailed in that State without objection, there was much reason to believe that the profession had deemed the law settled in favor of the debtor on this point; and then he significantly adds: "I am free to say, that if the question were entirely new, and many estates had not passed on the faith of such assignments, the strong in inclination of my mind would be against the validity of them."

The earlier cases in Maine, New Hampshire, Vermont, Rhode Island, and perhaps in Massachusetts, sustain the validity of such assignments, although the district court of Maine held the contrary doctrine in the case of *Lord v. The Brig Watchman*, Ware, 242. For many years, however, the statutes of all those States, except perhaps Rhode Island, have prohibited assignments containing such conditions of release.

In the first case involving this question which came into

the supreme court of Maryland (*McCall v. Hinckley*, 4 Gill, 129), the decree of the chancellor sustaining the assignment was affirmed by a divided court, but the learned and exhaustive opinion of DORSEY, J., against the validity of the deed, is unanswerable, and later decisions of that court, like those of Connecticut and Illinois, are to the effect that the requirement of a release as a condition of participation in the fund, the surplus resulting to the assignor, is fraudulent and avoids the deed. *Malcomb v. Hodges*, 8 Md. 418.

Among the States that hold squarely against the validity of release conditions in such assignments, are New York, Ohio, North Carolina, Georgia, Mississippi, Texas, Tennessee and Missouri.

The leading case in New York, and which has been followed by many of the other States, is the case of *Grover v. Wakeman*, 11 Wend. 190, which contains a full review of the authorities, English and American, and an elaborate and able discussion of the question upon principle, by a number of the twenty-four eminent jurists and senators who composed the Court of Errors of that day. By that and other decisions in New York, it has become the settled doctrine in that State, not only that a stipulation for a release as a condition of receiving a benefit under the deed, the surplus returning to the debtor, in exclusion of non-releasing creditors, is fraudulent, but that such a stipulation as a condition of preference, though the only penalty be the postponement of non-releasing creditors to others, avoids the deed. The principle established in *Grover v. Wakeman* and subsequent cases is, that although preferences are allowed, the appropriation of the property to the use of the creditors must be absolute and unconditional, and that the creation of a trust that is to operate as a coercion of the creditors into a relinquishment of part of their demands, is fraudulent and void, though no portion of the property be reserved to the debtor's own use. The law of Ohio, and that of Missouri, goes to the same extent. *Barrett & Nicholson v. Reed et al.*, Wright, 701; *Atkinson et al. v. Jourdan*

et al., 5 Ohio, 294 ; *Brown v. Knox* ; *Boggs v. Knox*, 6 Mo. 302.

The earlier cases in Alabama were in support of such assignments, although the principle was condemned in several cases, but the later cases in that State have approved and adopted the general principle of *Grover v. Wakeman*, that an assignment for the benefit of creditors must be absolute and unconditional, without reserved benefit or attempted coercion. See 1 Am. Lead. Cas. 83.

It is insisted by counsel for defendant in error that the release clause in the deed amounts at most to a mere preference of creditors, "which right of preference has always and everywhere existed ;" but we cannot take this mild view of the case. True there is no reservation to the debtor of any portion of the property assigned, in terms, but there is none the less a reserved benefit to him in the discharge of debts which he contracted to pay ; a benefit which he seeks to secure for himself by attempted coercion of the creditors through this very "preference." The debtor in this case in effect says to his creditors : "Those of you who agree to release me from my obligations, can take all my property and divide among you ; there may be enough to pay you in full, or may not ; you take the chances of being paid in full or in part, the refusing creditors may get something ; they take the chances of getting paid something or nothing ; I take the surer chance of a discharge from my obligations in whole or in part." In short, the creditors take the doubtful chance of getting all they are entitled to, while the debtor takes the almost certain chance of paying less than he agreed to pay. If all the creditors should consent to release, there could evidently be no preference. So, too, if all should refuse. There is no absolute preference in the case.

Without expressing any opinion as to the validity of assignments creating preferences merely, it is sufficient to say that the preference here claimed is incidental to the attempted coercive discharge of the debtor. By such dis-

charge, he reaps a certain benefit. He seeks, in effect, to legislate in his own interest; to make for himself a private bankrupt law independent of statutory enactments. He seeks to execute this law he has made, and procure his own discharge by compelling his creditors to take what he has offered them. There is a positive delay of the creditors by placing the property out of the reach of their legal pursuit, and preventing a distribution within two months after the date of the deed. The creditors then are to be delayed in receiving the avails of property which ought to belong to them immediately upon its conveyance to the assignee. For whose benefit is this delay? Not for the creditors, for they will get no more after assenting to or refusing the conditions proposed than they would get at once, without any such condition. The delay is manifestly intended to benefit the debtor in order that he may secure the advantage of the coveted release to which he has no rightful claim.

In *McCall et al. v. Hinckley et al.*, cited *supra*, Judge DORSEY, of the court of appeals of Maryland, says: "That a model of such an assignment as that now before us could have been substituted for the old and common form of a deed of composition, is strange, indeed. And it can only be accounted for by supposing it to be the cunningly devised invention of him who, in stretching his ingenuity to rescue the debtor from the power and rights of the creditor, lost sight of the principles of both law and morality."

And Judge BRECKENRIDGE, in giving his opinion in *Lippincott v. Barker*, 2 Binney, 174 (4 Am. Decis. 444), declares that "it has been left to the *astutia Americana* of debtors to devise such a warehousing of effects out of the hands of the law for a time, for the benefit of particular creditors. I think it to the let and hindrance of creditors and that such disposition is void, both at common law and by statute, though not fraudulent in fact in the particular case, yet fraudulent in law, and, therefore, void. It is not simply a surrender of his property as satisfaction *pro rata* of his debts, that the insolvent has in view. He couples an

interest for himself in obtaining a discharge from that proportion of the respective debts which may remain unsatisfied. It is taking an undue advantage of the situation of the creditor to impose this condition. It is immoral to exact it. *Volenti non fit injuria* if the creditor accepts, but it is making a volunteer by compulsion, and is, in fact, a robbery. One enlightened on the principles of moral honesty, would never think of it. He would give what he had to one or more, or to the whole of his creditors, but he would never think of annexing a condition precedent or subsequent to such surrender. Of such conditions, a chancellor would not compel a fulfillment. I can think of nothing morally honest, or strictly legal, but the indefinite, unconditional surrender of the property. Pass this boundary, and I can draw no line where an assignment shall be supported and where not."

In *Grover v. Wakeman*, referred to *supra*, Justice SUTHERLAND expresses the views of the court upon this point as follows: "Where the assignor parts with all control over the property, and devotes it absolutely to the benefit of his creditors, without any reservation or stipulation for his own advantage, the honesty of his intention is so apparent, and the advantage to the creditor so direct and decisive, that they cannot be said to be obstructed or delayed in their remedies. But where, instead of distributing his property among his creditors as far as it will go, he places it beyond their reach by an assignment, not merely for the purpose of saving it from one particular creditor to be given to another, or to be equally divided among all, but for the purpose of enabling him to extort from some or all of them an absolute discharge of his debts as the condition of receiving a partial payment, he perverts the power to a purpose which it was never intended to cover, and which the principle, on which the right to give preferences is founded, will not justify. Why should a debtor be permitted in this way to operate on the fears of his creditors and coerce them into his own terms? It has sometimes been said in answer

to this view of the case, that there is nothing immoral or unjust in a debtor in embarrassed circumstances, and who is unable to pay all his debts, making the best arrangements in his power with his creditors, and giving the largest dividend, or the whole, to those who will settle with him on the best terms; and if he can do this while he retains his property in his own hands, there is no reason, it is said, why he should not be permitted to do it under cover of an assignment.

Parties not under legal disabilities may make such contracts as they please, and, if supported by a consideration and there is no fraud in the case, they will not be disturbed. * * * * * But the case is materially changed when the debtor first places his property beyond the reach of his creditors, and then proposes to them terms of accommodation. He obstructs their legal remedies, hinders and delays them in the prosecution of their suits, by putting his property in the hands of trustees with the view of getting an absolute discharge from his debts, and exempting his future acquisitions from all liability."

Judge VAN NESS, in *Hislop v. Clark*, 14 Johns. 458, states what I consider to be the sound principle upon this subject. He says an insolvent debtor has no right to place his property in such a situation as to prevent creditors from taking it under the process of a court of law and to drive him into a court of equity, where they must encounter expense and delay, unless it be under very special circumstances and for the purpose of honestly giving a preference to some of his creditors, or to cause a just distribution of his estate to be made among them all. Judge SPENCER, in *Austin v. Bell*, 20 Johns. 442, and Chancellor KENT, in *Seaving v. Brinkerhoff*, 5 Johns. Ch. 329, obviously concurred in the soundness of that proposition. The Supreme Court of Errors in Connecticut adopted it in *Ingraham v. Wheeler*, 6 Conn. 277, and it was most happily and impressively amplified and illustrated by the learned judge of the United States district court for the State of Maine,

in the case to which I have referred. *Lord v. Brig Watchman*, Ware, *supra*. "After the maturest reflection upon this subject, I have come to the conclusion that the interests, both of debtor and creditor, as well as the general purposes of justice would be promoted, if the question is still an open one, by confining these assignments to the single and direct appropriation of the property of the debtor to the payment of his debts."

And Senator TRACEY, sitting in the same case, declares: "The law does not recognize any right on the part of an insolvent debtor, to an absolute discharge from his creditors on distributing among them his estate. One who contracts a debt agrees not merely that he will pay it if his present property is sufficient, but also if his future exertions shall give him the power. In short, he pledges but the property he possesses, and his capacity to acquire property."

We have quoted this much from the matured opinions of eminent jurists, in some of the leading cases covering the question we are considering, realizing the impossibility of expressing so well and forcibly in any language of our own, the doctrine and principles which we think must apply in this case. Colorado has no statute law relating to bankruptcy, or governing the disposition of the estates of insolvent debtors. The question here considered is, therefore, an open question and must be settled by the principles of enlightened justice as well as by the principles of the common law, under the statute of 13 Elizabeth, as interpreted and applied by the highest courts of the country; and in the conflict of authorities upon the subject, we think it will be found that the great weight of reason and authority is against the validity of assignments imposing such conditions. A late law writer lays down the doctrine upon this subject thus: A condition in a deed of assignment requiring the creditors to release the assignor from all claims before receiving any benefit under the deed, the surplus returning to the debtor, and not to the non-releasing creditors,

renders the deed fraudulent and void ; *and such a stipulation as a condition of preference*, although the only effect is to postpone the non-releasing creditors to a share of the surplus, renders the assignment void. The principle is, that although preferences are allowed, yet the appropriation of the property to the creditors must be absolute and unconditional, and a trust which coerces the creditors into a relinquishment of part of their claims, in order to enjoy any benefit under the deed, is fraudulent and void, although no portion of the surplus may go to the grantor." 2 Perry on Trusts, § 592.

Numerous authorities are cited in support of the doctrine of this text. And in Burrill on Assignments, the most complete work on this subject extant, the author, upon an elaborate review of the authorities upon the question before us, says (2d ed., p. 172): "Taking into consideration the opinion expressed by Chief Justice MARSHALL, in *Brashaer v. West*, 7 Peters, 608, it seems probable that should a case be brought before the supreme court of the United States, which could be decided on general principles and free from the controlling influence of State construction, the decision would be against the right to stipulate."

Many of the States have legislated upon this subject during the past forty years, and by statutory enactment, have prohibited the making of assignments containing reservations, release clauses, and even preferences. This may be taken as an indication of prevailing sentiment, touching the principles involved in such transactions, as well as a reflex of the weight of judicial decisions.

It is conceded, that in this case there is no fraud in fact, and the question therefore is, whether upon the face of the deed itself, the assignment is fraudulent in law.

In view of the recent repeal of the National Bankrupt Act, the absence of local laws upon the subject, and the consequent necessary settlement of the affairs of insolvent debtors outside the guiding control of legislation, we have given to this case that consideration which its manifest

importance has seemed to demand, and we cannot avoid the conclusion that its determination should be in accordance with the weight of judicial authority, the tendency of modern legislation, and the growing spirit of the law in favor of exact justice between debtor and creditor.

We must, therefore, hold the deed in question fraudulent and void.

The judgment of the court below will be reversed, and the cause remanded for further proceedings not inconsistent herewith.

Judgment reversed.

SMITH et al. v. DISTRICT COURT OF ARAPAHOE COUNTY.

1. The repeal of a statute conferring jurisdiction takes away all right to proceed under the repealed statute, even in suits pending at the time of the repeal, unless they are saved by a clause in the repealing statute.
2. Where the appellate court might have original jurisdiction over the subject-matter of an action, the parties voluntarily appearing and going to trial will thereby waive all objections as to jurisdiction over the person. And where a party once submits himself to the jurisdiction of the court, he may not be permitted afterward to challenge it at his pleasure.

Petition for writ of prohibition.

THE petitioners brought suit before a justice of the peace in Arapahoe county, against Wolfe Londoner. A trial was had, and on the 10th of October, 1872, a judgment was rendered for the plaintiffs for \$201.45. On the 31st day of that month, the defendant prayed and obtained an appeal to the probate court of said county. On the 20th day of November, 1873, the cause was again tried *de novo* in the latter court, on appeal, and a judgment was rendered for the plaintiffs for the same sum. On the 1st day of December, 1873, the defendant prayed and obtained an appeal to the district court. Before the trial of the case in the district court, the law giving appellate jurisdiction to the latter court was repealed.

Appellees, before the trial of the case in the district court, moved to dismiss the appeal, on the ground that the unconditional repeal of the act of 1872 took away all jurisdiction, and that the judgment of the probate court thereby became final, and beyond the power of the district court to review. The motion was denied, and the cause was afterward tried. The jury failed to agree. At a subsequent term of the court, the appellees renewed their motion, which was also denied, and as the district court again announced its intention to try, application was made for this writ of prohibition.

Messrs. BUTLER & WRIGHT, for petitioners.

Messrs. MILLER & CLOUGH, for respondent.

ELBERT, J. The act of 1872 (9 Sess. Laws, 105) provided for appeals from the final judgments and decisions of probate courts to the district court.

This act was repealed, so far as it applied to the probate court of the county of Arapahoe, by the act of 1874 (10 Sess. 217). The repealing act took effect from and after its passage, and contained no saving clause as to actions pending on appeal.

In the case of *Harrison v. Smith*, 2 Col. 625, it was held that an appeal pending under the act of 1872 was rightfully dismissed by the appellate court for want of jurisdiction. The court says: "The repeal of a statute conferring jurisdiction takes away all right to proceed under the repealed statute, even in suits pending at the time of the repeal, unless they are saved by a clause in the repealing statute."

The appeal proceedings which are sought to be prohibited by our writ was one taken under the act of 1872, and was pending and undetermined at the time of its repeal. We have considered the case of *Harrison v. Smith*, cited *supra*, and see no reason for change or modification of the doctrine there announced. The facts disclosed by this

record, however, present the additional question, whether the appellate court may not proceed with the trial in virtue of its original jurisdiction of the subject-matter, the petitioners having expressly or impliedly consented thereto.

In the case of *Kurtze v. McCord*, 1 Col. 164, Justice GORSLINE says: "We think it unnecessary to discuss the question whether the law conferring appellate jurisdiction upon the probate courts has been repealed or not, for in this case the plaintiff in error not only submitted himself to the jurisdiction of the probate court, but, by taking the appeal, thrust himself into the jurisdiction. It cannot be, nor is it denied, but that the probate court had jurisdiction of the subject matter, and by the parties voluntarily appearing and going to trial, they waived all objections as to jurisdiction of parties."

In the case of *Lyon v. Washburn*, 3 Col. 204, Justice WELLS says: "At the close of the case made by the plaintiff in the court below, the defendant put in his testimony and submitted the whole matter to the determination of that court upon the merits without excepting to the jurisdiction in any form. The tacit stipulation which is to be implied from his conduct in this respect is equivalent in its effect to an express waiver of the objection, and inasmuch as the probate court might have entertained the controversy, if the cause had been an original one, the jurisdiction cannot now be questioned."

In the case of *Randolph County v. Ralls*, 18 Ill. 29, the consent of the parties appeared upon the record, and the court say: "The circuit court then had original jurisdiction of the subject-matter, and the parties by voluntarily appearing and consenting to a trial between them upon the subject-matter, waived all objection to jurisdiction of parties.

"The suit stood, so far as the jurisdiction of the court is concerned, the same as if it had been originally commenced in the circuit court in the ordinary way, and the parties brought in by the service of process, or as if they had vol-

untarily entered their appearance without any previous proceedings and without objection gone to trial. * * *

"The rule is that jurisdiction of the subject-matter cannot be conferred upon the court by consent of parties, nor can want of it be waived, but where the law confers upon the court original jurisdiction of the subject-matter, full appearance, without objection, confers upon the court jurisdiction of the persons and it may then be adjudicated."

The cases of *Allen v. Belcher*, 3 Gilm. 594, and *Bisher v. Richards*, 9 Ohio St. 498, are in support of the same doctrine. It appears from the record that at the April term, 1874, and subsequent to the repeal of the act of 1872, the petitioners appeared in the appellate court, and caused the case to be docketed and moved the court for an order requiring the appellant to pay the docket fee, which motion was granted.

At the following September term the petitioners interposed a motion to dismiss on the ground of want of jurisdiction arising from the repeal of the law granting it.

This motion was denied, and it does not appear that the petitioners *excepted* to the ruling. Whether in view of petitioners having docketed the cause and moved for costs, this ruling was proper, we need not say, as they appear afterward to have consented to the jurisdiction.

At the April and September terms, 1875, the cause was *thrice* set for trial, "as well the plaintiff as the defendant consenting thereto," as appears from the record. Subsequently the petitioners went to trial without objection, introduced evidence and submitted the issues to a jury. The jury having failed to agree, the cause, at the October term, 1876, and again at the January term, 1877, was set for trial, "as well the plaintiff as the defendant consenting thereto." At the January term the petitioners again interposed a motion to dismiss on the same grounds as before.

It was perfectly competent for the petitioners, after having interposed their motion to dismiss the appeal for

want of jurisdiction, either before or after it was denied, to waive the objection.

That they did so, abundantly appears from the record, as we have shown. Having once submitted themselves to the jurisdiction of the court, they could not again challenge it at pleasure. To permit it would be trifling with courts and the rights of parties.

Whether, if an exception had been saved to the ruling of the court on the motion to dismiss, any different conclusion would follow we need not decide.

The writ must be denied with costs.

Writ denied.

VOLUNTARY APPEARANCE IS WAIVER OF OBJECTION TO JURISDICTION of the persons: *Thibault v. De La Roche*, 9 Cal. 224; *De La Roche v. De La Roche*, 12 Cal. 228; *Schryver v. Nordick*, 12 Cal. 228; *Jones v. Hertz*, 14 Cal. 41. But merely making a motion to dismiss is no. such an appearance: *Low v. Nelson*, 14 Cal. 412.

DENVER & RIO GRANDE RY. CO. v. OLSEN.

1. It is not proper to submit to a jury the question as to the proper construction of a town ordinance admitted in evidence.
2. When a railway company, in the exercise of its lawful business, in running a train through the street of an incorporated city (which prohibited by ordinance certain animals running at large), killed an animal within the city limits, the animal coming within the prohibition of the ordinance; *held*, that the company was liable only if the animal's death was the result of gross negligence on the part of the company's servants.

Appeal from District Court of Pueblo County.

OLSEN, the appellee, had judgment on the verdict in, the district court, in the sum of \$100.

Messrs. WELLS, SMITH & MACON, for appellant.

Mr. A. B. PATTON, for appellee.

THATCHER, C. J. This was an action to recover damages for the killing of a mule, the property of the appellee, by a freight train of the appellant, in the city of Pueblo, July 1st, A. D. 1876. It was tried in the district court without

written pleadings, having been appealed from a justice's court.

The mule, at the time it was killed, was, and for some time prior thereto, had been running at large within the city limits.

The company's defense is, that it is not liable for the value of the mule, in the absence of gross negligence on its part, as Olsen had suffered the same to run at large in violation of the city ordinance. Instructions to this effect were asked by the company, and refused by the court. By reference to the record we find that section one of "An ordinance" of the city of Pueblo, "to restrain certain animals from running at large," is as follows :

"Section 1. That any cattle, swine, mules, horses, jacks, goats or stallions running at large within the city, are hereby declared to be a nuisance, and any owner or keeper of any such animal who shall suffer the same to run or be found at large, shall be subject to a fine of two dollars for each twenty-four hours such animal shall be suffered to remain at large."

The appellee insists that the substance of the instructions refused, upon this point, were given by the court in instruction number five, which was as follows :

"If you believe from the evidence that the plaintiff voluntarily suffered the mule which was killed to run at large within the limits of the city of Pueblo, *and that the same was contrary to the ordinances of said city*, then, if the animal was killed by a passing train within the limits of said city, the defendant is not liable except upon proof of gross neglect on the part of the agents."

This instruction is, *in the main*, correct, but we think it is erroneous, in so far as it submits to the jury the question as to the proper construction of the town ordinance. It is assumed in argument by the appellee, that his act in permitting the mule to run at large for a continuous number of hours, less than twenty-four, is not in contravention of the

ordinance. This is not its correct interpretation. Whether the mule was permitted to run at large one hour or twenty-four is immaterial. Any mule running at large, without regard to the length of time he is permitted to remain at large, is declared to be a nuisance.

If the jury believed from the evidence that the plaintiff suffered the mule to run at large, the ordinance was violated without regard to the belief of the jury as to its proper construction. The instruction was, we think, misleading. With correct instructions the jury might properly, although they would not necessarily, have found a different verdict.

Although the mule was unlawfully at large, it does not necessarily follow that the company is not liable. If the mule was wantonly killed—if its death was the result of gross negligence on the part of the agents of the company, the plaintiff, notwithstanding the fact that the mule was unlawfully at large, is entitled to recover. The railway company was in the exercise of its lawful business, and its agents had the right to presume that the track would not be obstructed within the corporate limits of the city by animals running at large. They were not called upon to adopt any previous precautions, although required to avoid doing any injury, if it could be prevented at the time.

The true rule is laid down as follows, in 1 Redfield on the Law of Railways, p 523:

“Every one in the exercise of a lawful business has the right to expect, and conduct his business upon the expectation that others will also perform their duty, and if they do not, that they will be required by the administrators of the law to take the natural consequences of such neglect, provided that even when in fault, in exposing themselves or their property to damage and loss from the lawful pursuit of lawful business by others, they be not wantonly damaged by such others, but only from necessity.”

The judgment of the court below is reversed, and the
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cause remanded for further proceedings, not inconsistent with this opinion.

Reversed.

Mr. Justice STONE having been of counsel did not sit in the cause.

CONTRIBUTORY NEGLIGENCE WILL NOT BAR RECOVERY if the defendant, after becoming aware of the danger, failed to use ordinary care to avoid the injury: *Kansas Pac. Ry. Co. v. Granger*, 4 Colo. 528.

JOHNSON v. FISHER.

A wrote to B, requesting further time to C, in which to dispose of certain goods on sale by C, and which B had demanded of C to return, concluding: "I think you had better let him (C) have, until sometime in November, when I will be there and see that all the goods he is unable to send back at that time shall be paid for. So far I guarantee," which proposition was accepted by B; *held*, that the guaranty was limited, and at most that B could recover damages only to the value of the goods sold in the interim between the date of the acceptance of the proposition, and the month of November.

Error to County Court of Arapahoe County.

THE case is stated in the opinion. The defendant below had judgment for costs.

Messrs. BUTLER & WRIGHT, for plaintiff in error.

Mr. JOHN W. HORNER, for defendant in error.

THATCHER, C. J. Charles Johnson, a merchant in Denver, shipped goods at various times during the spring and summer of 1876, to John C. Fisher, at Caribou, to sell on commission. John C. Fisher is the son of the defendant in error. He was accountable to Johnson for all goods consigned to him at their billed price, but was at liberty to return the unsold goods to Johnson, who was to receive them at the price at which they had been billed.

Business being dull at Caribou, but few and small remittances were made to Mr. Johnson. Becoming dissatisfied, Johnson, September 11, 1876, wrote a letter to John C.

Fisher, directing him to continue his sales only until October 1st, and then demanding that he should return to him whatever balance he still had on hand. His father, the defendant in error, desiring that the time should be extended within which the goods might be sold, wrote to the plaintiff in error the 24th day of the same month, from Howardsville, requesting him to forbear for a time. In this letter he says: "I just received a letter from my son in Caribou, in which he says you have requested him to send back the goods he has remaining unsold on the 1st of October. Now he has given me his reasons for not sending you money for one month, and they are good ones, and I think you had better let him have until some time in November, when I will be there and see that all the goods he is unable to send back at that time shall be paid for. So far, I guarantee."

This letter was answered by Johnson, accepting the proposition. The natural interpretation of this letter is, that if the proposition therein contained should be acceded to, he would guarantee payment for all the goods then on hand that should not be returned in November.

It does not purport to be a guaranty for past indebtedness. It relates only to the goods whose return Johnson had requested. Guardedly, in the closing words of his letter, viz.: "So far, I guarantee," he limits his undertaking. In the most favorable view for the plaintiff, the measure of damages recoverable would be the value of goods sold in the interim between the date of the acceptance of the proposition contained in the letter, and the month of November. What goods, or the value thereof, were on hand when the proposition was accepted, nowhere appears. The evidence shows, that in May, 1877, goods were returned to the plaintiff of the value of \$116.89. For aught that appears, it cannot be said that when the proposition to guarantee was accepted, there were any other goods on hand. There is no evidence that a sale of any was made in the interim. Although the testimony of the defendant's

son was taken, the plaintiff did not interrogate him as to the value of the goods on hand. As it does not appear that there was a breach of the guaranty, the court below properly held that there could be no recovery.

The judgment will be

Affirmed.

CLELLAND et al. v. THE PEOPLE.

1. Where there is no authority for a term of court on a particular day, any proceeding at a term so begun and held will be illegal and void.
2. The provision of the Constitution (Art. VI, § 20), empowering the judges of the district courts to fix terms of court until they should be fixed by the general assembly, is not to be construed to be in conflict with the act of 1876 (Laws 1876, p. 66), empowering the judges to order other terms than those prescribed by statute, but is in addition thereto. Where a judge fixed a term, the fact should affirmatively appear in the record.
3. Leave to file a supplemental record which will contain an amendment to a *scire facias* in respect to matters of substance, will not be allowed after error brought.

Appeal from District Court of Fremont County.

THE appellants, Clelland and Toupain, were sureties on the recognizance of John L. and Lewis Camblin, who had been recognized for their appearance to answer an indictment for grand larceny at the district court of Fremont county. The statute provided that the November term of that court should be begun on the second Monday in November. On the 16th of November, 1876, the recognizance was forfeited and *scire facias* issued returnable to the April term following. The defendants demurred; the demurrer was overruled and the defendants pleaded, among other pleas to the writ, *nul. tiel record*, on which issue was joined. Judgment went for the penalty of the bond, and the sureties appealed to this court. Leave was prayed in this court by the attorney-general, after joinder in error,

to file a supplemental record showing an amendment in the *scire facias* in matter of substance, since the appeal.

Messrs. WELLS, SMITH & MACON, for appellants.

Mr. A. J. SAMPSON, attorney-general, for appellees.

STONE, J. The act of February 8, 1876, fixing the terms of court in the third judicial district (Sess. Laws, 11th Sess., p. 67), provides that the terms of the district court of Fremont county are to be held on the third Monday of April and the second Monday of November of each year. The *scire facias* avers a forfeiture of the recognizance at a term of said court begun and held on the 16th day of November, 1876. There being no authority for a term begun on that day, any proceeding had at a term so begun and held would be illegal and void.

While it is true, as contended for by the attorney-general, that section 20, article 6 of the Constitution empowered the district judges to fix the terms of their courts until they should be fixed by the general assembly, yet this provision of the Constitution is not to be construed as in conflict with the act of 1876 fixing the terms of the district courts in the third district, but as additional thereto, empowering the several district judges to order a term as necessity or convenience might require, at a time other than that fixed by statute; and in this view, if the judge of that district did, by order, fix a term of the district court to be begun and held for the county of Fremont on the 16th day of November, 1876, this fact should affirmatively appear by the record:

Leave to file a supplemental record which should contain an amendment of the *scire facias* in respect to the day on which the court was begun and held, was denied at the last term of this court, on the ground that to allow such amendment after error brought in matter of substance, was to deprive the defendants of the right to answer; and that they had the right to plead to the case as made and presented by the writ, and hence an amendment, which would be

equivalent in effect to an amendment of the writ after joiner in error in this court, would cut off that right.

In respect, therefore, to the averment in the writ as to the time of forfeiture, the plea of *nul tiel record* was sustained, and the court below erred in the judgment thereon.

The judgment is reversed and the cause remanded.

Reversed.

GOMER v. SHINER.

A motion to dismiss for want of jurisdiction, after plea to the jurisdiction filed, is a waiver of the plea. Where the defendant appears, a rule to plead may be entered, and in default of a plea judgment *nul dicit* should be entered.

Error to County Court of El Paso County.

THE defendant in error brought her action against Gomer, the plaintiff in error, in the county court, in assumpsit. The defendant appeared and filed his plea to the jurisdiction of the court. On the day following he moved by his attorneys, Wilkes and Sweet, to dismiss the cause for want of jurisdiction; the motion was denied. The attorneys thereupon withdrew from the case; the court entered judgment by default, and a jury was called who assessed damages in favor of the plaintiff in the sum of three hundred and ninety-five dollars, upon which judgment was entered against the defendant for that amount with costs. To reverse this judgment Gomer prosecutes this writ of error.

Mr. J. W. HOBNER and Mr. D. J. HAYNES, for plaintiff in error.

Mr. L. J. LAWS, for defendant in error.

ELBERT, J. By his motion to dismiss upon the same grounds as alleged in his plea in abatement, the plaintiff in

error must be regarded as having abandoned his plea and elected to take the objection to the jurisdiction by motion. That the objection was properly taken by plea and not by motion does not affect this result. The court erred, however, in rendering judgment by default. The plaintiff in error had appeared to the action, and there should have been a rule to plead, and in default of plea the judgment should have been *nil dicit*. *Wilcox et al. v. Field et al.*, 1 Col. 4; *McNasser v. Sherry*, id. 13.

The judgment of the court below is reversed, and the cause remanded for further proceedings according to law.

Reversed.

ADAMS v. BINKLEY.

An actual occupant and owner of the improvements at the date of the entry of the town site, upon a lot in the town of Rosita, under the statute (R. S., p. 623) is entitled thereto as against one who claims under conveyance from a third party, but who had never been in possession and who had never been the owner of the improvements.

Appeal from District Court of Custer County.

THE case is stated in the opinion.

GEORGE S. ADAMS, *pro se*.

Mr. JAMES BUELL and Mr. J. W. HORNER, for appellee.

ELBERT, J. This was a bill of interpleader, filed by the trustees of the town of Rosita under the provisions of section 9, article 12 of the act relating to "towns and cities" (R. S., p. 623), against Adams and Binkley, who were adverse claimants of 25x100 feet of lot 20 in said town. Each claimant appeared and answered, and upon the hearing a decree was rendered in favor of Binkley.

This decree clearly was not warranted and must be re-

versed. The town site of Rosita was entered March 22, 1876. The evidence shows that on the 16th of October, 1875, the premises in controversy were unimproved and unoccupied. That at or about that date Adams entered upon and took actual possession of the same, erected a house thereon and occupied the same continuously from November 20, 1875, until May 1, 1877. That April 29, 1876, he filed with the trustees his written statement, claiming the premises, in accordance with the provisions of section 4, article 12 of the act respecting towns and cities (R. S., p. 620). Binkley's claim of title is based on a deed from one Bradbury, dated May 10, 1875, Bradbury claiming by purchase from one Jane Kirkham, who occupied another portion of lot 20. Bradbury does not appear to have ever occupied or improved the premises; nor does Binkley, after his purchase from Bradbury. At the date of the entry he was not in the actual possession of the premises, nor had he ever been; he was not the owner of improvements thereon, nor had he ever been.

The entry was "in trust for the several use and benefit of the rightful occupants of said land and the *bona fide* owners of the improvements thereon," and, clearly, Binkley cannot be regarded as a beneficiary. It is equally clear that Adams, by his occupancy and improvements, at the date of the entry, was entitled to a deed from the trustees. *Cook v. Rice*, 2 Col. 131; *Clayton v. Spencer*, id. 378.

The evidence does not show, as claimed, that the relation of client and attorney existed between Adams and Binkley; nor do the declarations of Adams, testified to by Bradbury and Blake, afford sufficient ground for saying that he is estopped from asserting his title.

The decree of the court below is reversed and the cause remanded, with instructions to enter up a decree in accordance with the views herein expressed.

Reversed.

ARNOLD v. WOODARD.

A tenant is estopped to deny his landlord's title. If, after leasing the premises, the tenant acquires rights adverse to his landlord, he is bound to surrender the property before he can be permitted to assert them.

Appeal from District Court of Lake County.

THE facts are stated in the opinion. The defendant below had judgment.

Mr. CHARLES S. THOMAS and Mr. JAMES Y. MARSHALL, for appellant.

Messrs. WELLS, SMITH & MACON, for appellee.

ELBERT, J. This was an action of ejectment brought by Arnold against Woodard to recover possession of certain real estate.

The defendant, Woodard, having died after the commencement of the action, Mary A. Woodard, his widow and heir at law, was substituted as a party.

Upon the trial it was admitted that the defendant, Woodard, was in possession of the premises in controversy, as the tenant of the plaintiff at the time of the commencement of the action.

The defendant offered in evidence a patent from the United States for the land, issued to her after the commencement of the suit, as the heir at law of James A. Woodard, deceased.

The action of the court in admitting this patent is the only question we need consider.

It is a general rule, founded upon reasons of public policy, that the tenant is estopped to deny the landlord's title. By taking a lease from him ; by entering and occupying the premises under the lease, the tenant admits the title of the lessor. If, after leasing the premises, he acquires rights adverse to his landlord, he is bound to surrender the property before he can be permitted to assert them. Tyler

on Ejectment, 186-550, and cases there cited. *Milsap v. Stone*, 2 Col. 140.

In view of this rule, the admission in evidence of the patent issued to the defendant, Woodard, was error. It was permitting the tenant, without surrender of possession, to show an adverse title, which she had acquired after the commencement of the suit.

We are unable to see that this case comes within the principle of the cases which hold that the tenant may show, in bar of the action, the termination of the landlord's estate, as when there has been a conveyance by the landlord to the tenant himself or to a stranger; or when the estate of the lessor has been determined by operation of law or limitation of estate. In such cases the tenant is not estopped, as his defense is not founded upon his own conduct, but upon the conduct of others or the act of the law. The spirit of the general rule is, that the tenant shall not avail himself of any act of his own in hostility to the landlord's title as a ground of refusal to surrender the possession under his contract of tenancy.

The record does not show the steps taken by Woodard to secure his patent, but the law prescribes them, and the issuance of the patent involves the fact that they were taken.

Woodard entered upon the premises as tenant, and was a tenant at the time of the commencement of the suit. His acquisition of the title of the United States was of necessity by the assertion of rights adverse to his landlord, who was a pre-emption claimant. We see no reason, therefore, on principle, for making this case an exception to the general rule, that the tenant who, after leasing, acquires rights adverse to his landlord, is bound to surrender the premises before he can assert them. *Milsap v. Stone*, cited *supra*. This view renders it unnecessary to consider the question raised in the pleadings.

The judgment of the court below is reversed and the case remanded for further proceedings according to law.

Reversed.

TENANT MUST SURRENDER POSSESSION to land before setting up adverse possession: *Arnold v. Woodward*, 14 Colo. 257, 188, 189.

BARNARD, Ad'r, etc. v. McKENZIE.

1. A mechanic's lien under the statute (Laws 1872, p. 147) will not lie for hauling ores from a mine to a quartz mill. The statute contemplates a lien only for such labor or material as may have been performed or furnished in the development, improvement or conservation of the mine, which has become incorporated with and constitutes a part of its value.
2. Notwithstanding the mechanic's lien was unknown to the common law, yet in view of the equitable character of the statute, it should be liberally construed, but cannot by construction be extended to cases not provided by the statute.
3. The proceeding to enforce a mechanic's lien is purely statutory, and the court has no authority to enter up a decree for a part of the claim, independent of the petitioner's right to a lien.

Appeal from District Court of Lake County.

THE facts are sufficiently stated in the opinion.

Messrs. MILLER & CLOUGH, for appellant.

Mr. CHARLES S. THOMAS, for appellee.

ELBERT, J. This was a petition to enforce a mechanics' lien on the Berry tunnel, under the provision of the lien law of 1872. Sess. Laws, 1872, p. 147.

Section four of the act provides, that "all miners, laborers and others who work or labor to the amount of twenty-five dollars or more, in or upon any mine, lode or deposit, yielding metals or minerals of any kind, or upon any shaft, tunnel, adit or other excavation designed or used for the purpose of draining or working any such mine, lode or deposit, and all persons who shall furnish any timber or other material to the amount of twenty-five dollars or more, to be used in or about any such mine, lode or deposit, shall have and may each respectively claim and hold a lien upon such mine, lode or deposit, for the amount and value of the work or labor so performed or material furnished, by filing in the county clerk and recorder's office of the

county in which such mine, lode or deposit is situated, within forty days after the time when the last work or labor was performed, or the last materials were furnished by him, a statement as required by section two of this act."

The answer of the defendant Bruce admits the filing of a statement by McKenzie, the lien claimant, under the provisions of the act.

McKenzie's employment appears to have commenced in November, 1875, and continued until the 29th of June, 1876, at which time the last work was done. His claim is for \$518, in some part for material furnished, but chiefly for work and labor in *hauling ores* from the mine. The evidence discloses that there was no material furnished nor work or labor performed by McKenzie, in or upon the mine after the 15th of June, 1876, except *hauling ores* from the mine to the stamp mill.

The statement was filed July 27, 1876, and was not within the forty days limited by the act, unless we can say that one who is employed to haul ore from a mine after it has been taken from the shaft or tunnel, is entitled to a lien under the provisions of the section cited.

Laws giving the mechanic and material-man a lien on real property, their labor or capital has contributed to improve and enhance in value, are founded in manifest equity. Such legislation is in behalf of a large and meritorious class, poorly able as a rule to sustain loss, and little qualified to secure themselves against it by safeguards of their own suggestion.

Notwithstanding the lien was unknown to the common law and is purely the creature of the statute, in view of its equitable character, we think the statute giving it should be liberally construed so as to advance its objects.

The lien, however, is purely statutory and cannot be extended by construction to cases not provided for by the statute.

The mechanics' lien laws of the several States of the Union are in their main provisions substantially similar.

The leading idea is to secure the mechanic and material-man upon values they have directly contributed to create.

Says Mr. Phillips: "The lien of the mechanic * * * is a remedy in the nature of a charge on land given by statute to the persons named therein, to secure a priority or preference of payment for the performance of labor or supply of materials to buildings or other improvements to be *enforced against the particular property in which they have become incorporated* in the manner and under the limitations therein expressly provided." Phillips on Mechanics' Liens, 15.

Courts have construed these statutes most liberally, so as to include incidental labor where it has become incorporated with and contributed to the value of the property sought to be charged with the lien.

In the case of *Hill v. Newman*, 38 Penn. St. 151, the statute was held to include the work of a teamster who had hauled the lumber used in the erection of a building.

In the case of *Knight v. Norris*, 13 Minn. 473, the statute was held to include the architect who furnished plans and specifications for and superintended the work.

But in each of these cases the lien was for work and labor which became incorporated with and a part of the property sought to be charged with the lien.

The lien provided for by section 4 above quoted is for work and labor "in or upon any mine, lode or deposit," and for materials furnished "to be used in or about any mine, lode or deposit." This language fixes clearly the relation which the work and labor must sustain to the property sought to be charged. It contemplates only such labor or material as has been performed and furnished in the development, improvement or conservation of the mine, which has become incorporated with the mine and constitutes a part of its value. To give a lien for work or labor not performed, in the language of the section, "in or upon the mine," would not be construction, but judicial legislation. The hauling of ores by the petitioner from the mine

to the quartz mill can in no just sense, within the meaning of this statute, be regarded as work and labor performed "in or upon the mine." His labor so performed has in no degree become incorporated with it or, *per se*, enhanced its value. The equity upon which the lien is founded does not exist. He could as well ask it upon any other property of the defendant.

As to two hundred and thirty-three dollars of the petitioner's claim, the court below decreed a lien, and as to two hundred and eighteen dollars of the claim it entered a separate decree of indebtedness and awarded execution thereon.

The proceeding to enforce a mechanic's lien is purely statutory, and we know of no provision which can be construed to authorize the court to enter up a decree for a part of the claim independent of the petitioner's right to a lien.

The decree of the court below is reversed and the cause remanded.

Reversed.

MECHANIC'S LIEN LAWS MUST BE LITERALLY CONSTRUED: *Bare Arts. G. & S. M. Co. v. Bouscher*, 10 Colo. 387; *Williams v. Uncompahgre Co.* 13 Colo. 47; *Cannon v. Williams*, 14 Colo. 22; *Eico E. & M. Co. v. Musgrave*, 14 Colo. 81. But notwithstanding the statute must be fully complied with or no lien attaches: *Greeley St. L. & P. Ry. Co. v. J. Harris*, 12 Colo. 222. The demand must be in consequence of actual performance of labor: *Tabor v. Armstrong*, 10 Colo. 232. A decree for payment of money in the absence of a lien was erroneous prior to Act of 1893 (*Tart. & Co. Corporation v. Mullen*, 4 Colo. 515); but since that statute the rule is different: *Cannon v. Williams*, 14 Colo. 22. But see the dissenting opinion in the last case, page 22.

ROOHE v. CAMPBELL.

1. On appeal from a county court where the record recites that issue was joined in an ejectment suit, the regularity of the proceedings in this regard must be presumed.
2. The plaintiff in ejectment, although he declares for the whole, may recover any distinct part or parcel of the premises.

Appeal from County Court of Hinsdale County.

THE case is stated in the opinion.

MR. M. S. TAYLOR, for appellant.

MESSRS. GUNNELL, BELL & WILSON, for appellee.

ELBERT, J. This was an action of ejectment brought by the appellant against the appellee.

The objection, that trial was had without any plea by the

Defendant, is not well taken. The record recites that *issue was joined*, and as the statute prescribes that the defendant "shall plead the general issue only," it is to be presumed in favor of the regularity of the proceedings, that this plea was in. The plaintiff in ejectment, although he declare for the whole, may recover any distinct part or parcel of the premises. *Ballance v. Rankin*, 12 Ill. 420; *Holmes v. Seeley*, 17 Wend. 75.

The premises claimed by the plaintiff embraced about thirty acres. Of this land the defendant only claimed a portion one hundred by one hundred and fifty feet.

It is unnecessary to decide whether on the evidence the plaintiff should not have had a verdict for the entire premises. In view of a new trial we forbear to express any opinion on this point. Clearly he was entitled to such portion as was not claimed by the defendant, and the jury should have so found. In this the verdict was against the evidence, and the court erred in overruling the motion for a new trial.

The judgment of the court below is reversed, and the cause remanded for a new trial.

Reversed.

DEVER v. MORTRAGON.

Under the statute (Gen. Laws, 1877, § 1599), an appeal will not lie in any case, civil or criminal, from a judgment of a justice of the peace to the district court. A dismissal of such appeal must be without costs.

Error to District Court of Costilla County.

TRESPASS *quare clausum*.

MR. JOHN C. FITNAM, for plaintiff in error.

STONE, J. From a judgment rendered by a justice of the peace, an appeal was taken to the district court on the 8th day of September, A. D. 1877, and, at the next ensuing

term of said court, on motion of the defendant, the suit was dismissed and judgment for the costs rendered against the plaintiff, who thereupon brings the case to this court, and assigns for error, that the rendition of said judgment is without the jurisdiction of the district court.

Section 1599, Gen. Laws (Act of March 14, 1877), is as follows :

"All appeals from judgments of justices of the peace, both in civil and criminal actions, shall be taken to the county court of the same county, and no appeal shall lie from a judgment of a justice of the peace in any cause, civil or criminal, to the district court."

This law was in force at the time the appeal was taken, and hence the district court acquired no jurisdiction of the case, and had no authority to render any judgment therein, except to dismiss the appeal. And such dismissal of the appeal must be without costs. *Bartels v. Hoey*, 3 Col. 279.

The judgment of the district court is accordingly

Reversed.

BURDSALL v. WAGGONER et al.

1. To set aside a conveyance on the ground of fraud against creditors, something more than a fraudulent intent upon the part of the grantor is required; want of consideration, or knowledge of the fraud upon the part of the grantee, must also be shown; or there must be some secret trust between the parties, or other circumstances which will operate to debar the grantee from protection as a purchaser.
2. By the statute (R. S., §§ 20, 21), fraudulent intent is to be deemed a question of fact and not of law; and in this case, *held*, that the conveyance not having been shown to be a voluntary conveyance, it was essential to show that the grantee had notice of the fraud of his grantor.
3. To maintain a creditor's bill the complainant is generally required to show not only a judgment obtained, but execution issued and returned unsatisfied in whole or in part; but even where such return is not necessary, the complainant must, by proper averment, lay sufficient ground for the relief sought.

4. In addition to an averment of fraudulent conveyance, it must appear that such disposition embarrasses the creditor in obtaining satisfaction of his debt, as that there is want of property sufficient to satisfy such debt, other than the property alleged to have been fraudulently conveyed.
5. Proof cannot be admitted of any matter not noticed in the pleadings; a party must stand or fall by the case made in his bill. An appellate court will not, as a rule, reverse a decree in order to allow an amendment to the bill.
6. A voluntary conveyance is not *per se* fraudulent under the statute.
7. If a debtor is perfectly solvent he can do with his property as he will, so long as he does not dispose of so much of it as will disable him from paying his debts.

Appeal from District Court of Arapahoe County.

THE bill in this case alleges that Burdsall, the appellant, obtained a judgment in the county court of Arapahoe county against Henry O. Waggoner, Sr., on the 15th of November, 1871; that he procured an execution to be issued and that the writ was levied on lot twenty-five, in block forty-one, in the city of Denver, as the property of Waggoner, Sr.; that on the 24th day of January, 1872, the sheriff sold the property under the writ of execution, and that it was bid in by Burdsall; that on the 7th of December, 1872, the time of redemption having expired, Burdsall received a deed from the sheriff for the premises. The other facts are stated in the opinion.

Messrs. WELLS, SMITH & MACON, and Mr. S. S. WALLACE, for appellant.

Messrs. FRANCE & ROGERS, for appellees.

STONE, J. This is a case in chancery to set aside a conveyance of real estate from Waggoner, one of the defendants, to Moss, the other defendant, upon the ground of alleged fraud against the complainant creditor.

Upon a hearing in the court below upon the testimony taken before the master, the bill was dismissed. The assignment of error is, that the court erred in dismissing the bill and in not rendering a decree in accordance with the prayer

for relief. The evidence tends to show that the grantor made the conveyance with a fraudulent intent to hinder and defeat the complainant in the recovery of his debt in his suit at law which was pending when the conveyance was made. There are several circumstances in the case which tend to cast suspicion upon the transaction, but we think the evidence is insufficient to make out a case upon the pleadings. To set aside a conveyance for fraud against creditors, something more than a fraudulent intent upon the part of the grantor is required. Want of consideration or knowledge of the fraud on the part of the grantee must also be shown, or there must be some secret trust between the parties, or other circumstances which will operate to debar the grantee from protection as a purchaser. The bill charged the grantee with knowledge of, and participation in, the fraudulent intent of the grantor, as well as a total want of any consideration whatever. These allegations are denied in the separate answers of the defendants, and no proof was made, nor was any evidence attempted to be introduced touching any of these averments.

Our statute concerning frauds, R. S., ch. 37, is a substantial adoption of the statutes of 13th and 27th Eliz., but these latter are so far modified by the 20th and 21st sections of our statute as to affect both the mode and extent of proof required to avoid a conveyance on the ground of fraud. By these sections the fraudulent intent is to be deemed a question of fact and not of law; a conveyance shall not be considered fraudulent for want of consideration alone, nor shall the title of a purchaser for a valuable consideration be impaired unless it appear that he had notice of the fraudulent intent of his grantor.

In this case the conveyance not having been shown to be a voluntary conveyance, it was essential to show that the grantee had notice of the fraud of his grantor. *Johnson v. Johnson*, 3 Metc. 65; *Myers v. Kinzie*, 26 Ill. 38.

There is another point which is also fatal to appellant's case. There is no averment in the bill of insolvency of the

defendant debtor, or that there was not property other than that alleged to be fraudulently transferred, out of which the judgment at law could have been satisfied. The bill is in the nature of a creditor's bill, and to entitle the complainant to maintain a bill of this character, he is usually required to show not only a judgment obtained, but an execution sued out with a return of *nulla bona*, or that the writ is unsatisfied in whole or in part. *Alexander v. Tams*, 13 Ill. 224; *Heacock v. Durand*, 42 id. 283; *Child v. Brace*, 4 Paige, 815.

To this general rule there are some exceptions (*Stoere v. Hoagland*, 39 Ill. 265), but, even where such return is not necessary, the complainant must, by proper averment, lay sufficient ground for the relief he seeks in a court of equity.

The bill should show not only that the debtor has made a fraudulent disposition of his property, but that such disposition embarrasses him in obtaining satisfaction of his debt or judgment; there must be an averment of want of property sufficient to satisfy such debt other than the property which is alleged to have been fraudulently conveyed, for if there be other property sufficient, then the resort to equity is unnecessary. *Harris v. Taylor*, 15 Cal. 848; *Dunham v. Cox*, 2 Stockton (N. J. Eq.), 467; *Thomas v. Mackey*, 3 Col. 293; *Crockett v. Lee*, 7 Wheat. 527.

In the case of *Dunham v. Cox*, *supra*, this doctrine is clearly laid down and assented to unanimously by the whole bench of eleven judges, composing the court of errors and appeals.

It is true, testimony was taken in the case to show that Waggoner, the debtor defendant, had no property other than the lot which was the subject of the alleged fraudulent transfer; but while it is possible that such testimony might, under certain circumstances, be admissible as showing a badge or *indicium* of fraud in the conveyance which is sought to be set aside (*Howe v. Ward*, 4 Greenl. 195), yet where such showing is a substantive ground of equity relief, such testimony is inadmissible unless it is in support

of a proper averment in the bill of the fact which is sought to be proved by such evidence.

It is a maxim, fundamental, both in law and equity, that no proof can be admitted of any matter not noticed in the pleadings. Proofs must be pertinent to the issue, *secundum allegata*. A party must stand or fall by the case made in his bill. Daniel's Chancery (4th ed.), 852; *Rowan v. Bowles*, 21 Ill. 19.

Nor, unless under exceptional circumstances, will an appellate court reverse a decree in order to allow an amendment to the bill.

While the bill in this case is thus defective, as well as in other respects not necessary to notice, we cannot refrain from remarking that the answers of both defendants are singularly vague, inexplicit and evasive. Neither by the pleadings nor by the evidence is such a case made and presented as to entitle the complainant to the relief prayed.

Decree affirmed.

THATCHER, C. J. I concur in the conclusion of Mr. Justice STONE, on the ground of insufficient averments in the bill. Following the rule laid down in *Mackey v. Thomas*, 3 Col. 293, the charge of fraud in the bill is too general. If it be admitted that the conveyance was voluntary, it was not therefore *per se* fraudulent, as against existing creditors. Such is the construction of a statute like ours by the court of appeals of New York (*Young v. Hermans*, 66 N. Y. 387; *Holden v. Burnham*, 63 id. 75), a case from which this court quoted approvingly in *Thomas v. Mackey*, cited *supra*. If a debtor is perfectly solvent, he can do with his property what he will so long as he does not dispose of so much of it as to disable him from paying his debts. In the bill there is no allegation that the debtor was insolvent or embarrassed. For aught that appears he may have been possessed of ample property, other than the property in controversy, to pay his debts. If so, the deed cannot be attacked by his creditors. The bill, in the

absence of sufficient allegations showing that the conveyance operated as a fraud upon Burdsall, was at the hearing properly dismissed. For these reasons I agree with brother STONE that the decree of the court below must be affirmed.

Mr. Justice ELBERT, having been of counsel in the court below, did not sit in this case.

TO MAINTAIN CREDITORS' BILL complainant must generally show a judgment, together with unsatisfied execution; *Emery v. Young*, 7 Colo. 109; *Newman v. Drexler*, 9 Colo. 233; *Hood v. Saunders*, 11 Colo. 144. But creditors may test validity b. suit before execution sale: *Stock Grocers' Assn. v. Newton*, 15 Colo. 334; *Burdsall v. Waggoner*, 4 Colo. 231.
ALLEGATIONS AND PROOF MUST CONFORM: *Gibb v. Wall*, 10 Colo. 139.

BURDSALL v. WAGGONER et al.

As a general rule the father is entitled to the earnings of a son during minority, but where a minor son contracts on his own account for his services, with the knowledge of his father, who makes no objection, there is an implied assent that the son shall be entitled to his earnings.

Appeal from District Court of Arapahoe County.

Messrs. WELLS, SMITH & MACON, and Mr. S. S. WALLACE, for appellant.

Messrs. BENEDICT & PHELPS, for appellees.

STONE, J. This case presents substantially the same questions as the case of *Burdsall v. Waggoner and Moss*. The only question peculiar to this case is, whether Waggoner, jr., was entitled to the money paid in purchase of the lot in controversy, it having been earned by him as wages during his minority. The testimony shows that young Waggoner had lived away from home from the time he was nine years old up to the time he came to Colorado, about two years before the date of the conveyance, at which date he was about twenty years of age; that during all the time he so lived away from home he was out from under parental control; that he earned his own living, clothed, supported and educated himself, with his father's full knowledge and consent; that when he came to Col-

orado, it was upon a proposition from his father to work for the latter at regular monthly wages; that he did so work for about eighteen months, when he purchased the property in question of B. L. Ford, through his father as the agent of Ford; that he had a settlement with his father and was allowed in payment the sum of \$720, which was applied as purchase-money on the lot in question; that he then went to Washington, D. C., to complete his education, where he got a position in the pension office at a salary of \$1,200 a year, out of which he remitted to Ford the balance of the purchase-price of the lot; that after the purchase he leased the lot to Waggoner, senior, in consideration of the payment of taxes on the property; that the purchase of the lot was agreed upon several months prior to the execution of the deed, and prior to the judgment of the appellant against Waggoner, senior. We think the evidence fully establishes the emancipation of Waggoner, junior, and that he was therefore legally and justly entitled in his own right, to his wages which were applied in the purchase of the property in question.

While it is clear, that as a rule the father is entitled to the earnings of his son during minority, yet it is equally clear that this right may be relinquished, and where such minor son contracts on his own account for his services, and the father knows of it and makes no objection, there is an implied assent that the son shall be entitled to his earnings. *Morse v. Welton*, 6 Conn. 551; *Whiting v. Earle*, 3 Pick. 201; *Nightengale v. Worthington*, 15 Mass. 273.

And in every other respect the *bona fides* of the conveyance, on the part of the grantee, was fully established by the evidence. As no fraud was proved so as to affect the title of the grantee as a purchaser for a valuable consideration and without notice, and since the bill is defective in the same respect as in the case of the appellant against Waggoner, senior, and Moss — the other case referred to — the decree of the court below will be affirmed.

Decree affirmed.

Mr. Justice ELBERT, having been of counsel in the court below, did not sit in this case.

JACKSON et ux. v. ALLEN.

1. Where one, acting as an agent in the purchase of a mine, took from the owners of the mine two bonds for title, one in the sum of \$1,500 cash, and \$4,000 to be paid out of the net proceeds of the mine, and the other in the sum of \$4,000 cash and \$4,000 out of the net proceeds of the mine, and concealed from his principal the first named bond, and represented that purchase had been made upon the terms of the last-mentioned bond, *held*, that such concealment and the procurement from the principal of the \$4,000, as the cash payment, was a fraud upon the principal; and, *also*, that upon detection, the agent having agreed with the principal upon the amount due, for which the former gave his note to the latter, the court would not stop to inquire into the precise sum due, if the face of the note approximated such sum and the parties had settled upon that basis; and, *also*, that an assertion of the principal at the time of the execution and delivery of the note, that the agent was "liable to prosecution for fraud," was not sufficient upon which to base the defense of duress; and where the agent subsequently acknowledged the validity of the note, by giving jointly with his wife their two notes, payable in one and two years, upon the surrender of the original, and there being, at the last transaction, no preponderance of evidence of duress, such defense could not prevail.
2. In a suit in chancery, where the evidence has been taken before a master, an appellate court will examine into the entire record, and affirm or reverse the decree of the court below, upon principles of equity, as the facts will justify.
3. The statute (R. S., p. 348, § 8) fixes the majority of a female at the age of eighteen years, and at that age she may execute a promissory note.

Appeal from District Court of Arapahoe County.

THE facts are sufficiently stated in the opinion.

Mr. S. P. ROSE and Mr. E. P. HARMAN, for appellants.

Messrs. WELLS, SMITH & MACON, for appellees.

THATCHER, C. J. The bill in this case, which was dismissed in the court below, seeks to restrain the negotiation and prays for the cancellation of two certain promissory notes made by the complainants to the defendant. The chief grounds relied upon are the alleged want of consideration, and that their execution was procured by fraud and duress practiced by the defendant. There is no evidence tending to show,

however remotely, that Cora E. Jackson was coerced into the signing of the notes. At the request of her husband, she voluntarily joined in their execution. Mr. Jackson comes into a court of equity with unclean hands, convicted by his own evidence of a deliberate attempt to defraud the appellee. For the good name of Colorado it is to be earnestly hoped that an attempt to justify fraudulent practices by pleading the custom of the country will never receive the sanction of any of our judicial tribunals.

The appellee, and one George Allen, during a visit to Boulder in July, 1875, examined "Victoria Lode No. 2," and were well pleased with it. In an interview with Frank P. Jackson he proposed to the appellee and George Allen that they three should purchase the mine jointly. This proposition was acceded to. Upon the representation of Jackson that he could more advantageously negotiate the purchase of the mine, he was authorized to buy for their joint benefit at any sum not exceeding \$4,500 in all, and not requiring a cash payment at the time of purchase exceeding \$4,000. Jackson, for a purpose which subsequent events make plain, took two bonds for deeds from the owners of the mine, "one of said bonds (to follow the allegations of the bill) being for the sum of fifteen hundred dollars (\$1,500) cash, and four thousand dollars to be paid out of the net proceeds of the mine, and the other calling for four thousand dollars (\$4,000) cash, and four thousand dollars in the net proceeds of the mine." The *last-mentioned* bond was shown to George Allen secretly, and without the knowledge of either George Allen or appellee as to the price paid, the purchase had been made by Jackson on the basis named in the first bond, viz. : \$1,500 cash in hand, and \$4,000 additional to be paid out of net proceeds. Jackson drew a check for \$4,000 on First National Bank of Denver, payable to the order of J. W. Corser (one of the mine owners) and to be charged to the account of Harrison Allen. This check was indorsed both by Corser and Jackson, and dated July 22, 1875. On presentation

the check was cashed by the bank out of the funds of appellee, and \$1,500 of the amount were paid by Jackson to the owners of the mine, being the only cash payment required. Jackson had the deed of the entire mine made to himself, and he conveyed two-thirds thereof to the two Allens. Jackson concealed from appellee the fact that he had made a cash payment of only \$1,500, and represented that he had no money with which to pay one-third of the total alleged consideration which appellee had advanced for his benefit, but that he expected to receive the money in a few days from Pittsburgh, Pa. He then gave his note to appellee payable in seven days for \$1,333.33. August 2, 1875, Jackson made a payment on this note of \$1,200, stating at the same time that he would pay the balance as soon as possible.

It is fairly deducible from the evidence that this payment was made out of his ill-gotten gains. Here was an evident attempt to defraud appellee out of \$2,500. But Jackson alleges in his bill, and testifies at the hearing, that to enable him to consummate the purchase of the mine, it was necessary to call in one J. B. Shaw, a mining broker, to aid in the negotiations, and that he paid Shaw \$500 for his services, for which he, Jackson, claims a credit. Shaw was not put upon the stand. If \$500 were in fact paid him for his services in aiding to concoct, carry out, and conceal a perfidious scheme, the ultimate purpose of which was to defraud the appellee, we are aware of no principle of equity that will require the defrauded Allen to re-imburse Jackson the amount he paid out to his partner in guilt. If, as counsel for appellant contends, it be conceded that the employment of Shaw by Jackson was for a legitimate purpose, it does not appear that appellee had authorized such employment or the paying out of commissions, nor was the employment subsequently ratified. Indeed the evidence conclusively shows that the fact of such alleged employment was for about five months carefully concealed from appellee.

At the time the mine was bought the former owners agreed to sink the shaft twenty feet deeper than it then was, and to timber it, Jackson to furnish the lumber, and they further agreed to run a tunnel one hundred feet on the lode. For their work they were to receive \$1,400. When the work was completed, Jackson paid the former owners of the mine \$1,400, as per contract. Of this sum, on account of the development of the mine, and before Jackson's fraud was discovered, appellee paid by draft Aug. 26, 1875, \$100, and by draft Sept. 29, 1875, \$325.

Jackson claims a credit on account of services as superintendent of the mine. The evidence we think does not justify the claim. Appellee's testimony is to the effect that for his services as superintendent he was to receive \$4 per day, payable out of the ore on the dump. Jackson testifies that he was to be paid for his services without regard to the value of the ore. McPherson testifies that he (Jackson) never superintended the work on the mine, "but was out prospecting and looking after a contract he had let on Standard lode." The evidence convincingly shows that Jackson hauled away and appropriated quantities of the best ore, of which he made no account or return.

Jackson alleges in his sworn bill, and testifies at the hearing, that for his one-third interest in the mine, he gave appellee his note for \$1,200. He swears that nothing was said about the balance, \$183.33, by appellee, and further, that he paid the whole amount due on the note about a week afterward.

Appellee's testimony is in direct conflict with Jackson's testimony on this point. Not only does appellee testify that the note was for \$1,833.33, that but \$1,200 had been paid on it and indorsed as a credit, but by the production of the note itself, the evidence of appellee is corroborated. That the court below did not give full credence to the evidence of Jackson, some parts of which were intrinsically improbable, and other parts of which were proved to be absolutely, and we think, willfully false, is no ground of

error. To believe the evidence of Jackson upon any point, unless corroborated, is a tax upon human credulity. It appears from his own testimony that both, by language and conduct, he uttered and acted falsehoods in all his transactions with appellee. In addition to this, as we have before seen, the falsity of some of his testimony on material points at the hearing, was established by indubitable proof.

Appellee, having learned, Dec. 18, 1875, of one of the former owners of the mine, that but \$1,500 cash had been paid therefor, confronted Jackson in his office at Denver two days later, and demanded an explanation. Jackson confessed the fraud, but attempted to excuse himself by saying: "That's the way we do business here." He further said he thought the mine would pay from the grass roots; that he aimed to get his interest free of cost; that he was hard up; that he wished first to get the \$2,500 in his own hands, and that when the mine would pay, he would return it. After being detected he offered to make reparation as far as possible. Appellee testified: "Jackson made his own figuring, and in adjusting the difference between us, in settlement of the work in the mine and the money wrongfully taken from me, said there was \$2,000 in justice due me, and asked me to take his note, which proposition I accepted, and we then settled accounts. I took his receipt in full and his note for \$2,000, in six months, at eighteen per cent interest. I told him he was liable to prosecution for fraud, but that I had no desire to prosecute or injure him—simply wanted my money." This statement is substantially corroborated by Gaylord C. Allen who was present at the interview and settlement. Considering the evidence adduced at the hearing as a whole, we cannot say that the *precise* sum then due was \$2,000, but it approximated it, and the parties settled upon that basis. Sufficient appears to show that the note was not without consideration, and although Jackson testified that the note was executed under threats of criminal prosecution, and without consideration, the preponderance of credible evidence, as we weigh it, does not support that

view. The reconveyance of one-third interest in the mine by Jackson to appellee, we are impelled to conclude was made as security for advances to be made by appellee in the future development of the mine, Jackson then being without funds to contribute for that purpose. In fulfillment of this agreement to advance funds, appellee has already expended between \$800 and \$900.

The validity of the \$2,000 note Jackson subsequently acknowledged, and promised that the same should be paid when due. It certainly cannot be claimed that he was then under duress. Appellee having learned that Jackson, with a view to avoid the payment of the note, had transferred all his property to his wife, requested him to secure him. A check for \$180, which had been given by Jackson to appellee on account of accrued interest, had been dishonored by the bank. There were then due on note and check \$2,240. Appellee surrendered both note and check, and received in lieu thereof two notes executed by Jackson and wife, one for \$1,000, due in one year, and one for \$1,240, due in two years, with ten per cent interest per annum. As to whether, in this last transaction, threats of criminal prosecution were made, there is oath against oath, and even if Jackson was equally credible, under the ordinary rule, the burden of proof being with him, his case is not made out. In a chancery proceeding where the evidence has been taken by a master, an appellate court will not sustain the decree of the court below, merely on the ground that it is not unsupported by evidence; but will examine the entire record, sift all the evidence adduced with the view of arriving at the truth. We can only weigh the evidence. The witnesses neither appeared before the court below nor before this court. Their manner of testifying and their appearance upon the stand may be considered by a jury, or, when the trial is to the court, by the court. But here there was no such opportunity.

Carefully weighing all the evidence in the light of the rules laid down by the authorities for testing its value, we

are constrained to the conclusion that the decree of the court below is justified by the facts and founded upon principles of equity.

It is insisted, however, that as Cora E. Jackson was not twenty-one years of age when she signed the notes, that she was not bound thereby. Under our laws a female attains her majority at eighteen years of age. R. S., p. 348, § 8; *Stevenson v. Westfall*, 18 Ill. 209. This objection is, therefore, without force.

the decree of the district court is

Affirmed.

IN EQUITY, WHERE EVIDENCE IS TAKEN BEFORE MASTER, appellate court will examine entire record, and affirm or reverse the decree as the facts justify. *Miller v. Taylor*, 6 Colo. 48; *Bates v. Bacon & W.*, 14 A. M. Co. 14 Colo. 141. And the same rule applies to appeals from trials by jury; *Stock Growers' Bank v. Newton*, 13 Colo. 230.

PEYTON v. GREGORY.

On appeal under section 348 of the Code, a copy of the notice of appeal must be furnished to the court, otherwise the appeal will be dismissed.

Appeal from County Court of Hinsdale County.

Mr. M. S. TAYLOR, for appellant.

Mr. J. C. BELL, for appellee.

STONE, J. This was an appeal from a justice of the peace to the county court, whence it was appealed to this court.

Section 348 of the Code provides, that "On appeal from a judgment rendered on appeal, or from an order, the appellant shall furnish the court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used on the hearing in the court below." * * * And "if the appellant fail to furnish the requisite papers, the appeal may be dismissed."

The appeal in this case is sought to be taken and perfected under the provisions of the Code. No copy of the notice of appeal has been furnished the court in compliance with this requisite of the Code, and the appeal will, therefore, be dismissed.

Appeal dismissed.

DENVER AND RIO GRANDE RY. CO. v. GLASSCOTT.

Where, in an action against a railway company by one of its employees for a balance due him for services rendered as conductor of a passenger train, it was undertaken by the company to prove an offset in moneys alleged to have been collected but not accounted for by the conductor, by comparison of daily returns extending over a period of eleven months, by the plaintiff in the action and a fellow-conductor running alternate days over the same route, *held*, that such method of proof was erroneous, and the evidence properly excluded from the jury; *also*, that where the verdict must, under the law, have been the same, notwithstanding the admission of the evidence excluded, the verdict would not be disturbed.

Error to County Court of Arapahoe County.

THE case is stated in the opinion.

Messrs. WELLS, SMITH & MACON, for plaintiff in error.

Messrs. PATTERSON & CAMPBELL, for defendant in error.

THATCHER, C. J. Robert A. Glasscott was a conductor of the defendant company. He brought suit against the company for the balance claimed to be due him for services as conductor rendered to the company, laying his damages at five hundred dollars, for which sum a verdict was returned and judgment entered in the court below. Unless the defendant was entitled to an offset, no dispute arises as to the correctness of the judgment. The company by its pleas and proof offered to offset against the claim of the conductor, the sum of fifteen hundred dollars, which it is alleged that he, as conductor, had collected from passengers traveling on his train, and retained and converted to his own use. To support the allegations of conversion and the amount of the same, plaintiff in error called R. F. Weitbrec, its treasurer, and proved by him that defendant in error had been conductor of passenger trains of plaintiff in error, running between Denver and El Moro, during eleven months next preceding May 1, 1877; that it was the duty

of defendant in error, as such conductor, to collect fare of all passengers on his trains not provided with tickets; that a round trip of a train run by defendant in error was from Denver to El Moro and back to Denver, a distance of 220 miles each way; that at the conclusion of every such round trip, defendant in error was required to report to the auditor and treasurer of plaintiff in error the number of passengers carried each way, the points on the route to which and from which they were transported, with the number and kind of tickets on which they traveled, the number without tickets, and the amount of money collected from such passengers, which money it was his duty to turn over to the treasurer at the end of each round trip; that he, the witness, had in court every one of such reports made by defendant in error during said eleven months; that plaintiff in error had another conductor, named Cole Lydon, who conducted trains of plaintiff in error on alternate days with defendant in error; that Lydon made same number of trips as defendant in error in said eleven months; that said Lydon's trains generally, although not always, contained same number of cars as that of defendant in error; that number of cars was liable to be increased or diminished as necessities of travel required; the schedule of fares was same; that he, witness, also had all of Lydon's reports for said eleven months, and that they were the same as those made by defendant in error, but differed in the amount of money shown to have been received during said eleven months.

The only controversy in this case arises as to the manner in which the company proposed to prove that Glasscott was in default. The theory of the company seems to be that upon the above statement of facts Glasscott should be held liable for the difference between Lydon's receipt and the amount he, Glasscott, paid to the treasurer. With a view to fix his liability and the amount thereof, the attorney of the company interrogated the witness as to the difference between the receipts of the two conductors. This evidence,

and other evidence belonging to the same class, the court excluded. All other evidence offered was admitted. Our only inquiry, therefore, is : Did the court err in excluding the evidence mentioned ? The learned counsel insist that had it been made to appear that there was a difference in favor of Lydon between the total sums paid the treasurer by the two conductors, "if the jury had found for the plaintiff in error, upon that circumstance alone, the court would not have been justified in setting the verdict aside." This proposition is, we think, untenable. The possibility that there might be an exact equality in the receipts of the two conductors is so remote, and subject to so many disturbing influences, that we cannot believe that it can justly be considered as the foundation of legal liability. One conductor may be more attentive to the patrons of the road, and therefore more popular than another. The current of travel may be very unequal on two successive days, and this may continue for weeks. Excursion trains, crowded with passengers, may have been run on certain days, which might materially increase the receipts on such days. On one day every passenger getting on board at Denver might be provided with a ticket, and the receipts at this point in consequence be nothing. The next day one or a dozen passengers may have boarded the train and have forgotten to buy tickets. The same thing is liable all along the line, so that even if the number of passengers carried by each conductor during the period of eleven months, or any shorter period, should be the same, it is by no means, in our judgment, a fair inference that the receipts will be the same, or approximately so. Counsel treats us with a metaphysical disquisition on the "Doctrine of Chances" and the "Theory of Probabilities," and even indulge in algebraic equations for the purpose of demonstrating the remoteness of the possibility that the receipts of the two conductors would be the same. We have not thought it necessary to solve the algebraic problem with a view to determine the chance of equality of receipts. It is true that *ceteris paribus* the

position that an equal number of persons would forget to buy their tickets each day before entering the cars is not unsupported by metaphysical writers. Says Mr. Henry Thomas Buckle, in his work on the "History of Civilization in England" (Vol. 1, page 32): "We are now able to prove that even the aberrations of memory are marked by a general character of necessary and invariable order. The post-offices of London and of Paris have latterly published returns of the number of letters which the writers through forgetfulness omitted to direct: and *making allowance for the difference of circumstances*, the returns are year after year copies of each other. Year after year the same proportion of letter writers forget this simple act; so that for each successive period we can actually foretell the number of persons whose memory will fail them in regard to this trifling, and as it might appear, accidental occurrence."

Whether or not forgetfulness is under unvarying laws, certain it is, in our opinion, that in addition to forgetfulness, there is such a complication of causes tending to vary the receipts of the two conductors, that it would be unsafe, as well as unwarranted, to adopt the rule for which plaintiff in error contends. We can find no support for it in the adjudicated cases.

For eleven months Glasscott had been the trusted agent of the company. With regularity at the close of every round trip he accounted to the company for the alleged amount of his receipts. Of his own accord, without the slightest suspicion as to his fidelity having been expressed against him, he quit the company's service. The fact of the difference between the receipts of the two conductors, had it been proved, would have been far from establishing the matter in dispute, viz.: that the difference had in fact been collected and embezzled by Glasscott. It is so remote a circumstance that, had the rejected evidence been received, the jury would not have been warranted in rendering a different verdict. The verdict, had the excluded evidence been admitted, not only might but *must*, under the law, have been the same. In such case the rule is that the verdict

should not be disturbed. *City Bank of Brooklyn v. Dearborn*, 20 N. Y. 246; *Starbird v. Barrows*, 48 id. 200.

The judgment of the court below will be affirmed with costs.

Affirmed.

Mr. Justice STONE, having been of counsel, did not sit in this case.

FRANCIS v. WELLS.

Under the former system of practice a judgment or decree rendered in vacation is void; where the law does not confer jurisdiction, a stipulation that judgment might be entered in vacation would be unavailing.

Appeal from District Court of Clear Creek County.

Mr. L. C. ROCKWELL, for appellant.

Mr. E. T. WELLS, *pro se*.

Per Curiam. The decree pursuant to stipulation of parties, upon which was founded an order of court, was rendered in vacation. The cause was pending in the district court of the second judicial district of the late Territory, in and for Clear Creek county. The hearing was had in a different district, at the supreme court chambers, and after the adjournment of the district court for Clear Creek county.

The decree was rendered at neither the time nor place provided by law, nor was it in any sense the act of the court. *Cooper et al. v. The American Central Ins. Co.*, 3 Col. 318; *Brumley v. The State*, 20 Ark. 77; *Osborne, Ex parte*, 24 id. 479; *Wightman v. Karsner*, 20 Ala. 451; *Garlick v. Dunn*, 42 id. 464; *Doss v. Waggoner*, 3 Tex. 515; *Richardson v. Hunter*, 23 La. Ann. 483; *White v. Riggs*, 27 Me. 117; *Brown v. Compton*, 8 Tenn. 431.

In the case of *Peabody v. Thatcher et al.*, 3 Col. 275, Mr.

Justice WELLS, speaking for a majority of the court, asserts the doctrine that the stipulation of parties cannot confer jurisdiction when the law does not give it.

In the cases of *Filley v. Cody* (*ante*, p. 109), and *Kirtley and Roberts v. Marshall Silver Mining Co.*, (*ante*, p. 111), the identical question before us was determined. It was there held that a judgment or decree rendered in vacation, entered as of term, in the absence of a statute authorizing it, was without validity. Nor is it thought that the order of court by which it was sought to confer jurisdiction upon the judge *in vacation* to hear and determine the cause in a different district was legally effectual for any purpose.

In *Filley v. Cody*, *supra*, the court says under the former system of practice "there was no authority of law for the hearing and judgment in vacation, and the judgment was absolutely void. The agreement by the litigant parties, that the judgment so rendered should be treated (contrary to the fact) as having been rendered and entered as of the trial term, is substantially, notwithstanding the terms in which it is couched, an attempt to confer by consent a jurisdiction which the law did not authorize or afford."

The decree will be reversed without prejudice to the testimony already taken, and the cause remanded for further proceedings.

Reversed.

DECREE RENDERED IN VACATION was held void in *Atchison, T & St. F. R. R. v. People*, 5 Colo., 80

COON et al. v. RIGDEN.

1. Instructions given or refused by the court below cannot be reviewed by this court where the exception to them is general.
2. Where a sheriff is a party to a cause pending in the probate court the coroner is the proper officer to execute process issuing out of such court in such case.
3. Regularly, when a sheriff is a party to an action, his official character should appear by allegation in the declaration, or by suggestion of record; the courts, however, will, in the first instance, take judicial notice of who are their officers.

4. Trespass will lie against an officer who takes the goods and chattels of the owner on an execution or attachment against a third person. To maintain the action the plaintiff must show actual or constructive possession, or general or special property in them, and a right to the immediate possession.
5. The title to chattels may pass, though the possession may not change.
6. No man will be permitted to set up his own fraud as a basis or claim for his own benefit.
7. The term "subscribed" in the statute (R. S., p. 389, § 12), held to be a substitute for the word "signed" in the English statute, and as requiring a signature at the end of a written or printed instrument.
8. In contemplation of the statute (Laws 1874, p. 185), a *femme covert* is no longer *sub potestate viri* in respect to the acquisition, enjoyment and disposition of real and personal property.
9. The care and control of the wife's property by the husband will not *per se* operate to defeat the wife's right as against the creditors of the husband

Error to County Court of Larimer County.

TRESPASS *de bonis asportatis*. Plea not guilty and two special pleas, the first being :

A plea of confession and avoidance, setting up a levy of an attachment writ upon the property in question, at the suit of Yeager against John H. Rigden, and that the property was the property of John H. Rigden, and in his possession at the time when, etc. *Second, actio non*, "because they say that after the said defendant the said Marcus Coon had executed the aforesaid writ of attachment on said property, described in said declaration herein, and had taken said property into his actual possession, to wit: on the 21st day of April, 1877, and before the commencement of this action, and after the committing of the supposed trespass alleged in said declaration, the said defendant herein, Joshua Yeager and John H. Rigden, the husband of the said plaintiff herein, made and entered into a written agreement that said attachment levy might remain on said property, being the property described in the declaration herein, and not be released except said John Rigden could sell it or part thereof, and pay the amount of said sale to said defendant, Joshua Yeager, which agreement is in words

and figures as follows, to wit: 'This agreement, entered into the 21st of April, 1877, between Joshua H. Yeager of the first part, and John H. Rigden of the second part, witnesseth: That whereas, the said party of the first part did on the 20th day of April, 1877, institute a suit by attachment, in the district court of the county of Larimer, against the said party of the second part, to secure a certain demand against him, and, whereas, the sheriff of said county levied said writ on certain property of said party of the second part, this day, now, therefore, it is hereby stipulated and agreed, that said attachment levy shall remain on said property, and that in the meantime said party of the second part may have three months to pay and satisfy so much of the said attachment claim as the note amounts to, and that if he can sell any of the property attached he shall have the same released, provided he pays what the property sells for, to the party of the first part, to apply on the claim sued on, and the party of the first part hereby remits ten dollars of the amount of the attachment costs. It is also hereby stipulated that the party of the second part hereby relinquishes all the right, title and claim to the possession of a herd of cattle, as per agreement entered into between said parties on the 11th day of December, 1875. And said party of the second part hereby agrees to go to work immediately and gather and hunt up all the cattle belonging to said party of the first part that can be found, and account for those which cannot be found, and deliver them up to said party of the first part, and fully pay and satisfy and indemnify said party of the first part for all loss, costs and expenses herein and under said agreement, except the sum of ten dollars costs remitted. The party of the first part is to furnish two hands to assist in gathering said stock, and after all said cattle are gathered in and accounted or paid for, and all the expense and costs paid as aforesaid, and said attachment satisfied, the said suit is to be dismissed by said party of the first part, at defendant's cost. It is also agreed that the party of the first part shall take the

cattle from the ranch of the party of the second part in said county as fast as they can be found, free of charge against the party of the second part, and is not bound to furnish the two hands to gather in the stock as herein stipulated.

(Signed)

J. H. YEAGER,

J. H. RIGDEN.'

And the defendants say that the stock and goods and chattels mentioned in the aforesaid agreement are the same and none other than the said goods and chattels described in said declaration herein, and that they are the same goods and chattels now held by virtue of said writ of attachment, and none other; and that said agreement is still in force and unsatisfied; and that the said goods and chattels referred to in said agreement held by said attachment are the same and none other than the goods and chattels described in said declaration proven the property of said John H. Rigden when they were attached and liable to be attached at the county aforesaid, and this the defendants are ready to verify. Wherefore they pray judgment, etc."

To which the plaintiff replied that the property in the said goods and chattels was not in the said John H. Rigden, as in said pleas alleged, but in the said plaintiff.

The other facts are sufficiently stated in the opinion.

Mr. G. BERKLEY and Mr. E. V. PRICE, for plaintiff in error.

Messrs. HUGHES & WELBORN, for defendants in error.

ELBERT, J. Under date of February 15, 1876, John H. Rigden sold to J. H. Yeager, certain cattle and other chattels, giving a bill of sale of the same. On the 18th of April following, Yeager sold the same property to Caroline Rigden, the wife of J. H. Rigden, the first vendor, also giving a bill of sale therefor. On the 20th day of April, 1877, Yeager sued out of the district court for the county of Larimer a writ of attachment against the goods and chat-

tels, lands and tenements of the said John H. Rigden, which was levied by the sheriff upon the property thus transferred, as the property of J. H. Rigden. On the 23d of May following, Caroline Rigden, the wife, brought an action of trespass in the county court of Larimer county, against Yeager, the plaintiff in the attachment suit, and Marcus Coon, the sheriff, who made the levy. Trial was had in the trespass suit at the June term, resulting in a verdict in favor of the plaintiff for \$1,600.

The defendants, Yeager and Coon, bring error.

The instructions in this case, both given and refused, cannot be reviewed in this court as the exception to them is general. Such an exception we have repeatedly held insufficient. *Webber v. Emmerson*, 3 Col. 248; *The Kansas Pacific R. R. v. Ward*, ante, p. 30.

The remaining assignments we will consider in their order. A motion was made to quash both the summons and venire, as being improperly directed to and served by the coroner. Section 3, Article 5, R. S., p. 180, provides that the coroner shall serve and execute process of every kind, and perform all other duties of the sheriff when the sheriff shall be a party to the case. * * * * This is a special provision for the service of process in suits where the sheriff is a party, and controls and limits section 33 of the act concerning probate courts, R. S., p. 527, which provides that "all process issued by or out of said probate courts, shall be directed to the sheriff or any constable of the proper county."

The probate (now county) court is a court of record. The sheriff is an officer of all courts of record in his county, and the same reason exists for holding this provision applicable to the probate as to the district court. Both motions were properly overruled. Regularly we think, when the sheriff is a party, his official character should appear by allegation in the declaration or by suggestion of record. Courts, however, take judicial notice of who are their own officers, and, in the absence of any proof to the

contrary, the court in this instance was justified in presuming the identity of the defendant and the sheriff.

In the absence of any showing that the defendant Coon was not the sheriff of that name, the court was not called upon to quash the writs, nor was the defendant entitled to judgment on his pleas.

The matter set up in the two special pleas would not avail as a bar to a recovery, unless Rigden, the husband, was the owner of the property attached. His agreement that the property attached should remain subject to the attachment was without force or effect, unless the title to the property was in him. There is no allegation that in making this agreement he acted as agent of his wife. The replication, therefore, in denying the ownership of Rigden, went to all that was material in the pleas, and the defendant's motion for judgment, upon the ground that his special pleas were not traversed, was without merit.

The objection that the verdict was against the evidence resolves itself into two propositions:

1st. That there was not sufficient evidence that the plaintiff had either a general or qualified property in the chattels which were the subject of the trespass.

2nd. That there was not sufficient evidence of possession, either actual or constructive, to maintain the action.

Trespass lies against an officer who takes the goods and chattels of the owner, on an execution or attachment against a third person. *Gauche v. Mayor*, 27 Ill. 134; *Hessing v. McCloskey*, 37 id. 341.

To maintain the action, the plaintiff must have had, at the time of the commission of the injury, the actual or constructive possession of the goods, or general or special property in them, and a right to the immediate possession. 1 Waterman on Trespass, § 521, and cases there cited.

Treating the sale by Rigden to Yeager, and the subsequent sale by Yeager to the plaintiff, as a *bona fide* transaction, there was abundant evidence to show property in the plaintiff. There was a bill of sale to her from the

defendant, Yeager, and his receipt for the purchase-money. It was also in evidence that the property was originally purchased with money which the wife had received from her relatives in England, and that the note of Yeager, held by her, represented a part of this money. There does not appear to have been any actual delivery under either sale; nor as between the parties was any actual delivery necessary. The title to chattels may pass though the possession may not change. In each case, the possession remained with Rigden. Whether he acted as the agent of the wife, in holding the cattle, need not be determined. She was the general owner, and, as such, had the right to immediate possession, and this was all that was required for the maintenance of the action. 1 Waterman on Trespass, *supra*.

It is insisted, however, that the respective transfers were made with a fraudulent view of putting the property into the hands of the wife, and beyond the reach of the creditors of the husband. There was some evidence going to show, that such was the purpose, whether sufficient or not, we need not inquire. If such was the character of the transaction, the defendant, Yeager, was a party to it, and may not impeach it. He executed a bill of sale to the plaintiff, acknowledging the receipt of the purchase-money, and, in the absence of any fraud touching its execution, he is not in a position to question its *bona fides* as a creditor of Rigden, the husband.

A conveyance to defeat creditors is good as between the parties and their representatives. It is not competent for either party to impeach the provisions of such a contract on the ground that it was intended as a fraud on creditors, for the general principle of law, that no man shall set up his own fraud as the basis of a right or claim for his own benefit, would clearly apply. Benj. on Sales, § 490.

It is objected, however, that the bill of sale from Yeager to the plaintiff was not *subscribed* as required by the 12th section of the Statute of Frauds (R. S., p. 339), and was void.

The bill of sale recites the sale, specifies the several chattels sold and their separate as well as aggregate value. Across the face of this are written the words "Received of Caroline Rigden, the sum of eleven hundred and twenty-five dollars."

Our statute requires that the memorandum shall be subscribed by the party to be charged. The term "subscribed" is a substitute for the term "signed," used in the English statute, 29 Charles, and is held, "in its habitual use, and according to both its popular and literary signification, to require a signature at the end of a printed or written instrument." *James v. Patton*, 2 Seld. (N. Y.) 13; *Davis v. Shields*, 26 Wend. 350.

The bill of sale and the receipt are evidently but parts of an entire contract. The one evidences the sale, and the other the payment of the purchase-money. Why it was written across the face of the bill of sale does not appear. It may have been for want of space at the bottom of the page, or the whim of the party who drafted it. It is immaterial. The receipt stands at the end of the contract, and is subscribed by Yeager. This is a subscription of the entire contract as much as if the receipt followed the bill of sale upon the same or the next page. To say otherwise would be an unwarranted refinement in testing the ordinary business transactions of daily life by the requirements of the statute.

The laws of this State contemplate and provide for the independent acquisition and enjoyment of a separate estate by the wife. In the case of *Wells v. Caywood*, 3 Col. 487, it is said "in contemplation of the statute, whatever may be the actual fact, a *femme covert* is no longer *sub potestate viri*, in respect to the acquisition, enjoyment, and disposition of real and personal property. The statute asserts her individuality and emancipates her in the respects within its purview from the condition of thralldom in which she was placed by the common law."

It is claimed, however, in the case at bar, that the plain-

tiff has subjected her separate property to liability for the debts of her husband by reason of the care and control which she allowed him over it.

The doctrine as claimed is too broad. The care and control of the wife's property by the husband will not, *per se*, operate to defeat the wife's right as against creditors. To say that, being the *bona fide* owner of personal property, she may not allow her husband to have the general care of it, that he must avoid any contact with or custody of it, on peril of subjecting it to his debts, would be practically to annul the statute, or demand a separation of interest incompatible with the marriage relation. The husband is the customary guardian of his wife's property, where it does not pertain to the household. Had the law in terms forbidden his care and custody, its provisions in the wife's favor would have been practically useless. She could not have availed herself of them except by living separate and apart from her husband.

The legislature must have foreseen this natural and necessary agency. It is founded on the marital relation; in his physical strength and her physical weakness—in that division of duties which is universal, assigning to the husband the field, and to the wife the house. They must have also foreseen the temptation and opportunity for fraud and collusion upon the part of the husband and wife as against creditors. Notwithstanding this, they enacted the law and left its abuses to be guarded against by the prudence of parties dealing with them, and the power and disposition of courts to track the intricate windings of fraud and defeat its machinations.

Should the wife permit the husband to deal with and sell her separate property as his own, or obtain credit upon it as his own, undoubtedly this would be a fraud against which courts would extend their protection. *Patton v. Gates*, 67 Ill. 166.

So, too, it has been held that when the wife places her money in the hands of her husband for the purpose of car-

rying on a general trade, although in the wife's name, and the husband by his labor and skill, extending through a series of years, increases the fund, the entire capital embarked in the enterprise will be liable for his debts. *Wilson v. Loomis*, 55 Ill. 352; *Watman v. Price*, 47 id. 22; *Elijah v. Taylor*, 37 id. 249.

But the case at bar does not come within the reason of the rule laid down in any of these cases. The plaintiff testified that the property was purchased originally with her own money, received by her from relations in England; that they carried on a dairy, and that her husband as her agent had the general care of the cows; that upon the sale to Yeager by her husband, he transferred to her Yeager's note for the amount of the purchase-money as property belonging to her. The testimony of the husband is to the same effect.

The husband appears to have had the care of the cattle both before and after the sales referred to. That Yeager left the cattle in his charge after his purchase, is accounted for by the fact that he was herding other cattle for Yeager under a contract.

It does not appear that he held himself out to Yeager as the owner of the property, or obtained credit from him in any way as the apparent owner. It does not appear that, at the time the indebtedness to Yeager was incurred, the cattle had been purchased. There was no concealment of the wife's claim to the property; there was no claim of ownership by the husband by which Yeager was misled; on the other hand, there was full knowledge on the part of Yeager of the wife's ownership, derived through himself. At least the jury must have so believed and found.

Under such circumstances, to say that the general care and supervision, which the husband exercised over the property, will operate to defeat the wife's claim and right to it, would be to defeat the full intent and purpose of the statute, and render the independent acquisition and enjoyment

of property by the *wife*, dependent upon onerous and unequal conditions. *Dean v. Bailey*, 50 Ill. 482.

There is, therefore, no reason for reversal on the ground that the verdict is unsupported by the evidence; on the other hand, we think it in harmony with the weight of evidence.

There was more or less evidence admitted which was objectionable as being immaterial, but we are unable to see that the defendants were in any way prejudiced thereby.

These are all the assignments regarded as necessary to consider.

The judgment of the court below is affirmed with costs.

Affirmed.

INSTRUCTIONS GIVEN & REFUSED by the court below cannot be reviewed upon a general exception. 14 Colo. 325.
 HUSBAND'S CONTROL OF WIFE'S PROPERTY BY HUSBAND will not operate to defeat the wife's right as against her husband's creditors. *Palmer v. Hanna*, 6 Colo. 62; *Lake v. Bender*, 18 Nev. 190.

McINTIRE v. BARNES et al.

1. The statute (Laws 1872, p. 147) gives, when its provisions are observed, a lien to sub contractors and persons furnishing materials and labor, for the value thereof, but not exceeding the amount due or to become due to the principal contractor at the date of the notice to the owner of the lien claimed.
2. A contract for the erection of a building of "the best lumber," merely, must be construed to mean the best lumber of which buildings were ordinarily constructed at that place.
3. Where a building was to be completed within a given time, the value of the rental between that time and the time of actual completion may be recouped, unless by settlement, intended to be final, such damages were waived either expressly or by implication.
4. Where the owner permits the contractor to continue work after the expiration of the time in which the work was to be completed, he waives the right to rescind the contract on that ground. But by consenting to the extension he does not thereby waive such damages as he may have sustained by reason of the delay.
5. Although an account rendered may not be conclusive, it is always admissible to be weighed by the court or jury as other evidence, and may be treated as final when made with full knowledge of all the circumstances.

Appeal from District Court of El Paso County.

BARNES and others, the appellees, filed their petition in the district court of El Paso county for a mechanics' lien, alleging that the petitioners contracted with Sybrant who, as the agent of McIntire, the appellant, was erecting a building, to furnish labor and materials therefor. The cause was heard on the petition, answer, replications and master's report, and the court entered its finding and decree in favor of the petitioners to the effect following :

"That McIntire was owner of lot 19, block 92, in Colorado Springs; that he contracted with Sybrant for the erection of a building thereon and agreed to pay him therefor \$3,100; that said building was erected in pursuance of said contract, and was accepted by McIntire upon completion; that upon settlement on September 27, 1875, a balance was found due Sybrant of \$646.62; that Barnes furnished material for building to amount of \$530.27; that McGovney & Co. furnished lumber to amount of \$636.09; that Millard did work and furnished materials amounting to \$225.50."

"DECREE :—That McIntire pay lien claimants within 90 days from date \$646.60 and interest from September 27, 1875, at 10 per cent per annum, amounting in all to \$736.40, as follows: To Barnes, \$280.33; to McGovney & Capehart, \$336.68; to Millard, \$119.40, and interest on said sums at 10 per cent per annum from date until paid, and costs of suit; that upon default the sheriff sell lot 19 at public auction to the highest and best bidder for cash, at front door of county clerk's office, and to give notice as in case of sales under execution."

McIntire prayed and perfected an appeal to this court. Other facts are stated in the opinion.

Mr. WM. HARRISON, for appellant.

Mr. WM. A. WILKES and Mr. T. A. McMORRIS, for appellees.

THATCHER, C. J. The appellant and J. V. Sybrant, in the spring of 1875, entered into a contract wherein it was agreed that the said Sybrant should build a house, furnishing all the material according to certain plans and specifications, on a certain lot in the town of Colorado Springs, and would complete the same on or before June 15, 1875. The total consideration to be paid was \$3,100, of which sum \$300 were to be paid when the walls were completed; \$300 on completion of building, and \$2,500 in real estate, consisting of two lots, one of the value of \$1,500, the other of the value of \$1,000. The original agreement was lost. After the building was completed, upon application of McIntire, Sybrant furnished him with a certificate setting forth, substantially, the terms of the contract as he understood them. While the building was in progress of construction it is fairly inferable from the evidence, that in lieu of conveying to Sybrant the lot valued at \$1,000, McIntire agreed to pay the like amount in money, to enable Sybrant to complete the building. Not only is the testimony of Sybrant to this effect, but McIntire's course in making cash payments, largely in excess of the amount due, if the terms of payment had not been subsequently altered, tends to corroborate Sybrant's statement, that the original contract was subsequently modified by parol, so far as to convert the \$1,000 payment in real estate into a money payment.

The lien claimants are Gerrit S. Barnes, the firm of McGovney & Capehart and Albert S. Millard. Barnes furnished to Sybrant, the contractor, hardware and materials for use, and that were used in the construction of McIntire's building, of the value of \$530.27. McGovney & Capehart furnished materials of the value of \$636.09 which were used in the building, and Millard furnished materials which were used in the building of the value of \$225.50. No dispute arises as to the amount due the several lien claimants from Sybrant, but the controversy presented by the pleadings and proofs relates to the validity of the several claims as liens on the building and premises of McIntire, under the

statute of this State, approved February 9, 1872, Session Laws 1872, p. 147.

The statute just cited, when its provisions are observed, gives a lien to the sub-contractor and persons furnishing labor and materials, for the value thereof, but not exceeding the amount due or to become due from the owner to the principal contractor at the date of the notice to the owner of the building, of the lien claimed. *Jensen et al. v. Brown*, 2 Col. 694. The lien of the sub-contractor and material-men is always in strict subordination to the terms of the original contract between the owner and his immediate contractor. Phillips on Mechanics' Liens, § 62. A material inquiry therefore is, what amount was due at, or became due after, the filing of the lien.

Appellant urges that the building was not finished as the contract of Sybrant. It is true that as he was making but slow progress in the construction of the building, McIntire directed Sybrant's foreman to complete the work more speedily so that it might be ready for occupancy by D. J. Martin, his prospective tenant. The building was completed by the foreman with the consent, and to a certain extent, under the direction of Sybrant. McIntire treated the contract as entire and as completed by Sybrant. In the account rendered by McIntire to Sybrant, the amount paid the foreman by McIntire was charged up to Sybrant. We do not think the court erred in finding that the building was completed by Sybrant. The account rendered demonstrates, that, as understood by the parties, Sybrant was accountable to McIntire for whatever amount was advanced to the foreman toward the completion of the building.

Although the contract called for the best lumber, it is not necessarily to be construed to mean lumber of rare or extraordinary quality. Within the reasonable intent of the contract, "the best lumber" means the best of the kind that is ordinarily used in the construction of like buildings. In view of the fact that the evidence discloses that there was none other than Colorado lumber in the Colorado Springs

market at the time, it is to be presumed that had it been the intention of the parties that clear Chicago lumber, or any other lumber to be transported from a distant market, should be used, the contract by apt words would have so declared. Had it been made to appear that Chicago lumber was ordinarily used in Colorado Springs in the construction of similar buildings, the question might be differently resolved. In the absence of such evidence the claim to recoup damages on the basis of the difference in value between Chicago lumber and Colorado lumber of the kind used in the building, is not well founded.

The testimony as to the character of the Colorado lumber used in the building is widely conflicting. If there was any departure from the terms of the contract in this respect, what damages, if any, were sustained, does not appear. In view of all the evidence, we think the court might have found, as it must, in fact, have found, that any claim for damages on that ground had been waived by the acts and conduct of the appellant.

A very different question relates to the appellant's claim to recoup, on the ground that the building was not completed within the agreed time. According to the terms of the contract, the building was to have been finished June 15, 1875; but McIntire, by permitting Sybrant to continue to work on his contract after the expiration of the time, waived his right to rescind the contract on that ground. But, by consenting to the extension, he did not *thereby* waive such damages as he may have sustained by reason of the delay. Waterman on Set-off, § 515; Sedgwick on Meas. of Dam., p. 215 (n); *Sinclair v. Tallmadge*, 35 Barb. 602; *Abbott v. Gatch*, 13 Md. 314.

The evidence shows that the appellant caused the building to be erected, not for his own use, but with the intention of renting it to others. If it should appear that the building could have been rented June 15th, had it then been completed, or at any time thereafter prior to September 1st, when it was finished, ordinarily, the owner would be

entitled to recoup the amount he might and could have received for its use, for such a period of time as it might and would have been used, had the building been completed within the contract time. *Wagner v. Corkhill*, 40 Barb. 175.

From the testimony of McIntire and Martin, it appears that had the building been completed in time, it would have been occupied by a tenant, two and half months before it was finally finished. The rental value for that period might be recouped, unless, by a subsequent settlement intended by the parties to be final, such damages were expressly, or by implication, waived.

About a month after the completion of the building, sub-contractors and material-men having applied to McIntire for the amount they claimed to be due, he sought a settlement with Sybrant, so that he (McIntire) might be enabled to pay off the lien claimants *pro rata*. Sybrant testifies, that before the settlement was had, "McIntire claimed he wanted to know how much money was going to parties who had claims against the building." Accordingly, he rendered the following account to Sybrant:

"H. A. McIntire, real estate, loan and insurance agent, Colorado Springs, Colorado.

This statement of account between H. A. McIntire and J. V. Sybrant, made this 27th day of September, 1875, shows that the contract price of building erected on lot 19, block 92, Colorado Springs,

was.....	\$3, 100 00
There was paid June 10, 1875.....	\$650 00
There was paid July 6, 1875.....	1, 450 00
There was paid July 29, 1875.	105 00
On August 26, 1875, it being impossible to get the building completed by the contractor, another party was called and completed it, to whom was paid,	248 38
	2, 453 38
Balance due contractor.....	<u>\$646 62"</u>

This account, on presentation to Sybrant, was approved and indorsed *correct* over his signature, except that he claimed that \$150 were due him for extra work.

By this account it was agreed that (exclusive of extra work to the payment of which McIntire did not then bind himself), the balance then due contractor was \$646.02.

With a full knowledge of all the circumstances attending the carrying out of the contract, this settlement is had. And although it is true that an account rendered is not necessarily conclusive, it is always admissible in evidence to be weighed by the court or jury as other evidence. That the court treated it in the light of a final settlement between the parties, made for the evident purpose of enabling McIntire to adjust the lien claims against the building, is apparent from the decree. Having in view the concomitant circumstances we cannot say that, all the testimony being considered, the finding of the court is unsupported by the weight of evidence. We will not disturb it. As no one who can be prejudiced complains of the disallowance by the court of the item for extra work, it need not be considered.

The decree of the court below is

Affirmed.

BUILDING CONTRACT — BY WAIVING HIS RIGHT to reject lumber, the owner prevents the material man from rescinding the agreement to furnish it: *Curry v. McIntyre*, 7 Colo. 177.
MECHANIC'S LIEN — TENDS ONLY TO AMOUNT DEED TO BECOME DUE CONTRACTOR at the date of the notice to the owner of the lien claimed: *Tabor v. Armstrong*, 9 Colo. 284.

THE PEOPLE ex rel. MUNN et al. v. BOARD OF TRUSTEES OF THE TOWN OF OURAY.

A writ of mandamus issued by a district judge in vacation may not be made returnable at his pleasure into any county of his district, but must be made returnable in the county where the parties defendant may be properly impleaded. Where an alternative writ was so issued and made returnable before the judge in vacation in another county, and upon demurrer the proceedings were dismissed, *held*, that the judge was without jurisdiction at the time and place to hear the cause upon its merits, and the judgment of dismissal was therefore erroneous.

Appeal from District Court of Ouray County.

THE case is stated in the opinion.

Mr. C. S. THOMAS, for appellants.

Mr. M. S. TAYLOR, and Mr. P. L. HUBBARD, for appellees.

ELBERT, J. This was a petition for mandamus presented to the Hon. THOMAS M. BOWEN, judge of the fourth judicial district, for the county of Ouray, at chambers, July 18, 1877. An alternative writ was granted, returnable before the said judge at chambers, in Del Norte, Rio Grande county, on August the 6th. Upon the return day of the writ, the respondents appeared and demurred to the writ; the demurrer was sustained and the "writ and proceedings dismissed." This is assigned as error.

The first ground of demurrer assigned is, that "the judge at chambers in the county of Rio Grande has no jurisdiction of the subject-matter of this action or of the persons of these defendants." This point we regard as well taken. While the act of February 13, 1874 (Sess. Laws, p. 180), provided that the writ of mandamus might issue in vacation, there is nothing in its provisions that would justify us in saying that the judge might make it returnable to any county in his district at his pleasure. Formerly writs were returnable *ubicunque fuerimus in Anglia*, but it is not probable that the legislature contemplated a return to that ancient practice. The act makes the writ returnable "to any day in the next term or in the term then sitting, or any day in vacation that he may designate not less than ten days after the issuing of such writ with like effect as the court might do."

Had this writ been granted by this district court of Ouray county, it could not have been properly made returnable to another county in the district. The judge in vacation has no other or greater power.

Again, the act provides that "the clerk of the district court of the proper county shall keep a record of said cause and all proceedings therein, the same as if the same were had, done and determined in term time." This indicates a return of the writ before the judge at chambers within

the proper county, which is the county, where the parties defendant may under the law be properly impleaded.

The judge therefore did not err in dismissing the writ.

There was error, however, in dismissing the petition, as the judge had no jurisdiction at that time and place to hear the cause upon the merits.

The judgment in this respect is reversed with leave to the petitioners to renew their application on the petition filed if they should be so advised.

Reversed.

MANDAMUS MUST BE MADE RETURNABLE to the county where the defendants may be properly impleaded: *Bean v. People*, 6 Colo. 100.

No. 5 MINING Co. v. BRUCE et al.

1. Under the statute of February 13, 1874 (page 213), in the trial of issues of fact in the probate courts, if a party would have a trial by a jury of twelve, he shall make demand for a jury of that number before the venire is issued, and where the record failed to show either a waiver of, or a demand for, a jury of twelve, *held*, that the cause was properly tried by a jury of six.
2. Where there was no motion in the court below for a new trial this court will not examine into the evidence to ascertain whether it supports the verdict, but may do so for the purpose of determining the character of the instructions.
3. In an action upon a naked contract to sink a mining shaft a certain number of feet at a specified sum per foot, without any specific agreement for timbering, *held*, in the absence of such agreement, and in the absence of proof of custom requiring such work in a shaft, that timbering was no part of the contract.
4. Error may not be assigned upon the giving of a merely unnecessary instruction.
5. Where one is bound by contract to two persons severally, and only severally (their interests being also several), they not only may, but *must* sue upon it severally, and in a joint action the plaintiffs may not be permitted, over defendant's objection, to introduce evidence of a several contract.
6. Instructions must be warranted by the evidence properly before the jury, and when an instruction is given, based upon evidence improperly in the record, the judgment will be reversed.

Error to County Court of Clear Creek County.

IN the trial of this cause in the county court the record discloses the following evidence :

Bruce, one of the plaintiffs, testified : "Horton and I took contract for one hundred feet sinking at \$20 a foot with water stipulation ; defendant was to pay expenses for the water ; sank sixty-one feet and timbered ; date of contract was October ; commenced sinking October 20, 1875 : worked until December 20, 1875 ; sank twenty-five feet and stopped to work in engine room ; was told to do what was necessary to receive the machinery ; to do extra work necessary for hoisting ; they agreed to put in machinery, as soon as it was necessary, for hoisting ; we were to receive \$4 per day, each ; he engaged us jointly ; there is \$332 due for days' labor, my own individual time ; Horton's amounted to \$258 ; the shaft at this time was forty-five feet ; day-work began in December ; resumed sinking in May ; sank two days in May ; quit July, 1876 ; received on account \$1,433, including labor and contract ; balance due is \$795 ; were to be paid monthly on contract ; got money we did get, as we could ; got last payment July, 1876 — \$213.50 — the monthly installment ; the balance stated was then due during the first week of July, 1876 ; it had never been paid up according to contract since we commenced ; we didn't sink shaft the depth agreed on because we were not able to carry it on — we hadn't the money."

Cross-examination : "During July we were laid up on account of broken machinery ; during first three months of contract kept six men at work ; Teal didn't request to keep back 25 per cent of contract money, it was not the agreement ; whole contract was verbal ; we worked on the sinking together and the days' wages together ; up to December we had sunk twenty-four feet, and the water expenses were \$31.50 ; in December, eleven feet, water expenses were \$42 ; water expenses in May were \$341 ; we checked the time bailing ;

Teal was superintendent of the company ; was down in the shaft once, saw our timbering, and said that would do ; he told us to hire men to put in the machinery, and on water expenses, and he would pay the bill ; we employed the men to work for the company ; they told us to do the extra work, it had to be done."

Horton, plaintiff, after stating, in substance, same as Bruce, testified : "they owed us for sixty one feet on the contract at \$20 per foot, \$1,220, for work done by the day by me, \$258 ; by Bruce, \$332."

Cross-examination : "We based the charge for water expenses on inconvenience and loss of time ; states the quantity of water ; we drained the Equator shaft, that is what made the water so great ; we estimated the water increased our work one-half ; defendant accepted our work and agreed to pay ; I had my own days' wages, and I think Bruce put in both bills ; each kept his own money."

Motion to strike out all evidence of days' wages, first testified under objection, by said Bruce and said Horton ; motion overruled ; exception.

Simmons, sworn for defendant, testified as to contract and payments to plaintiff of balance due, \$137, including \$50 which directors agreed to allow for water ; "for days' work there is still due Horton \$200, Bruce \$128 ; plaintiffs were employed to work by the day ; orders were to employ them individually."

Cross-examination : "Am secretary of the company ; they had been at work three months before Hambel and I were authorized to act for the company."

George Teal, sworn for defendant : "Was director ; proved custom for contractor to take care of water ; examined the shaft ; proved defective work ; some timbers were crushed in and broken ; I cannot give an estimate in figures ; the superintendent should not have allowed it to be done as it

was; plaintiff presented bill at Hall's office; they brought in a claim for water expenses; it was repudiated; James Teal there read a statement of contract in their presence; don't know what objections were made; the agreement was, 25 per cent was to be kept back.

G. W. Hall, sworn for defendant: "Examined shaft; timbers broken and work badly done; have already spent from \$300 to \$400 to secure it; will have to be re-timbered; it will cost at least \$700 in work, besides the timbers to repair; I am president of the company."

William M. Treglone, sworn for defendant, stated: "That timbering put in by Bruce would have to be replaced on account of bad workmanship; to replace will cost double the price of original timbering."

Admitted in writing that if James Teal were present he would swear that, on the contrary, plaintiffs were to take care of the water at their own charges.

J. T. Horton, recalled, proved that James Teal, superintendent of the work, was in the shaft several times, and that the work had been accepted by the company; he found no fault with the work; he was superintendent for the company.

The jury found for the plaintiffs, assessing their damages at \$427, for which amount judgment was rendered. And thereupon the defendant below sued out this writ of error.

Messrs. MORRISON & WHITE, for plaintiff in error.

Mr. W. T. HUGHES and Mr. L. C. ROCKWELL, for defendants in error.

STONE, J. This action was brought by defendants in error, in assumpsit, to recover for work done in sinking a shaft on the mine of the plaintiff in error, upon a verbal contract therefor. The general issue was the only plea of the defendant below, on which issue was joined at the trial.

The first point made by the plaintiff in error that we are

called upon to notice, is that the case was tried by a jury of six, without waiver of the right to a jury of twelve.

The third section of the act amendatory of the law relating to probate courts, approved Feb. 13, 1874, declares that, "all issues of fact in said probate courts shall be tried by a jury of six men, unless both parties waive a trial by jury," etc. Section four of said act further provides that, "If at any time before the calling of the cause for trial, and before any *venire* shall have issued, either party shall demand a trial by a jury of twelve men, a jury of twelve men shall be summoned and impanelled, but the party demanding the same shall be required to advance and pay into court the sum of twenty dollars at the time of making such demand." A proper construction of these two provisions of the statute in force at the time seems to imply that the trial shall be had by a jury of six men, unless a trial by jury shall be waived by both parties, or unless one party or the other shall demand a trial by a jury of twelve. The record in this case does not show that a jury was waived, nor that a jury of twelve was demanded by either party, and the case was therefor properly tried by a jury of six.

The statute referred to authorizes the issuing of a special *venire* for a jury in such cases, and hence the fourth error assigned is unsupported.

The first, second, fifth, sixth, tenth, eleventh and twelfth assignments of error appear to have been waived by counsel for plaintiff in error, and are not argued in their briefs, so that the only alleged errors remaining to be noticed arise out of the giving and refusing of instructions.

Since there was no motion for a new trial in the court below, the evidence is not before us for the purpose of determining whether it supports the verdict or not, and we have therefore examined it only for the purpose of determining the character of the instructions in question.

The seventh assignment of error is that the court erred in

refusing to give to the jury the following instruction, prayed by plaintiff in error, to wit :

"The court instructs the jury that every contract to do work and labor is presumed to be a contract to do such work and labor in a good and workmanlike manner, unless the contrary is proved, and if the jury find from the evidence that the work of timbering in this case was not done in a good and workmanlike manner, the jury should allow against the plaintiff's claim the amount expended, or which must yet be expended, to make it a good and workmanlike job."

The first clause of this instruction is undoubtedly true as a rule applicable to contracts for works, but the latter portion depends for its correctness upon the state of facts disclosed by the evidence.

Neither the contract as set out in the pleadings, nor the evidence, shows that there was any agreement that defendants in error were to timber the shaft. It was a naked agreement to sink a shaft so many feet for so much money per foot. Had the contract specifically required the defendants in error to timber the shaft, they would of course have been bound to do such work in a good and workmanlike manner, but in the absence of such agreement, or in the absence of proof of custom requiring such work in sinking a mining shaft, we are left to infer that such timbering by defendants in error was voluntary on their part, and for the purpose of protecting themselves in their work, and whether permanent or temporary, good or bad in its character, it in no way affected the contract for sinking the shaft.

Under this state of facts shown by the testimony, the instruction was inapplicable and erroneous, and was therefore properly refused.

The errors, alleged in the eighth and ninth assignments, are for the giving of the two following instructions.

"The court instructs the jury that if the Number Five Mining Co. agreed to pay the plaintiffs for sinking down, and the expenses in bailing water, etc., monthly install-

ments for the same, and failed to do so, then the plaintiffs were justified in giving up the job, and may collect from the defendants any and all moneys reserved by the defendants as a forfeiture."

"The court further instructs the jury that if the defendant hired the plaintiffs jointly to do the work in the chamber by the day, they will find for the plaintiffs for at least the amount that the defendant admitted to be due the plaintiffs."

The first of these instructions was perhaps unnecessary, since no defense seems to have been made on the ground that the "job" was not completed, and the reservation of twenty-five per cent of the amount due for work, as it accrued monthly, does not appear to have been made on that account.

The second instruction has reference to extra work done in excavating an engine room or chamber, and for which plaintiff in error agreed to pay by the day. As to the correctness of this instruction, I disagree with the majority of the court, and hence state my own views and conclusions upon the point involved.

Bruce, as witness, testified that the defendants in error were engaged jointly to do this work, at the price of four dollars a day each. The secretary of the company testified that there was yet due on this work, "Horton, \$200; Bruce, \$128." That is to say, there was admitted to be due \$328, of which \$200 was for days' work done by Horton and \$128 for like work done by Bruce, aside from the contract for work in sinking the shaft. I can see no difference between this manner of keeping the account with respect to the work done by the contractors themselves, and what would have been the case if the contractors had hired other men to do the same work. The plaintiff in error would in either case be bound to pay the amount due for all the days' work, leaving the contractors to divide it between themselves, as they chose, or as they were respectively entitled to it. It is sometimes not without difficulty

that a line of distinction can be drawn between contracts that are joint and those that are several in their nature. Occasionally a contract seems to partake of both natures; and again a contract is found which is joint in its main scope and object, but which contains one or more covenants that are several, or *vice versa*.

I understand a difference to exist between an interest which is common and one which is joint; and that where parties have a *common* interest in the claim made in an action, they *may* join as plaintiffs, but where they have a *joint* interest they must so join. For instance, tenants in common may maintain a joint action for rent due under a lease of the joint estate, all the covenants in which are *with them* jointly, although by an agreement, annexed to the lease and made a part thereof, it is stipulated what portion of the rent shall be paid to each. *Wall v. Hinds*, 4 Gray, 256. On the other hand, where a deed is executed by several grantors jointly, but their interests in the premises conveyed are distinct and several, any one of them may bring his separate action for his share of the purchase-money. *Leake v. Brown*, 43 Ill. 372. But it would be otherwise, I take it, if the interest so conveyed were undivided or joint.

It the parties to a contract have a joint interest in the fulfillment of the contract, and sustain a joint damage by a breach of the engagement they had entered into, they must all bring a joint action. *Wright v. Post*, 3 Conn. 142; and this, too, although the terms be several, or joint and several. *Capen v. Barrows*, 1 Gray, 376; 1 Chit. Pl. (16th Am. ed.) 9 and note *y*; and 11 note *n*, and cases cited. Where plaintiffs sue as joint contractors they, as a general rule, undoubtedly must show a joint interest in the subject-matter of the suit, and as to the general rule of pleading as to joint and several actions, applied to those, distinctly as such, I do not differ with my learned brethren. I regard this case as one of a class *sui generis*, perhaps, where the principal contract is essentially joint, although some of the incidents are several as relating to some of the parties. The

main contract here was for the sinking of a shaft which plaintiffs below jointly contracted to perform. The work of excavating for the engine room was an incident of the former, and the necessity for it arose out of the principal contract. Hence they may be said to have been jointly interested in the fulfillment of the subsidiary contract for this work, as a necessary part of the other, although from the obvious difficulty of estimating the cost of this work in the same manner as for the sinking of the shaft, the mode of payment was fixed to be by the day, at least such interest was a common one; and I cannot think it would be doing violence to the rules of pleading and practice to allow the contractors to join in a single action for the price of their whole work, notwithstanding the price was to be differently computed for the different parts. If the work of excavation for the engine room had been the sole contract, or if pending the work on the shaft, the plaintiff below had engaged to go out and chop cord wood, or herd cattle for the company, by the day, I concede, of course, that such distinctly several contracts would create separate causes of action; but the construction of the engine room was, as I infer from the evidence, for the purpose of placing an engine to hoist material out of the shaft they were sinking, and this work was inseparable from the other. Entertaining this view of the legal question presented, and considering that there was no dispute as to the amount due for this part of the work done by the day, either between the parties plaintiff and defendant, or between the plaintiffs themselves, and that it was only withheld by the company on the ground that the contract for sinking the shaft was not fulfilled, thereby treating it as a part of the entire contract, I think that to hold that a severance was necessary, and send this case back, thereby compelling each of the defendants in error to bring a separate suit for that part of his wages which is undisputed, involving three suits where, in my opinion, one would suffice, seems to me a refinement calculated rather to obstruct than to facilitate the administration of justice.

THATCHER, C. J. With the conclusions reached by brother STONE, upon the several assignments of error, except that which relates to the right of the plaintiffs to recover in a joint action for the extra work, I am in accord. But I do not agree that the amount due each of the plaintiffs for such extra work was properly admissible in the joint action. The contract with the plaintiffs for sinking the shaft at an agreed price per foot was unquestionably a joint contract. But aside from this contract the company employed Bruce and Horton to work by the day in excavating an engine room. They were to receive each four dollars for every day they worked. Separate accounts were kept with each, and payments were made to them individually.

According to the testimony of the secretary of the company, the amount still due Horton on his separate account, for days' work, was \$200, and the amount due Bruce individually, for days' work, was \$128. Although the action was joint, the court permitted this evidence to go to the jury, and afterward denied the defendant's motion to exclude it, to which ruling the defendant excepted. It was not admissible in any view of the case, for any purpose. Its only tendency was to mislead the jury. The motion to exclude it should have been allowed. The simultaneous hiring of two or more persons to work by the day, each at a stipulated price per day, and each to be paid for the number of days he works, constitutes a several contract with each. "Where one is bound by contract to two persons (as B and C) severally and only severally (their interest being also several), they not only may, but it seems *must*, sue upon it separately; for the case is in effect that of two distinct contracts, though contained in one instrument." Gould's Plead., chap. 4, § 60.

The court instructed the jury "that if the defendant hired the plaintiffs jointly to do the work in the chamber by the day, they will find for the plaintiffs for at least the amount that the defendant admitted to be due the plaintiffs."

This instruction is not warranted by the evidence. If as a proposition of law, it is sound, it was nevertheless error to give it if there was no legal evidence upon which to base it. As we have already seen, the only evidence to which this instruction could apply, the court erroneously refused to exclude on motion of defendant. The instruction was misleading. Says Judge BREESE in *Ewing v. Runkle*, 20 Ill. 464: "The court should not send the jury out into the broad field of conjecture, but confine them to the facts as proven, on which alone instructions can be properly raised."

The evidence neither proves nor tends to prove a *joint* contract. The agreement was in its nature several. As to the facts testified to, connected with their employment, there is no substantial variance, unless indeed the testimony of Bruce, that the contract was joint, is to be considered. But this was a mere legal conclusion of the witness, which the facts did not authorize, and to which it was not competent for the witness to speak.

In these views brother ELBERT concurs.

The judgment is reversed and the cause remanded for further proceedings.

Reversed.

MILLER, impleaded, etc. v. SPARKS.

1. A lessor, before he exercises the right of re-entry reserved for breach of covenant to pay rent, must make actual demand of the amount due in strict compliance with the requirements of the common law.
2. That which is apparent to the court and appears from a necessary implication out of the record, is the same as if it were expressly averred.
3. That a complaint in an action of unlawful detainer under the statute (R. S., p. 382) alleges a forcible detainer, and also alleges a demand for possession when no demand was necessary, does not affect the sufficiency of the complaint, or render it obnoxious to the objection that two causes of action are stated in one count.

4. Under the statute (Laws 1873, p. 110, § 7), where a cause is brought into the district court of Gilpin county, from a justice's court by *certiorari*, it is in the power of the court to render an independent judgment upon the law and the evidence, without reference to the inquiry whether the judgment of the justice was an entirety or otherwise.

Appeal from District Court of Gilpin County.

FORCIBLE entry and detainer. Sparks, the appellee, filed his complaint before a justice of the peace of Gilpin county, substantially as follows:

That "on the 27th day of August, 1875, at said county, Alexander C. Newton and Loring P. Miller were the owners of, and in the possession of, the following described lode, mine and mining claim to wit: the east eight hundred feet of the Grand Army lode, situate in Eureka mining district, in said county, being the east eight hundred feet of that certain claim on the Grand Army lode, sixteen hundred feet in length, patented to said Loring P. Miller & George Newton, by the government of the United States. Also a certain shaft on said lode just outside of the surface boundaries of said Grand Army lode, as described in said patent, being same shaft sunk by said Miller and one George Wood; that on said 27th day of August, 1875, Alexander C. Newton and Loring P. Miller made and executed and delivered to said Ozias T. Sparks, their certain lease in writing, signed and sealed by said Miller & Newton and said Sparks, whereby said Miller & Newton conveyed, demised, leased and let unto said Sparks said above described premises, being said eight hundred feet on said lode, and said shaft, for and during the term of three years from the said 27th day of August, 1875; that said Sparks then and there, to wit: on said 27th day of August, 1875, entered upon and into the peaceable possession of said shaft and said eight hundred feet on said lode, was then, and from thence until the 1st day of March, 1876, in the quiet, peaceable and undisputed possession of said premises, and was during all that time working and mining said premises, according to and under, and by virtue of the said lease, so

executed to him by said Newton & Miller; that on the 1st day of September, 1875, said Sparks employed said Loring P. Miller and one George Newton to work for him in sinking a shaft and mining and hoisting ore on said mine, and said Miller and said George Newton worked for him from said 1st day of September, 1875, up to the 1st day of March, 1876, as his servants and employees, part of the time, and part of the time said Miller was working upon a contract with said Sparks for sinking the shaft; that on the 29th day of February, 1876, said Sparks was at the said mine as usual during the day, and went home at night, leaving one shift at work upon the mine, among whom was the said Miller; that the said Sparks returned to said mine at the usual hour on the morning of the 1st of March, between seven and eight o'clock, and found the door of the shaft house on said mine closed, and locked upon the inside, and the front door also locked upon the outside; that said Miller and George Newton were upon the inside; that said Sparks called upon them to open the door and admit him to the said shaft house and premises; that they refused to do so, and the said Miller said to complainant that he had possession of said premises and was running it, and that, if complainant came in the said shaft house, he would get hurt; that complainant then attempted to get in, and reached inside and tried to open the door, whereupon said Miller struck complainant on the hand with an axe, and wounded and injured the said complainant, and by such force, violence and threats of violence, did then and there, to wit: on said 1st day of March, 1876, turn said complainant Sparks out of possession of said premises, theretofore so possessed by him as aforesaid, and did then and there by such force, violence and threats, detain and hold possession of said premises, and with said Alexander C. Newton, has ever since unlawfully detained said premises against the right of said complainant, although the said Sparks has since the said entry of the said Miller and Alexander C. Newton, to wit: on the 3d day of March, 1876, made a demand, in

writing, of the said Loring P. Miller and Alexander C. Newton, for the possession of said premises, and mine and shaft thereon, a copy of which demand, in writing, is hereto attached and made a part hereof, marked 'A.' Yet they, the said Loring P. Miller and Alexander C. Newton now unlawfully detain and hold the possession of said premises and mine, and against the right of said complainant, therefore, he prays that the said Loring P. Miller and Alexander C. Newton may be summoned to answer this complaint, as is by statute in such cases made and provided."

Second count substantially the same as the foregoing, except as to the allegation of the entry, which was as follows:

"That on said first day of March, 1876, said Loring P. Miller and Geo. Newton, said Geo. Newton acting for Alexander C. Newton, unlawfully and forcibly entered upon said mine and premises, and forcibly detained the same from the said Sparks, and said Miller and Alexander C. Newton still unlawfully detain said premises, although said Ozias T. Sparks is lawfully entitled to the possession thereof, and has since said forcible entry, and before bringing this suit, made demand in writing of said Alexander C. Newton and Miller, for possession thereof."

The separate answer of Miller was as follows:

"Loring P. Miller, defendant in this suit, by way of an answer to the complaint in this case, by this, his amended answer to the first count in said complaint, says, he admits the making of the lease, together with the said Newton, and delivering the same to said Sparks, as in said first count of the complaint is alleged; admits that Sparks took possession of said premises and worked the same for the time, in the manner set forth in said count; admits that when Sparks came there on the morning of the first of March, 1876, the doors of the shaft house or building were closed and fastened as is charged and set forth in said first count; admits that he and George Newton were in the shaft house on the morning of the first day of March, 1876, when said

Sparks came to the said building or shaft house, and demanded the door to be opened and his admittance therein; admits he denied admittance to said Sparks at that time into said building and shaft house, but he denies that he said to said Sparks that he (Miller) would hurt him (Sparks) if he came into said shaft house or mine, and he denies that he struck said Sparks on the hands with an axe, or with any thing else, or that he touched him in any way, or used any threats of violence or injury to said Sparks, or that he used any words or actions, as have a natural tendency to excite fears or apprehension of danger toward said Sparks, or that he frightened said Sparks out of the possession of said premises, as in the said complaint is alleged; denies that he alone, or together with Alexander C. Newton, has kept or detained the possession from said Sparks of said premises, or any part thereof, by threats, or by force or violence, or in any other way, from the said first day of March, 1876, until the commencement of this suit, or for any part or portion of said time, except as hereinafter stated, and he denies that he has since the first day of March, 1876, either by himself or together with Alexander C. Newton, by force, violence or threats, kept or detained, or held possession of said premises or any part thereof, against the rights of said Sparks, as in said first count is alleged; admits that said Sparks served a paper on him demanding the possession of said premises on the third day of March, 1876, but whether said paper or notice was sufficient in law for the purpose intended he neither admits or denies, but will demand strict proof of the same at the trial; avers he did not have possession of said premises or any part thereof at the time said notice was served upon him, and could not give possession thereof, and has not had possession since that time.

And this defendant further answering the first count of said complaint says, that the lease mentioned and set forth therein among other things provides that said Sparks shall work and mine said premises in a good and workmanlike manner, including timbering said mine whenever or

wherever necessary, that said Sparks should pay to said Newton and this respondent as rent therefor ten per cent of the gross proceeds of said mine, payable whenever and as often as any ore shall be crushed, or treated or sold, and the proceeds thereof returned therefrom, said rent to be paid to said Newton and this respondent, or deposited to their credit in the Rocky Mountain National Bank, in Central City, in said Gilpin county, and in case said rent shall not be paid or deposited at the time and in the manner specified in said lease, the said Newton and this respondent might re-enter and take possession of said mine and premises, and every part thereof, and occupy and enjoy the same as of their first and former estate, and the said Sparks be put out of said premises, and the said Newton and this respondent have the right to use such force as may be necessary in so doing, and all rights of the said Sparks under said lease shall cease and absolutely determine. That said Sparks on or about November, 1875, had some two or three cords of ore mined, and taken from said premises, and crushed, and reduced, and received therefor at least one hundred and twenty dollars, ten per cent of the gross proceeds of which, under the terms of said lease, belonged to and should have been paid to said Newton and this respondent, by said Sparks as rent, but how much more rent is due them from said Sparks he does not know and cannot state, but said Sparks did not pay or offer to pay said Newton and this respondent, or either of them, any part thereof. Neither did he deposit the said rent, or any part thereof, in the Rocky Mountain National Bank, at Central City, to the credit of said Newton and this respondent, or to the credit of either of them, wherefore, upon the morning of the first day of March, 1876, the defendant went upon the said premises and into the shaft-house and building, peaceably and without force, and when no person or persons were in or upon the same, and took quiet, peaceable and lawful possession of said shaft-house and mine as aforesaid possessed by said Sparks, as he lawfully might do

under the terms of said lease, because of the forfeiture of said lease on the part of said Sparks, for the neglect and failure to pay the rent then and there due, under the same as aforesaid, and for said Sparks' neglect and failure to work and mine said premises, in a good and workmanlike manner in this, in not timbering said mine whenever and wherever necessary; avers that when he took possession of said premises as aforesaid, the said sum of twelve dollars and over for the rent had been due this defendant and Alexander C. Newton since the first day of December, 1875. And this defendant further answering says: That after he had taken possession of said premises as aforesaid, on the morning of March 1st, 1876, he immediately turned the said premises and every part and portion thereof, together with the appurtenances thereon, over to James C. Fagan; avers that he has not had the possession of said premises since the said first day of March, 1876, and then only for a very short time, and he denies that he alone, or together with said A. C. Newton, is guilty of forcibly entering into the possession of any part or portion of the premises mentioned and described in the said first count, on the first day of March, 1876, or at any other time, and dispossessing said Sparks, and by force, violence and threats, detained and held possession of said premises against the right of said Sparks, as in said count is alleged, and this he is ready to verify, wherefore he prays judgment."

The answer to the second count was substantially the same as the foregoing, denying the entry of respondent with George Newton as alleged in the second count. Sparks demurred; the demurrer was sustained and Miller elected to stand by his answer, and final judgment was thereupon entered on the demurrer. The cause coming on to be heard on the complaint, and the answer of Newton, the court, after hearing the evidence, gave judgment in favor of the plaintiff. Upon the review of the cause on *certiorari* in the district court, the judgment as to Miller was affirmed, and as to Newton reversed, and a writ of possession awarded the plaintiff. Miller prayed an appeal to this court.

Mr. WM. R. GORSLINE and Mr. L. C. ROCKWELL, for appellant.

Messrs. BELFORD & REED, for appellee.

ELBERT, J. A lessor before he exercises the right of re-entry reserved for breach of covenant to pay rent, must make an actual demand of the amount of rent due, in strict compliance with the requirements of the common law.

Whenever a forfeiture for the non-payment of rent is to be established, it is necessary to prove such a demand. Taylor's Landlord and Tenant, §§ 297, 298; *Chadwick v. Parker*, 44 Ill. 326; *Smith v. Whitbeck, et al.*, 13 Ohio St. 471; *Jackson v. Harrison*, 17 Johns. 66.

The defendant Miller could not avail himself of the right to re-enter the leased premises under the terms of the lease, without having first made a demand of the rent due, and in the absence of any allegation that such a demand was made, the matter set up in the answer did not constitute a defense.

The demurrer to the answer was properly sustained.

It is insisted, however, that the complaint is fatally defective and that the demurrer must be carried back to the first defective pleading.

The objections urged against the complaint are:

1st. That it does not show that the defendant entered upon the possession of the plaintiff.

2d. That two causes of action are stated in one and the same count.

Undoubtedly it is necessary, in an action of forcible entry and detainer, to show in the complaint that the defendant entered upon the possession of the plaintiff.

The allegation in the complaint in the case at bar "that Miller * * * by such force, violence and threats of violence did then and there, to wit, on said first day of March, 1876, turn said complainant, Sparks, out of possession of said premises" is in substance an averment that the com-

plainant was in possession of the premises at that date, and, taken in connection with the other averments of the complaint, satisfies the rule above stated. *Sparck v. Forsyth*, 40 Ill. 440; *Lee v. Stiles*, 21 Conn. 504.

"That which is apparent to the court and appears from a necessary implication out of the record is the same as if it were expressly averred." *State v. Nichols*, 8 Conn. 499.

Whether the facts stated in the complaint constitute a forcible entry or not is immaterial as the action lies, where the possession is maintained with force and strong hand, although the entry may have been peaceable (R. S., p. 392).

The allegations of the complaint show fully and clearly a forcible detainer under section two of the act. That the complaint alleges a demand of possession, when no demand was necessary, does not affect its sufficiency, or render it obnoxious to the objection that two causes of action are stated in one and the same count.

For these reasons the objections to the complaint are not regarded as well taken.

Section seven of the act concerning *certiorari* to justices and probate courts, provides that the district court "shall give judgment in the cause as the right of the matter may appear * * * and may affirm or reverse the judgment in whole or in part, or may render such judgment as the facts and law warrant."

Under the broad provisions of this section, we have no doubt of the power of the district court to render an independent judgment; to review and revise the whole case, and give such judgment as the justice should have given. *Berry v. Lowe*, 10 Mich. 9.

In the case at bar, the district court, upon the hearing, entered an independent judgment to the effect that the complainant, Sparks, recover the possession of the premises in controversy; that he have a writ of possession therefor, that he recover his costs as against Miller, and that the defendant Newton go hence without day and recover his costs against the complainant.

The power of the court to render such a judgment we think full and complete under the concluding clause of the section above quoted, to wit: "or may render such judgment as the facts and the law warrant."

The authorities relied upon by the appellant were under statutes in which this provision does not occur.

In the leading case of *Sheldon v. Quinlin*, 5 Hill, 442, the provision construed is "or give such judgment for either party as the very right of the matter may seem to require."

Justice BRONSON says, "the word 'party' as here used stands for *plaintiff* or *defendant*, and includes all persons belonging to a particular class. The clause does not mean that a judgment which is entire may be reversed as to one defendant and affirmed as to another, without any regard to the rules of law applicable to the case."

This decision was followed in Wisconsin in a number of cases, but is questioned by Chief Judge DIXON in the case of *Ditling v. Weber*, 29 Wis. 560.

It will be observed, however, that the provision is different from that in the statute of this State, in the essential words upon which the decision is made to turn.

We think the plain intention of the legislature was to empower the district courts to render an independent judgment upon the law and the evidence, without reference to the inquiry whether the judgment of the justice was an entirety or otherwise.

The judgment of the court below is affirmed with costs.

Affirmed.

DISTRICT COURT, ON CERTIORARI, MAY RENDER INDEPENDENT JUDGMENT ON the law and evidence: *Hopple v. Best*, 4 Colo. 556.

HAWSE v. BURGMIRE.

1. The several States may, in virtue of their reserved sovereignty, bar by statute, remedies upon contracts made in sister States, if suit be not brought within a period prescribed, and it is immaterial that the period limited is greater on contracts arising in the State, than upon those arising without the State.
2. When a promissory note was dated, executed and delivered in this State, although given for an indebtedness arising without the State, *held*, that the cause of action founded upon the note accrued within this State, and that evidence that the maker had agreed to pay the note in another State was immaterial.
3. When a promise in the common counts was laid at a time subsequent to the commencement of the action, *held* to be a clerical error, and cured by verdict.

Error to County Court of Clear Creek County.

THE facts are stated in the opinion.

Messrs. ROCKWELL & HUGHES, for plaintiff in error.

Messrs. MORRISON & WHITE, for defendant in error.

THATCHER, C. J. This action was brought by Burgmire against Hawse on the following promissory note :

“GOLDEN CITY, COLORADO, *April 16, 1872.*

Six months after date I promise to pay H. Burgmire, or order, the sum of one hundred and fifty dollars, with twelve per cent interest from date.

SAMUEL HAWSE.”

The declaration contained a special count on the promissory note, and also the consolidated common counts.

The defendant pleaded (1) the general issue and (2) that the cause of action arose without the State of Colorado more than two years before the commencement of the action.

By section 16, chapter 60, General Laws, it is enacted as follows : “It shall be lawful for any person against whom any action shall be commenced in any court of this State, where the cause of action accrued without the State, upon

a contract or agreement, express or implied, more than two years before the commencement of the action * * * * to plead the same, and give the same in bar of the plaintiff's right of action."

Of the validity of this section we entertain no doubt. The several States may, in virtue of their reserved sovereignty, bar by statute, remedies upon contracts made in sister States, if suit be not brought for their enforcement within the period prescribed. That the period limited by statute within which to bring suit upon actions or contracts arising in this State, is greater than the period prescribed for those arising on contracts in other States is not material. The statute of limitations of each State is without extra-Territorial force. By the law of the forum the remedy must be determined. Angell on Lim., ch. 8.

The controlling inquiry in this case is, whether the note upon which suit is brought comes within the true intent and meaning of this section, whether it is a cause of action which accrued within the State. Upon the solution of this question must depend our decision.

The note is an express contract. It was made in Golden City in this State, and there delivered to Burgmire's agent. On this contract the liability of the defendant arose. It is, however, contended that although the note was dated and executed within the State, that it must be treated as a Wyoming contract, on the ground that the original liability which was the inducement to the execution of the note, arose in the Territory of Wyoming.

Hawse had in Wyoming guaranteed the payment of a certain debt to Burgmire. This he failed to satisfy. For the amount of that he gave the note in suit. The former indebtedness was thus merged in the note. On its face it is a Colorado note, and the evidence proves that it was made here.

In our view it was not the purpose of the law-makers to include in the provisions of the section we are considering, contracts made within the State.

Where did the cause of action founded upon the note accrue?

In Illinois, under a statute precisely like our own (ch. 70, R. S., § 2), which provides that "it shall not be lawful for any plaintiff to sue a defendant out of the county where the latter resides, or may be found, except in cases where the debt, contract, or cause of action *accrued* in the county of the plaintiff * * * when it shall be lawful to sue in such county, and process may issue against the defendant to the sheriff of the county where such defendant resides," the question as to the meaning of the word *accrued* came before the supreme court of that State.

In *Phelps v. McGee*, 18 Ill. 158, it was held that *accrued*, as used in the section just quoted, refers to the place where the contract was finally executed and became obligatory upon the parties.

In *Aird v. Hayne*, 36 Ill. 174, it was held that an averment in a plea that the cause of action *accrued* in ascertain county is equivalent to the averment that the contract was made in that county.

We are satisfied that it was not within the reasonable intent of the legislature to extend the provisions of sec. 16, ch. 60, Gen. Laws, to any contract made within the limits of the State. It was designed to apply to contracts entered into beyond its jurisdiction.

Defendant offered oral evidence to show that he had agreed to pay the note in Wyoming. This evidence was immaterial. Whether the defendant had agreed to transmit money in payment of the note to Wyoming, or pay the note only on presentation in Golden City, does not, in our opinion, affect the construction of the section.

The note was misdescribed in the special count, and was therefore not admissible under it. Plaintiff in error insists that it was not admissible under the common counts, on the ground that the promise therein was laid at a time subsequent to the commencement of the suit. This fault in the declaration which was evidently a clerical error is cured after verdict. *Sorrel v. Lenin*, 1 Keb. 354; *Bemis v. Faxon*, 4 Mass. 284.

Judgment of the court below is

Affirmed.

BARKER v. HAWLEY.

It has been repeatedly held by this court that where the evidence is conflicting and the verdict is not manifestly against the weight of evidence, the verdict will not be disturbed. This court must assume the truth to be with the evidence which upholds the verdict. It is not enough that, had the verdict been different, this court would not have disturbed it.

Appeal from District Court of Gilpin County.

THE plaintiff, to maintain the issues upon his part, introduced himself as a witness, and testified as follows :

"I am the plaintiff in this suit. (Here the instrument sued upon is shown to the witness.) I have seen this instrument before; it was made by William J. Barker, the defendant in this suit. I have made a demand on him for the money some time in April or May, 1868, soon after I went into business with Mr. Lake. I told him, Barker, that I was hard up, paying three per cent per month for money; that I ought to have the money or the same rate of interest on it; he told me he would allow me ten per cent. I made a memorandum of the time and date of the conversation, and put it in the agreement, stating in pencil that it was drawing ten per cent from date. I do not know what became of the memorandum. He made no objection to paying principal; said he would allow ten per cent interest."

Cross-examination : "This conversation occurred in Black Hawk. I think no one was present except ourselves; at least no one that I know of. It was at his place of business; grain and feed business; I think the conversation occurred indoors; I told him I was in need of money, and paying large interest myself. I suppose he would be bound to pay ten per cent interest; he did not, I think, fix a definite time to pay principal. Do not know when we talked next, as late, I think, as 1870; two or three years intervened between the first and next conversation. I told him I was paying three per cent per month, and was hard up.

The agreement is in defendant's handwriting; he acknowledged it at different times. In September, 1873, I think, I had a conversation with defendant in Denver about this. I made a memorandum to fix date to collect interest; the conversation was in his store; I cannot recollect it all; I made demand for the money; he asked me why I had not made demand before; I think I told him in plain words that I did not think I could collect it. I did not think that the defendant was insolvent; I did not think I could make it on execution; think I can now. He lived at Black Hawk, and I at Central. There was no agreement after this; there is a verbal agreement that if I would send Mr. Schellenger to Black Hawk, and Barker executed a deed to me for certain property, I would give him a certain note. Mr. Schellenger did not bring back the deed; I sent him down there; Schellenger prepared the deed; I suppose I gave instructions regarding the deed; my recollection is not very clear, but I tried to get some property back that I sold, being the undivided one-sixth of three hundred feet of the Dorchester lode; may be the claims five, six and seven east; I am not certain, though. The amount was \$1,136; \$1,000 was on account of the purchase of the property, and \$136 for work on the same. Barker had just got back from the east. I don't remember a conversation about the time he went to Denver; Barker told me he was trying to sell the property."

Re-direct examination: "I don't know that he ever promised to pay it; he only promised to pay interest; never denied or refused to pay it."

Plaintiff then offered in evidence the paper sued on (see dissenting opinion of Justice STONE, *post*). To the introduction of which in evidence the defendant objected, but the court overruled the objection, and the defendant, by his counsel, then and there excepted.

Thereupon the said plaintiff was recalled and testified:

"In 1867 I had a conversation with Barker regarding this instrument; I wanted to know what he was going to do

about it ; he said he would pay me something on it. I believe he offered to pay at one time ; said he would pay me \$800."

Cross-examination : "This was soon after it was due, in 1867 sometime. In 1867 I think he had given up trying to sell the property. I told him I would not take \$800 ; I told him I would take the property back if he would deed it to me, but don't know that it was the same conversation. I made memorandum to fix time for interest to commence. Think I had other conversations ; I did not testify to this conversation this morning."

Re-direct examination : "Mr. Butler gave me advice."

Thereupon the plaintiff rested.

The defendant, to maintain the issues upon his part, gave in evidence the deposition of Frank A. Burnell, who testified : "That he was twenty-six years of age ; occupation, a clerk ; knows the parties to this suit ; have known H. J. Hawley for four years, and has known the defendant for the same length of time. I heard a conversation between Hawley and Barker ; it occurred in Barker's store in Denver, at 155 Fifteenth street. Mr. Hawley said to Mr. Barker, 'do you know you owe me \$1,000?' and Mr. Barker replied, 'no,' and asked what it was for. Mr. Hawley said, 'in looking over my papers, a few days ago, I found an agreement, which said if the Dorchester property was not sold by April, 1867, that he, Mr. Barker, was to pay the sum called for, \$1,000.' Mr. Barker replied that there was another agreement made after that, which said that if the property was not sold by April, 1867, that he, Barker, was to deed the property back to Hawley. Hawley said that was his understanding of the thing, and never knew any thing to be different until he found the agreement. Barker asked Hawley if he had owed him \$1,000, if he would not have called for it before. Hawley said, 'certainly I should, for I have been hard up.' This conversation was in September, 1873."

Cross-examination : "The contract referred to was a con-

tract made after the written contract mentioned by Hawley. I am now in the employ of W. J. Barker. I have related all of that conversation. Hawley did demand the \$1,000 at the time I left. I then left, and heard no more of the conversation between them."

Re-direct examination: "I do not know how long Hawley and Barker remained in conversation after I left; they were in there together for fifteen minutes or longer after I left; I passed in and out while they were in the office, and saw them talking."

The defendant then gave in evidence the deposition of John L. Schellenger:

"I am a merchant; age thirty-nine; reside in Denver, Colorado. I resided in Gilpin county, from August, 1860, to April, 1861; then from June, 1862, to April, 1873; I know the parties to this suit; have known Mr. Hawley between twenty-five and thirty years; have known Barker about ten years; I prepared the paper marked, "Exhibit A," attached to my deposition, at the request of Mr. Hawley, on the 11th day of March, 1869; Hawley requested me to make out a deed to an undivided one-sixth interest of claims five, six and seven, east of Discovery on the Dorchester lode, and an undivided one-sixth interest to Discovery claim, and claim number one, on the Columbus lode; he told me to prepare it, take it to Mr. Barker, and have him sign it; that Mr. Barker had agreed to do so, or pay him, Hawley, \$1,100, I think it was, and as the money had not been paid he wanted a deed to the property, and I prepared the deed according to his request; on the 11th of March, 1869, I presented said deed to Mr. Barker and wife, his signature, and they signed it in my presence, and, after signing it, Mr. Barker handed it to me; he and his wife acknowledged the same; Barker then asked me if Mr. Hawley sent a note of his for \$60, by me to hand to Mr. Barker; I told him no, that I had no such note; Mr. Barker then requested me to leave the deed with him, stating that he would see Mr. Hawley and get his note, and then hand

the deed to Mr. Hawley ; I then left, and left the deed with Mr. Barker ; I reported to Mr. Hawley on the 11th day of March, 1869, the conversation had with Mr. Barker, and Hawley said 'all right, I'll see Mr. Barker,' or words to that effect ; I was paid for my services ; I think by Mr. Hawley ; he said he would pay me, and I think he did with a settlement afterward had with him ; at the time I reported to Hawley what Barker said, I don't remember that any thing was said about any indebtedness due from Hawley to Barker as an offset to the note."

Question. Interrogatory 10. "Do you remember having any conversation with Hawley about the year 1865 or 1866, while Mr. Barker was east trying to sell the property mentioned in said deed, as to what Mr. Barker had agreed to pay him, Hawley, in case he sold said property ; if so, state fully all that was said by Hawley in regard to the same?"

Answer. "I remember of having a conversation with Mr. Hawley about that time ; during the conversation he, Hawley, stated that Mr. Barker had agreed that on the sale of that mining property, that he, Barker would pay him, Hawley, one-sixth of the amount sold for ; understood the amount to be \$30,000, of which Hawley was to receive \$5,000 ; he, Hawley, said he was satisfied that he would get the \$5,000, if the property was sold for \$30,000 ; have had several conversations with Hawley, all of the same substance ; we have been very intimate ; have known each other since we were boys."

Cross-examination : "After the 11th of March, 1869, I first saw the deed in full of 1873, in Mr. Barker's possession ; he presented the deed to me for the purpose of getting my notarial seal attached to the acknowledgment, which had not been done up to that time ; I don't know whether the deed was stamped or not on the 11th of March, 1869 ; I don't know whether the deed was ever delivered to Hawley or not."

Re-direct examination : "The acknowledgment was taken on the 11th of March, 1869 ; I did not affix my notarial seal to the certificate at the time, because my office was at Central City, and Barker resided at Black Hawk, and I did not have the seal with me when the acknowledgment was taken ; the deed was signed and acknowledged at his house ; I was authorized to accept a delivery of the deed for Mr. Hawley."

Re-cross examination : "I did not return it to Mr. Hawley because I was requested by Mr. Barker to leave it with him until he, Barker, and Hawley had settled, he, Barker, remarking that he would see Hawley in a few days."

Here follows "Exhibit A," which is a deed dated the 11th day of March, 1869, between William J. Barker and R. C. Barker, his wife, of the first part, and Henry J. Hawley, of the second part, in and by which the parties of the first part convey to the party of the second part certain mining property, situate in Gilpin county, Colorado, to wit: an undivided one-sixth interest of claims numbered five, six and seven, east of Discovery, on the Dorchester lode, and an undivided one-sixth interest of Discovery claim, and claim number one, east of Discovery, on the Columbus lode, situated near the Dorchester, all situated, lying and being in Russell mining district. Signed: William J. Barker and Rebecca C. Barker. Also, the acknowledgment signed by the witness, Schellenger, certifying that the deed was acknowledged on said day by Barker and wife.

Defendant then introduced as a witness in his behalf, Eugene Drake, who testified : "I know the parties to this suit ; I know the Dorchester lode, and have known it since 1863 or 1864 ; I worked on it ; we leased it from Barker and Hawley, three claims, five, six and seven, east ; leased it two years ago, in March or April ; my brother's name is Alonzo Drake ; he was with me in the lease ; Hawley was one of the persons who signed the lease ; Hawley first talked with us about the lease ; we occupied the property about

forty days; my brother paid Hawley two dollars, all we made; the lease was in writing, for one year; I am not sure that Hawley signed it; I think I gave it back to Hawley; I told Hawley that we had given up the lease, soon after we quit working it, about the latter part of May, 1873; he had lease prepared and sent it to Denver for Barker to sign."

Cross-examination: "Hawley did not tell me that he had any interest in it; he said he would write to Mr. Barker; he did not say that he had any interest in it; my father and myself made a bargain for the lease; my brother also spoke to him; Hawley and my brother and myself signed it first, and then it was sent to Denver."

The defendant then introduced Lester Drake, who testified: "I am the father of Eugene Drake; I know the parties to this suit; I have known the Dorchester lode since 1863, or longer; I had a conversation with Hawley about the lease; I think Hawley showed me a lease; I was not satisfied with it; Hawley said he would send it back and see what Barker said; they got another lease and then they went to work; Hawley said he did not have much interest in it, but would be entirely controlled by Barker; I am not sure that he said what he claimed; he did nothing with us only through Barker; I supposed Hawley and Barker owned the property; I saw Hawley and Barker there; I had conversations with Barker, and he always claimed interest in it; I saw lease after it was signed by Barker and Hawley."

Cross-examination: "Barker had us draw some ore for him four or five years ago; Barker was understood to be an owner since 1865; he had nothing to do with us regarding the hauling of the ore; Barker wanted to test it; Hawley said he would be entirely controlled by Barker; I was down at Denver and called to get lease from him of property, for boys."

Thereupon the said defendant offered in evidence, which was received and read to the jury, a letter written by the

said Hawley, to the said Barker, which was in words and figures following, to wit :

“CENTRAL, *March 7, 1873.*

WM. J. BARKER, *Denver, Col.:*

Dear Sir—The Drake boys from Lake Gulch are very anxious to get a lease on the Dorchester for one year. They urged me to make them a proposition, which I did verbally, which was for them to pay us 10 per cent of the gross proceeds from the mine, allowing them one month for repairs, hoisting water, etc. Also shaft to be sunk so many feet (no number mentioned) per month. I have not agreed to the above proposition, therefore nothing binding. Should be pleased to hear from you by return mail. Please state terms, etc., if you think best to let them have it.

Their names are A. B. and L. E. Drake. They told me to say that they could get \$20 per ton for the ore if near Georgetown.

Resp. Yours,

(Sig.) H. J HAWLEY.”

Thereupon said defendant was duly sworn as a witness in his own behalf, and testified as follows : “ I am defendant in this suit ; I know the property, the Dorchester lode, and have known it since 1863 or 1864 ; (here the instrument sued on was shown to the witness) in the fall of 1865 I purchased the property on the Dorchester lode, parts of claims five, six and seven ; I took power of attorney for the undivided one-half of five, when money, \$1,000, was deposited ; Hawley was to make deed to me ; before the time expired he was paid the \$1,000 ; he gave me a warranty deed for the undivided half of number five, east, on the Dorchester lode ; I left for the east to spend the winter and to make sale of the property, in the fall of 1865 ; I returned in the spring of 1866 ; the property was worked while I was gone ; I had, as I supposed, nearly perfected a sale of the Dorchester property, for \$30,000 ; I corresponded

with Hawley while I was gone; he asked me to give him one-sixth of what property would sell for, instead of the \$1,000 I had paid him; he urged me and I granted this request; he said \$25,000 would be a good start for me, and \$5,000 would be for him; I did not perfect the sale; I returned in May, 1866; sometime after he said he ought to have something to show he had paid me \$1,000, and I gave him the document that is here; I paid him \$1,000, he paid it back, and I gave an agreement to give him one-sixth of the proceeds of the sale; afterward he said he did not like the way the agreement was drawn, as after April he would be obliged to receive the money named in the agreement, instead of property, as agreement called for; I asked him what he wanted; he said it was worth two or three thousand dollars at least; I think the last agreement was made thirty to sixty days after the first; I drew up an agreement and took it to Hawley; I have not seen it since; I kept no copy of it, nor did I of this agreement; I have heard Hawley's testimony; I had no conversation with him about paying ten per cent interest; I told him several times I would make deed to him for it; I never had any conversation in which I agreed to pay \$800; I have not since that time agreed to pay it, nor has he demanded it, as he always claimed interest in the property; he had my note for \$60; he owed \$111 for work; \$1,000 was the price of the property; \$136 for work on the lode; I bought Columbus lode for \$100; last amount paid for work was \$669.98, on April 15, 1867; one-sixth was \$113.32, on last amount paid; a credit of \$60 was allowed, leaving balance due me, \$51.66; he said he would pay, at different times, once in thirty, once in sixty days; in 1869 Schellenger presented me warranty deed, and I signed it, and had a conversation with Schellenger, as he, Schellenger, states; I saw Hawley a few days afterward, and told him he did not send down note; he said no, he had not balance to send with it; when going to Denver I told Hawley I wanted to settle up our business before I went; I had considerable conversation about it; he said, 'you ought to forgive me that debt, and give me deed;' I ob-

jected, but afterward assented; he said, 'who will pay for recording?' I said, 'you will;' he said, 'no, I would hardly pay for recording for the property;' he said, 'you can place it on record whenever you want to pay for recording;' I saw him several times, and would laughingly ask about the recording of that deed; in 1873 he came to my place of business and said, 'Barker, do you know you owe me about \$1,000?' I said, 'what for?' he said, 'for Dorchester mine;' he said, in looking over papers he found an agreement that I was to pay him \$1,000 if the property was not sold; I told him there was a subsequent agreement; he said he thought so too; he said, 'I did not know you owed me until I found that agreement; I supposed that the property was to be deeded back;' during this time, March, 1873, a lease was made by us to the Drake boys; I told him there was another agreement; he said he thought so too, and would look for it; when he returned he admitted there was another agreement, if not lost; I have not at any time, since April, 1866, or 1867, admitted, or agreed, or promised, to pay this amount."

Cross-examination: "The subsequent agreement was made about thirty or sixty days after the first; I think I wrote it; it was written at his request; he said, if the property was not sold by April, 1867, he would be obliged to take \$1,135; and he would rather have the property deeded to him than to have the money; we made a new contract; I think this is all the difference; the second contract provided that the property should be deeded to him if not sold; he said if the property was not sold he wanted it; was worth so much more; the deed was in my possession in 1871; I had it in my possession when I came up and saw him; I don't remember conversation about paying interest to Hawley; I never had such conversation; I never promised to pay him since 1873; I called on Hawley, and said I regretted having a lawsuit; I said, 'I will purchase your interest in the Dorchester lode; we will not talk compromise;' the deed attached to Schellenger's deposition I had with me

that day, or the next after it was made; Hawley requested me to hold it until he could pay the balance; I kept it until the fall of 1873, and then did as he requested, paid for recording and put it on record; the deed was delivered to Hawley; I handed it to him one day, in my office in Denver, in October, 1873; he said he did not know as he could accept it; would have to see Mr. Teller first; he left it there."

Re-direct examination : "Since 1864, up to the present time, I have been able to pay any amount I owed."

Defendant rested.

The plaintiff, by way of rebuttal, introduced the said Henry J. Hawley, who testified : "I heard Mr. Barker's testimony about subsequent agreement; I am positive there was no subsequent agreement; I have never seen it; the deed was never tendered me until October, 1873; I refused to take it, on the ground I stated to him; I wanted the money; Barker was to pay for recording the deed; he was to pay for making the deed to Schellenger; he did not send it back; I don't remember his offering me the deed until October, 1873; I am quite positive about that; I had no conversation that I remember of, about the deed to mine, from that time until 1873; when lease was made to Drake boys, I did not claim any interest in the property; I did not make any admission of subsequent agreement, and told him so at Denver; I am positive that no such agreement was made; told him if he would show any such agreement, I would admit it."

Cross-examination : "I don't remember of making any promise to search for subsequent agreement; in 1867, 1868 and 1869, I did not claim an interest in the property; I claimed the agreement as so much money; I did not claim any interest in the property; I do not think I did; Drake knew I had owned property from letter, 'to pay us ten per cent of proceeds; they wanted us to sign the lease; they

paid us \$2; Barker got no part of it; I had conversation about the time Barker went to Denver; he said he had done considerable work on the mine."

The foregoing was all the evidence in the case as appears by the record. It was stipulated by counsel, in the court below, that exception might be entered of record *nunc pro tunc* to the overruling of the motion for a new trial.

Messrs. BUTLER & WRIGHT, for appellant.

Messrs. H. M. & W. TELLER, for appellee.

ELBERT, J. The only error insisted upon by counsel in argument is that the verdict of the jury was manifestly against the evidence, "the instructions of the court and the law of the case."

This court and the Territorial supreme court have repeatedly ruled that "when the evidence is conflicting and the verdict is not manifestly against the weight of evidence, the verdict will not be disturbed. *Taylor v. Randall*, 3 Col. 400; *Machette v. Wanless*, 2 id. 169; *Walling v. Warren*, id. 434; *Fisher v. Martin*, id. 525; *Martin v. Hazard Powder Co.*, id. 601; *Hall v. King*, id. 711; *Murphy v. Cunningham*, 1 id. 467; *Mather v. Glines*, id. 472; *Smith v. Cisson*, id. 29.

In the case of *Walling v. Warren*, *supra*, it was held that where the plaintiff and defendant contradict each other upon the stand, and neither of them is supported by other testimony, the verdict will not be disturbed.

Upon the matter of a new promise, Hawley testifies to a conversation with Barker in April or May, 1868, in which Barker promised to pay him interest on the note. This would necessarily involve a recognition of the existence of the principal indebtedness and a promise to pay it.

Barker denies that any such conversation was had. Neither was corroborated and the jury were the judges of the credibility of the witnesses.

Upon the matter of a new and substituted contract, Hawley testifies there was a verbal agreement that "if I would send

Mr. Schellenger to Black Hawk and Barker executed a deed to me for certain property, I would give him a certain note." This statement of the terms of the subsequent contract is corroborated by the testimony of Mr. Schellenger. He says "he (Hawley) told me to prepare it (the deed), take it to Mr. Barker and have him sign it—that Mr. Barker had agreed to do so, or pay him, Hawley, \$1,100, I think it was, and as the money had not been paid, he wanted a deed to the property."

Barker in substance testifies to an unconditional agreement upon the part of Hawley to receive a deed for the property, in satisfaction of the agreement sued upon, without any alternative.

Barker is corroborated by Burnell who testifies, that in a conversation between Hawley and Barker in Barker's store in Denver, in September, 1873, that Barker claimed that there was another and subsequent agreement, which provided that if the property was not sold by April, 1867, that he, Barker, was to deed the property back to Hawley, and that Hawley said such was his understanding.

Here again the testimony of the plaintiff and defendant is conflicting, and each is corroborated by another witness.

After its execution in March, 1869, Barker retained the deed until October, 1873, when he tendered it to Hawley after Hawley had demanded the money in September.

The evidence respecting the acceptance of the deed is conflicting, but the preponderance we think is that Hawley refused to accept it. Hawley so testifies.

Barker testifies that Hawley agreed to accept if he would pay the fee for recording, but admits that when he tendered him the deed in October, 1873, Hawley said "he did not know if he could accept it—would have to see Mr. Teller first."

Neither is corroborated.

The verdict of the jury involves their finding that there was no acceptance and without acceptance no title passed. There was no compliance with the terms of the substituted agreement, if there was one.

The testimony of the two Drakes, and Hawley's letter to Barker respecting the lease to them, prove nothing certain or definite respecting the relation which Hawley at that time sustained to the property. There is that which indicates him as the owner ; there is as much or more that indicates him an agent.

The case is clearly one for the application of the rule that when the evidence is conflicting and the verdict is not manifestly against the weight of evidence, the verdict will not be disturbed. As was said in the case of *Taylor v. Randall, supra*, "It was the province of the jury that tried the cause, as the evidence was so contradictory as to be impossible of reconciliation to determine to whom credit should be given. They are the proper judges of the weight of evidence and the credibility of witnesses. Sitting as an appellate court, we must assume the truth to be with the evidence which upholds, and not with that which assails the verdict, unless the weight of evidence very strongly preponderates against it. It is not enough that had the verdict been different, this court would not have disturbed it."

The judgment of the court below is affirmed with costs.

Affirmed.

Dissenting opinion of STONE, J. I regret that the only fixed conclusions which I have been able to arrive at upon the evidence in this case impel me to dissent from those reached by my brethren on the bench, and I have therefore felt it important to preface my reasons with reciting the material portions of the evidence and other parts of the record.

Plaintiff sued upon the following instrument :

"Received of H. J. Hawley eleven hundred and thirty-six dollars (\$1,136) in full payment of one-sixth part of lode mining claims, five (5), six (6) and seven (7) east from the discovery on the Dorchester lode, situated in the Russell mining district in Gilpin county, Colorado, which one-sixth of above-mentioned claims I am to hold and endeavor to make a sale of the same, and in case I make a sale, I am to

pay to said Hawley whatever amount I receive, less the expenses incurred in making such sale, and any time after April 1st, 1867, should the said Hawley so desire and demand of me, I agree to refund and pay to him the above-named sum of \$1,136, and when such payment is so made said above-described property is to revert back to me.

(Signed)

WM. J. BARKER.

BLACK HAWK, Colorado, *June 18, 1866.*"

Defendant plead the general issue, the statute of limitations, and special pleas setting up a subsequent contract to deed back the property in lieu of the money mentioned in the instrument declared on.

So much of the evidence as is pertinent to the issue was as follows:

The plaintiff testified in substance: I made a demand on the defendant for the money in April or May, 1868; told him I ought to have the money, or the same rate of interest on it that I was paying; he said he would allow me ten per cent interest; conversation occurred at his place of business; no one present but ourselves; do not know when we next talked; as late as 1870; two or three years intervened between the first and the next conversation; the agreement is in defendant's handwriting; he acknowledged it at different times; in September, 1873, I think I had conversation with defendant about it in Denver; was in his store; cannot recollect all the conversation; I made demand for the money; he asked why I had not made demand before; think I told him I did not think I could collect it; he lived at Black Hawk and I at Central; there was a verbal agreement, that if I would send Mr. Schellenger to Black Hawk, and Mr. Barker would execute a deed to me for certain property, I would give him a certain note; Mr. Schellenger did not bring back the deed; I sent him down there and gave instructions about the deed; my recollection is not very clear, but I tried to get back same property that I sold, being the undivided one-sixth of three hundred feet

of the Dorchester lode; may be the claims five, six and seven east, I am not certain though; the amount was \$1,136; \$1,000 on account of the purchase of the property and \$136 for work on the same; I don't know that he ever promised to pay it; he only promised to pay interest; never denied or refused to pay it. (The instrument sued on was here introduced.) I had a conversation with Barker regarding this instrument; I wanted to know what he was going to do about it; he said he would pay me something on it; I believe he offered to pay it one time; said he would pay me \$800; this was soon after it was due in 1867, I think he had given up trying to sell the property; I told him I would not take \$800; I told him I would take the property back if he would deed it to me, but don't know that it was the same conversation; think I had other conversations." The plaintiff rested here and the defendant gave in evidence the deposition of Frank A. Burnell, who testified: "I heard a conversation between Barker and Hawley in Barker's store in Denver; Hawley said to Barker, 'do you know you owe me \$1,000?' Barker replied 'No,' and asked what it was for; Hawley said 'in looking over my papers a few days ago, I found an agreement which said, if the Dorchester property was not sold by April, 1867, that he, Mr. Barker, was to pay the sum called for, \$1,000;' Barker replied 'that there was another agreement made afterward, which said that if the property was not sold by April, 1867, he, Barker, was to deed the property back to Hawley;' Hawley said 'that was his understanding of the thing, and he never knew any thing different until he found the agreement;' Barker asked Hawley 'if I had owed you \$1,000, would you not have called for it before;' Hawley said, 'certainly I should, for I have been hard up;' this conversation was in September, 1873; Hawley demanded the \$1,000; I am in the employ of Barker."

John L. Schellenger, in his deposition, testifies: "I have known Hawley since we were boys; I made out the deed March 11, 1869, at request of Hawley, to the undivided one-

sixth interest of claims five, six and seven east of discovery on the Dorchester lode, and one-sixth interest in discovery claim and claim number one on the Columbus lode; he told me to prepare it and take it to Barker, and have him sign it; that Barker had agreed to do so or pay him \$1,100, I think it was, and as the money had not been paid, he wanted a deed to the property; I prepared a deed according to his request, on the 11th of March, 1869, and presented it to Barker and his wife for signature, and they signed it in my presence, and, after signing it, Barker handed it to me; he and his wife acknowledged the same; Barker then asked me if Hawley had sent a note of his for \$60, by me to hand to him; I told him no; Barker then requested me to leave the deed with him, stating that he would see Hawley and get the note, and then hand him the deed; I left the deed with Barker and reported the conversation to Hawley the same day, and Hawley said 'all right, I'll see Mr. Barker,' or words to that effect; Hawley paid me for my services; I saw the deed afterward in the fall of 1873, in Barker's possession; he presented it to me for the purpose of getting my notarial seal attached to the acknowledgment, which had not been done up to that time; the acknowledgment was taken on the 11th of March, 1869; I did not attach my seal to the certificate at the time because I did not have it with me; my office was at Central, and the deed was signed and acknowledged at Barker's house, at Black Hawk; I don't know whether the deed was ever delivered to Hawley or not; I was authorized to accept a delivery of the deed for Hawley."

The deed introduced is as described by Schellenger.

The testimony of the two Drakes is to the effect that in 1873 they leased the property in question from Hawley and Barker; that both claimed an interest in it, and both signed the lease; that the rent was paid to Hawley.

A letter was introduced written by Hawley to Barker, respecting the proposition to lease to the Drakes, in which Hawley says: "They urged me to make them a proposi-

tion, which I did verbally, which was for them to pay us ten per cent of the gross proceeds from the mine," etc.

The defendant Barker testified: "In the fall of 1865, I purchased the property on the Dorchester lode; parts of claims five, six and seven; I took a power of attorney for the undivided half of five; when the money, \$1,000, was deposited, Hawley was to make deed to me; before the time expired he was paid the \$1,000, and gave me a deed for the undivided half of number five on the Dorchester lode; I went east to make sale of the property in the fall of 1865, and returned in the spring; I had, as I supposed, nearly perfected a sale of the Dorchester property, for \$30,000; I corresponded with Hawley while I was gone; he asked me to give him one-sixth of what the property should sell for, instead of the \$1,000 I had paid him, and I agreed to this; I did not perfect the sale and returned in May, 1866; sometime after he said he ought to have something to show that he had paid me \$1,000, and I gave him this document (the instrument sued on); he paid back the \$1,000, and I made the agreement to give him one-sixth of the proceeds of the sale; afterward he said he did not like the way the agreement was drawn, as after April he would be obliged to receive the money named in the agreement, instead of the property as the agreement called for; I think the last agreement was made thirty or sixty days after the first; I made an agreement and took it to Hawley; I have not seen it since, and kept no copy of it or of the other; I have heard Hawley's testimony; I had no conversation with him about paying ten per cent interest; I told him several times I would make a deed to him; I never had any conversation with him in which I agreed to pay him \$800; I have not since that time agreed to pay it, nor has he demanded it, as he always claimed an interest in the property; he had my note for \$60; he owed me \$111 for work; \$1,000 was the price of the property; \$136 for work on the lode; the last amount paid for work was \$669.98, April 15, 1867; one-sixth was \$113.32; a credit of \$60 was

allowed, leaving a balance due me of \$51.66; he said at different times, he would pay.

In 1869, Schellenger presented me a warranty deed and I signed it, and had a conversation with Schellenger as he testifies; I saw Hawley a few days afterward, and told him that he did not send down the note; he said no, that he had not the balance to send with it; when going to Denver, I told Hawley I wanted to settle up our business before I went; we had considerable conversation about it; he said you ought to forgive me that debt, and give me deed; I objected, but afterward assented; he said, 'who will pay for recording,' I said, 'you will,' he said, 'no, I would hardly pay for recording for the property'; he said, 'you can place it on record whenever you want to pay for recording'; I saw him several times and laughingly asked him about the recording of that deed; in 1873, he came to my place of business in Denver, and said, 'Barker, do you know you owe me about \$1,000,' I said, 'what for?' he said, 'the Dorchester mine;' he said in looking over papers he found an agreement that I was to pay him \$1,000, if the property was not sold; I told him there was a subsequent agreement; he said he thought so too; he said, 'I did not know that you owed me until I found that agreement, I supposed the property was to be deeded back;' I told him there was another agreement; he said he thought so too, and that he would look for it; when he returned he admitted there was another agreement, if not lost; I have not at any time since April, 1866 or 1867, admitted or agreed or promised to pay this amount.

The subsequent agreement was written at his request. He said if the property was not sold by April, 1867, he would be obliged to take \$1,135, and he would rather have the property deeded to him than to have the money. We made a new contract; this is all the difference. The second contract provided that the property should be deeded to him if not sold. Hawley requested me to hold the deed until he could pay the balance. I kept it until the fall of

1873, and then did as he requested, paid for the recording and put it on record. The deed was delivered to Hawley. I handed it to him one day in my office in Denver, in October, 1873. He said he did not know as he could accept it; that he would have to see Mr. Teller first; he left it there."

Hawley in rebuttal testified :

"The deed was never tendered me until October, 1873. I refused to take it on the ground I stated to him, I wanted the money. Barker was to pay for recording the deed. When the lease was made to the Drake boys I did not claim any interest in the property. There was no subsequent agreement. I am positive of this, and did not make any admission of such subsequent agreement. I do not remember of making any promise to search for a subsequent agreement. I told him if he would show such agreement, I would admit it. I did not claim any interest in the property in 1867, 1868, and 1869. I do not think I claimed any interest in the property. Drake knew I had owned the property from my letter "to pay us ten per cent of the proceeds." They wanted us to sign the lease. They paid us \$2.00. Barker got no part of it. I had a conversation about the time Barker went to Denver; he said he had done considerable work on the mine."

The court, of its own motion, gave the jury the following instruction :

"Upon an examination of the instrument sued upon, it shows in the judgment of the court that more than six years have elapsed since the cause of action accrued to the plaintiff, and is therefore barred by the statute of limitations, and if the plaintiff recover it must be upon a new, subsequent promise or acknowledgment of the existence of the pre-existing debt, upon which the law will imply a promise; and the burden of proof is upon the plaintiff to show such promise or acknowledgment. If you believe, from the evidence, that a subsequent agreement was entered into between the parties, relating to the same subject-matter, by which the money part of this agreement was omitted, and a deed

was to be executed to certain property in the agreement mentioned, and in pursuance thereof the deed was executed in accordance with such agreement, then the plaintiff cannot recover upon this instrument and your verdict should be for the defendant. If you find for the plaintiff, your verdict will be "we, the jury, find for the plaintiff and assess his damages at If for the defendant, "we, the jury, find for the defendant."

The court also upon motion of the defendant gave the jury the following instruction :

"The court instructs the jury that the instrument dated June 18, 1866, which has been received in evidence, was barred by the statute of limitations before this suit was brought, and no recovery can be had upon the same, unless the defendant, within six years before the bringing of this suit, made a new promise, and the burden of that proof rests upon the plaintiff and not upon the defendant. The plaintiff must recover upon the preponderance of testimony. If the plaintiff claims the right to recover upon a new promise alleged to have been made by the defendant, and the testimony upon that point is so conflicting that the jury cannot determine whether such a promise was made or not, they must find for the defendant."

The foregoing are all the instructions given. Neither of these instructions were excepted to. The jury found a verdict for the plaintiff in the sum of \$1,136.

There was a motion for new trial by defendant, on the ground that the verdict was against the evidence and the law of the case, which motion was overruled and exception taken.

The principal errors assigned are, that the verdict was manifestly against the evidence and the instructions of the court, and in that the court erred in overruling the motion for a new trial.

Upon the evidence and under the instructions of the court, which were certainly not misleading, I fail to see how

the jury should have found the verdict for the plaintiff which they did.

First. It must be admitted that the written contract sued on was, at the time of bringing the suit, barred by the statute of limitations, which was specially pleaded in the case. Nor do I think the evidence proves a new promise by the defendant at any time within six years next before the commencement of the suit, to pay any sum of money to the plaintiff upon any obligation arising out of the contract sued on. The only evidence of such promise is the testimony of the plaintiff himself, where he states that in April or May, 1868, he made a demand for the money, telling the defendant he ought to have the money or interest on it, and that the defendant then said, "he would allow ten per cent interest;" and upon re-direct examination he says: "I don't know that he (Barker) ever promised to pay it; he only promised to pay interest."

This evidence is flatly contradicted by the testimony of the defendant. Here, then, these two contradictory statements under oath stand against each other. Without any corroborating evidence on his part, can it be said that the plaintiff has made out his case?

Upon his cross-examination, the plaintiff, upon this point, further says: "I made demand for the money; he asked me why I had not made demand before; I think I told him that I did not think I could collect it; I did not think the defendant was insolvent; I did not think I could make it on execution."

The admission that the defendant asked him why he had not demanded the money before may, I think, be fairly taken, in connection with the testimony of both parties upon this point, to imply that the defendant was surprised at the demand being made, and had not reason to expect it. The reason given by the plaintiff, that he did not think he could collect it by execution, does not appear to be a very satisfactory one, inasmuch as when a creditor has ground for surmising that he cannot recover a claim by

law, he naturally makes a demand all the more promptly in hopes that the debtor will accede to the demand voluntarily.

While this may be regarded as a small grain of evidence to corroborate the testimony of the defendant, it yet seems to me sufficient to turn the scale, and forbid the conclusion that the plaintiff has established the making of a promise to pay within the time limited by the statute.

Second. If a subsequent contract was entered into by the parties, whereby it was agreed that defendant should deed back to plaintiff the property in lieu of the money that by the first agreement was to be paid therefor, then the plaintiff was not entitled to recover even though he had established a former valid promise to pay the money under the first agreement.

That there was such a subsequent agreement thereby rescinding the former one, appears to me quite conclusive by a fair preponderance of evidence.

The plaintiff himself testifies: "There was a verbal agreement that if I would send Mr. Schellenger to Black Hawk, and Barker executed a deed to me for certain property, I would give him a certain note." This statement taken alone is calculated to convey the idea that the "certain property" here referred to was other than the property in controversy, and that the "certain note" to be given was for the purchase-price. Upon further cross-examination plaintiff says: "Schellenger prepared the deed; I suppose I gave instructions regarding the deed; my recollection is not very clear, but I tried to get some property back that I sold, being the undivided one-sixth of three hundred feet of the Dorchester lode; may be the claims five, six and seven east; I am not certain though."

This rather striking vagueness and want of recollection about the transaction has an air of pretense and evasion, notwithstanding which the witness does admit that he *tried to get back the property that he had sold.*

But Mr. Schellenger makes perfectly clear the transaction

not only respecting the property deeded back to plaintiff, but as to the "certain note" referred to by plaintiff which he was to give to Barker. This witness says: "I made out the deed March 11, 1869, at the request of Hawley to the undivided one-sixth interest of claims five, six and seven east of discovery on the Dorchester lode, and one-sixth interest in discovery claim and claim number one on the Columbus lode; he told me to prepare it and take it to Barker and have him sign it, that Barker had agreed to do so or pay him \$1,100, I think it was, and as the money had not been paid he wanted a deed to the property." After testifying to the execution of the deed and its being by Barker handed to witness, Schellenger further says: "Barker then asked me if Hawley had sent a note of his for \$60 by me to hand to him; I told him no; Barker then requested me to leave the deed with him, stating that he would see Hawley and get the note and then hand him the deed; I left the deed with Barker, and reported the conversation to Hawley the same day, and Hawley said its all right, I'll see Mr. Barker, or words to that effect."

The note referred to by plaintiff in his testimony above, to be "given" to Barker upon execution of the deed, was clearly this \$60 note, and which was altogether outside of the main transaction respecting the reconveyance of the property in question. This is still further explained by Barker in his testimony wherein he says: "He (Hawley) had my note for \$60; he owed \$111 for work; \$1,000 was the price of the property; \$136 for work on the lode; I bought the Columbus lode for \$100; last amount paid for work was \$669.98 on April 15, 1867; one-sixth was \$113.32 on last amount paid; a credit of \$60 was allowed, leaving a balance due me of \$51 66; * * * in 1869 Schellenger presented me a warranty deed, and I signed it, and had a conversation with Schellenger as he states; I saw Hawley a few days afterward and told him he did not send down note; he said no, he had no balance to send with it." It thus appears that the \$60 note was to be given up to Barker in

adjustment of an outside or separate account between the parties.

In proof of the subsequent agreement to reconvey the property to Hawley, in place of the payment of the original purchase-price, the plaintiff admits that he tried to get back the property in question, because the money had not been paid for it; that he told Barker he would take back the property if he would deed it to him, and that he instructed Schellenger to prepare the deed for this purpose; while the testimony of Schellenger, as well as that of the defendant and the witness Burnell, is decisive on this point, and that the deed was executed accordingly.

Third. A question is made as to the complete delivery of the deed, and this, it seems to me, is the only question upon which it is possible to make the decision in affirmance of the judgment, turn. True, the evidence shows that at the last moment, Hawley refused to receive the deed, acting under the advice of counsel. But if there was any thing lacking in respect to a complete *actual* delivery, it was solely because Hawley then refused to receive it, and not that there had been no offer to deliver it, for that it was tendered is testified to by Barker, who says: "I handed it to him one day in my office in Denver; * * * * he said he did not know as he could accept it; would have to see Mr. Teller first; he left it there." The only explanation offered as to the non-delivery and record of the deed, from the time it was executed, in 1869, to the fall of 1873, is given in the testimony of Barker, who says: "Hawley requested me to hold it (the deed) until he could pay the balance. I kept it until the fall of 1873, and then did as he requested, paid for recording and put it on record."

This delay, then, seems to have been as much the fault of Hawley as Barker, and was with the assent of both, and if it be true, and this is not controverted, that Barker, after some controversy as to who should pay for recording the deed, finally put it on record at the request of Hawley, the grantee, I am inclined to regard this, under all the circumstances, as a sufficient constructive delivery. Hence it fol-

lows that in place of the purchase-price of the property originally agreed to be paid Hawley, he agreed to take back the property; a deed for this purpose was made at his request, and after several years' delay, to which he assented, the deed was placed upon record at his request, so that the legal title to the property has thereby become absolutely vested in him, while by the judgment of the court he has also recovered the original price.

I cannot agree that upon the evidence in the case the plaintiff should be allowed to have the property in controversy and the price of it also. To say that the property was thrust upon him against his will, and that therefore the defendant cannot be heard to complain, is to decide the very question upon which this whole branch of the case hinges; and upon this point I am forced to conclude that the agreement to take back the property, as between the plaintiff and defendant, was fairly carried out. The whole transaction seems to have been conducted rather loosely on both sides, and while I do not undertake to pronounce upon the *equities* of the case, I cannot be unconvinced that upon the issues joined in the suit, the evidence does not support the verdict rendered by the jury in the case. While it has been repeatedly held in this court that a verdict will not be disturbed where the evidence is conflicting merely, or depends on the degree of credibility to be given the respective witnesses by the jury, or where the plaintiff and defendant, as witnesses, contradict each other, and there is no other evidence in the case (*Murphy v. Cunningham*, 1 Col. 467; *Mathews v. Glines*, id. 472; *Machette v. Wanless*, 2 id. 169; *Walling v. Warren*, id. 434); yet where the verdict is clearly and manifestly against the evidence, it should be set aside in furtherance of justice. *Keating v. Pedee*, 2 Col. 526; *Martin v. Hazard Powder Co.*, id. 601.

I think this is a case that comes within the latter rule. There is shown, in my opinion, not merely a want of preponderance of evidence, but lack of proof on behalf of the plaintiff to reasonably support the verdict upon the issues joined in the case.

VERDICT WILL NOT BE DISTURBED where evidence is conflicting and the verdict not manifestly wrong. *Colburn v. Webster*, 4 Col. 333; *Dickson v. Moffat*, 5 Col. 117; *Schiller v. Luedeke*, 6 Col. 312; *Snodder v. Fowler*, 11 Col. 337; *Denver Fire Brick Co. v. Platt*, 11 Col. 630; *McGrath v. Bassett*, 11 Col. 633; *Ullman v. McCormick*, 11 Col. 683; *La Fite v. Buge*, 12 Col. 213.

CODY v. FILLEY.

1. "Service of the within is hereby admitted the 16th day of October, 1878," signed by counsel for appellee; *held*, sufficient evidence of service by copy of notice of appeal, under section 339 of the Code. This court will not consider affidavits of parties impeaching the record in such case.
2. When the notice of appeal and the undertaking intelligibly refer to the cause in which judgment was rendered; *held*, sufficient under the Code
3. An undertaking on appeal under the Code need not be signed by the appellant.
4. There is nothing in the Code fixing the time of the service of the notice of appeal, but the rights of the appellee, under section 358, giving him "thirty days to except to the sufficiency of the sureties," would be impaired unless the service preceded or was contemporaneous with the filing of the undertaking.
5. There is no provision of the Code, that in terms or by implication, requires that the service and the filing of the undertaking on appeal should be on the same day.

Appeal from District Court of Gilpin County.

Messrs. H. M. & W. TELLER, for appellee, now moved to dismiss the appeal.

Messrs. BUTLER, WRIGHT & KING, *contra*.

Per Curiam. The record in this case shows, that on the 14th day of October, 1878, the appellant, by his attorneys, filed in the office of the clerk of the district court a notice of appeal. On the 19th of the same month, they file with the clerk what is a copy of this notice (but not marked as such), indorsed: "Service of the within is hereby admitted the 16th day of October, 1878." This is signed by counsel for appellee, and sufficiently imports a service by copy, in accordance with the provisions of section 339 of the Code.

We cannot consider the affidavits of parties impeaching the record in this particular.

An objection is taken, that the notice of appeal and the "undertaking" are not entitled of the cause in which judgment was rendered.

Judgment was rendered in the case of "*Margaret E. Cody v. Giles F. Filley, impleaded with,*" etc. The notice and bond are entitled "*Margaret E. Cody v. Giles F. Filley.*"

It is not without reluctance that we tolerate, much less sanction, a practice of this kind. The provision of section 401 of the Code, however, we think reaches and remedies the defect. Notwithstanding the defective title, both papers "intelligibly" (*i. e.*, in a manner to be understood) refer to the cause in which judgment was rendered, and they must be held, under this section, "valid and effectual." *Mills v. Dunlap*, 3 Cal. 94.

The objection taken to the undertaking, that it is executed by an attorney in fact, and that the original power of attorney is not filed with it in this court, cannot be sustained. This is an appeal under the Code, and the undertaking need not have been signed by the appellant at all. The rule can have no application, except when the bond is executed in pursuance of the former practice.

The notice of appeal was filed October 14th, and served October 16th. The undertaking was filed October 19th.

This was sufficient, the undertaking being filed within the time limited by the court.

There is nothing in the Code, in terms, fixing the time of service of the notice of appeal, but the rights of the appellee under the provisions of section 358, giving him "thirty days in which to except to the sufficiency of the sureties," would be impaired, unless the service preceded, or was contemporaneous with, the filing of the undertaking.

There is no provision of the Code, that in terms or by implication, requires that the service and the filing of the undertaking should be on the same day. The California cases cited in support of the contrary view were under a section of their Code which required in terms the filing of the notice of appeal and undertaking "at the same time," and this in view of a similar provision fixing a time in which the appellee should except to the sufficiency of the sureties,

made *service* of the notice at the same time necessary. Olney's Code, § 940, p. 813.

The motion is

Denied.

PULLMAN PALACE CAR CO. v. BARKER.

1. While the law exacts from the carrier of passengers the utmost care and skill, it refuses to take into consideration damages remotely resulting from a breach of their contract or neglect of their duty. The maxim is *causa proxima, non remota spectatur*.
2. Where the plaintiff, a woman, was a passenger on a sleeping-car of the defendant, which, through the negligence of the defendant, caught fire, and the plaintiff, on account of the smoke and flames, was compelled, in a half-clad condition, to leave the car, and caught cold which resulted in the suppression of her menses and subsequent illness, it appearing from the evidence that such illness was of the character that results from arrested menstruation: *Held*, that the plaintiff being "unwell" at the time, there was in her then physical condition an intermediate and independent cause of the subsequent illness, which was the remote and not the proximate result of the defendants' negligence.
3. Persons who are ill have a right to enter and travel in the cars of a railroad company, and as a common carrier of passengers the company has no right to prevent them, but the increased risk arising from conditions of health affecting their fitness to travel, certainly where such conditions are unknown to the carrier, must be assumed by the passenger.

Appeal from District Court of Arapahoe County.

THE appellee, the plaintiff below, had judgment, on the verdict of a jury, in the sum of \$1,480.00. The facts are sufficiently stated in the opinion.

Messrs. BUTLER & WRIGHT, for appellant.

Messrs. SYMES & DECKER, for appellee.

ELBERT, J. This was an action on the case brought by Diana Barker against the appellant, for injuries sustained by reason of alleged negligence.

The controversy, as presented by the record, respects the *extent*, not the fact of the appellant's liability. While the law, out of regard for human life and safety, exacts from the carriers of passengers the utmost care and skill, it refuses to take into consideration damage remotely resulting from a breach of their contract or neglect of their duty. The maxim is *causa proxima, non remota spectatur*.

In cases of contract as well as of tort, where no question arises of fraud, malice or oppression, the loss or injury for which compensation is sought must be the natural and proximate consequence of the alleged breach or wrongful act. Sedgwick's Measure of Dam. 57 *et seq.* ; Shearman and Redfield on Neg., § 595 *et seq.*

What is the proximate cause of an injury in a legal sense is often an embarrassing question, involved in metaphysical distinctions and subtleties difficult of satisfactory application in the varied and practical affairs of life.

The proximate cause required is not the greatest possible ; the negligence to which the responsibility attaches may sometimes concur with or precede other agencies in producing an injury. A result may be physically, secondary and consequential, and yet in legal contemplation be proximate. As a consequence the rule is vague and of difficult application. As said by BRAMWELL, B., "it is sometimes like having to draw a line between night and day ; there is a duration of twilight when it is neither night nor day." Each case of this description must be decided with reference to the circumstances peculiar to it.

The question as presented in the case at bar is not without difficulty.

The sleeping car of the appellant caught fire in the night and was burning, through the negligence of its employees ; the appellee, with her husband, occupied a berth which the flames had already reached, when she was awakened. The suddenness of the alarm and the imminency of the danger from the smoke and approaching flames, left no time for the appellee to properly clothe herself ; she left the burning car

with but slight clothing, and in her stocking feet; in passing to the next car she was compelled to stand for a minute or two on the platform of the car; it was an extremely cold night in January, and by reason of this exposure she caught a severe cold which caused the cessation of her menses, and resulted in a long period of illness.

Was this illness, in legal contemplation, the proximate result of the negligence of the appellant, for which the appellee may rightfully demand compensation?

In the case of *Milwaukee, etc., Railway Co. v Kellogg*, 4 Otto, 475, Mr. Justice STRONG says: "The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the fact constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that in order to warrant a finding that negligence or an act not amounting to a wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. * * * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not, when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of a sufferer must be to the originator of the intermediate cause * * * The inquiry must therefore always be whether there was any intermediate cause disconnected with the primary fact and self operating, which produced the injury."

The long illness of the appellee, as shown by the evidence, was of such character as results from arrested menstruation. Independent of the fact that she was "unwell" at the time, it cannot be said that the negligence of the

appellant resulted in her long illness or any illness. Conceding that the appellee was compelled on account of the smoke and flames to leave the car in the half clad condition she did, the exposure to the cold was the direct and necessary result of the appellant's negligence. Her subsequent illness, however, was not the result of the exposure, but the result of the exposure *in her then condition*. Here, then, intervenes an independent cause of her illness, a cause resting in her physical condition, appertaining exclusively to herself, with which the appellant had no concern, and to which it sustained no relations either by contract or by the general duty imposed by law upon carriers of passengers. Where physical weakness or disability is apparent to, or is brought to the attention of the carrier, undoubtedly that high degree of care which the law imposes upon him, would, under certain circumstances, involve duties in reference thereto. As that he shall allow an aged, infirm, or crippled person, a reasonable time in which to get on or off the coach or car, having reference to their crippled or infirm condition. *Coll v. Sixth Ave. R. R. Co.*, 33 Sup. Court (N. Y.), 190.

While this is the case it cannot be said that the law imposes any duty respecting the possible secret complaints and diseases of passengers affecting their fitness to travel. Where no duty is imposed, no liability can attach. Another passenger might have suffered equally serious consequences from the effect of the cold upon a wound in the foot, superinducing inflammation, and possibly necessitating amputation. Can it be said that the law imposed upon the carrier an enlarged duty having reference to the wound, and that the added risk of traveling in this condition must be assumed by him and not by the passenger from whose personal condition it springs? We think not. While it is true that menstruation is a law of health, it is also true that it is a condition requiring greater care and prudence to avoid exposure.

“The cars of a railroad company are not hospitals, nor

their employees nurses." Persons who are ill have a right to enter the cars of a railroad company and travel therein; as a common carrier of passengers the company has no right to prevent them, but the increased risk arising from conditions affecting their fitness to journey, certainly where they are unknown to the carrier, must rest upon their own shoulders. *New Orleans, etc., R. Co. v. Stratham*, 42 Miss. 613; *Hobbs v. The London, etc., R. Co.*, 10 Law Rep. (Q. B.) 111.

The illness of the appellee, as shown by the evidence, was traceable to her physical condition at the time of the accident, and was not the subject-matter of damage. It was a remote, and not a natural or proximate result of the appellant's negligence.

The judgment of the court below is reversed, and the cause remanded for a new trial.

Reversed.

DAMAGES IN TORT AND CONTRACT are distinguished in *Cincinnati H. & I. R. Co. v. Bales*, 4 Ind. 478, where the principal case is cited. RAILROAD—DAMAGES FOR NEGLIGENCE.—The principal case is said in *Terre Haute & I. R. Co. v. Buck*, 98 Ind. 322, to be not sustained by authority.

KNOX et al. v. McFERRAN.

1. When it is made to appear to this court that alleged evidence, through inadvertence, has been improperly incorporated into a bill of exceptions, opportunity will be given to apply to the court below to amend.
2. Where a party fails to except to the allowance of the amendment, he having had due notice of the application to amend, this court must presume that the court below allowed the amendment upon proper evidence.

Appeal from District Court of El Paso County.

Messrs. WILLIAMS & McMORRIS, for appellants, now moved to strike from the files the supplemental record filed herein by the appellee.

Mr. J. C. HELM, *contra*.

Per Curiam. It being made to appear to this court that certain alleged evidence had, through inadvertence been

improperly incorporated into the bill of exceptions, this cause was continued to give the appellee an opportunity to apply to the court below to amend the bill of exceptions. This accords with approved practice. *Wolfley et al. v. Lebanon Mining Co.*, 3 Col. 296; *Brooks v. Bergen*, 40 Ill. 65.

Appellant's counsel was duly notified of the motion to amend and appeared in response to the notice. The amendment to the bill of exceptions, which we are asked to strike from the record, is as follows:

"Now at this day, it being one of the days of the regular October term, A. D. 1878, of said court, comes James H. B. McFerran, defendant and appellee in said cause, by his attorney, and moves the court to amend the bill of exceptions heretofore filed herein; and affidavits of counsel for defendant, and of defendant himself having been filed in support of said motion; there being no counter affidavits filed, or other evidence in contradiction of the said affidavits filed by defendant; and the notes taken by the court at the trial of said cause having been mislaid and lost; and the said judge having been misled as to the agreement of counsel for the respective parties in connection with said bill of exceptions at the time of the presentation of the same for his approval, and he having in consequence thereof signed the same without a careful inspection thereof; and the court being convinced that said bill of exceptions contains material error, and should be so amended as to conform to the truth; and due and proper notice having been given counsel for plaintiff and appellants of the submission of this motion; and after argument of counsel thereon: It is hereby ordered and adjudged by the court that said bill of exceptions be amended by striking therefrom all that part of the testimony of James Knox as witness, sworn and examined in said cause in behalf of plaintiff, contained in the following statement: 'And I, as cashier, let McGovney have the money to make the last payment due on Rose's bond for a deed;' also, 'I, as cashier of the First National Bank, took the assignment as part payment of

McGovney's indebtedness due the bank.' 'He was allowed two thousand dollars for the premises in question, and credit was given him therefor by the bank.' "

Of the contents of the affidavits filed in the lower court, we are not apprised. Nor do we know whether the judge allowing the amendment had any recollection touching the alleged testimony that had been erroneously inserted in the original bill. Although the judge's minutes of the testimony taken at the trial were lost or mislaid, there may have been other and sufficient data to amend by. The appellants failed to except to the allowance of the amendment. Had appellants made it appear to this court by a bill of exceptions, that the lower court had no sufficient means of information by which to make the amendment, the motion to strike out would rest upon a much more substantial foundation. But in the absence of such exception we must presume that the court below allowed the amendment upon proper evidence. *Wallahan et al. v. The People*, 40 Ill. 103.

Motion to strike out will be

Denied.

APPEAL—ACTION OF COURT ON APPLICATION TO CORRECT RECORD does not furnish ground for a separate appeal, but such action should be reported as an amendment to the original transcript of the record: *Peyles v. Peyles*, 14 Colo. 584.

MOHR et al. v. BARNES.

Under the Code every material allegation in the complaint, not traversed, is taken as true. In an action on a promissory note, the plea of payment admits the original liability for the amount of the note described in the complaint, and the burden of establishing the payment is upon the defendant.

Appeal from District Court of Las Animas County.

THE case is stated in the opinion.

MESSRS. YEAMAN & JOHN, for appellants.

MR. GEORGE BOYLES, for appellee.

THATCHER, C. J. This is an action brought by Mohr,

Mohr & Co. against Frank W. Barnes, to recover the amount claimed to be due on two promissory notes alleged to have been lost. The plaintiffs, by verified complaint, particularly describe the notes, allege their loss, and a demand of payment. The only plea filed is that of payment. After the evidence for the plaintiffs was all in, the court, on motion of defendant, entered a judgment of nonsuit. Plaintiffs then moved the court to set aside the nonsuit, and grant them a new trial, which motion was denied. An appeal is taken specifically "from the judgment of nonsuit, and also from the order of the court denying the motion to set aside said judgment and for a new trial."

Under the former system of practice, if, in an action of assumpsit, issue were joined upon plea of payment, the plaintiff was *prima facie* entitled to a verdict without introducing any evidence. The effect of the plea is to admit the original liability, and the burden of proving its discharge is assumed by the defendant. Like a default it admitted some damages, but not *necessarily* the entire sum laid in the declaration. The original cause of action was by that plea conceded, but not the amount thereof. "The substance of the issue is that the plaintiff had been paid his debt or demand. On proving payment and acceptance of any sum of money, the burden is thrown on the plaintiff of showing that his whole debt was not satisfied." If, however, the defendant plead payment as to some definite sum, the plaintiff was not held to the proof of such amount as it was by the plea specifically admitted. *New York Dry Dock Company v. McIntosh*, 5 Hill, 290; *Waggoner v. Bells*, 4 Mour. (Ky.) 11, 12; *Scott v. Hall*, 8 Conn. 303; 1 Phill. Ev. 628, 629; Cowen & Hill's Notes, and case there cited.

Under the Code, every material allegation, not controverted by the answer, is, for the purposes of the action, taken as true. Code, § 72. Here the suit is founded upon two instruments, in writing, signed by the defendant and specifically described, as containing the amount of the demand. The plea of payment is, under the Code, an

admission of original liability, for the amount of the two notes described in the complaint, and throws the burden of establishing the payment thereof upon the defendant. *Canfield v. Sanders*, 17 Cal. 571.

It is true that the contents of a written instrument can only be proved by the writing itself, except when the original has been lost or destroyed, in which case sufficient evidence of its loss or destruction must be first submitted to the court before oral evidence of its contents can be received. But here it was not necessary to prove the *contents* of the notes. By pleading payment, the defendant admitted their contents, and what is admitted by the defendant need not be established at the trial by the oath of the plaintiff or any other person. The motion for a judgment of nonsuit was improperly allowed.

Judgment reversed and cause remanded.

Reversed.

MILLER v. SEYBERT.

A motion to set aside a judgment in the court below is, properly, no part of the judgment-roll.

Appeal from County Court of Ouray County.

THIS was an appeal from the order of the county court, refusing to set aside a judgment.

Messrs. MILES & ANDREWS, for appellee, now moved to dismiss the appeal.

Mr. ABRAM CUTLER, for appellant.

Per Curiam. The record in this case consists of the judgment-roll alone. There is no statement. The judgment-roll presents no question for review. The motion to set aside the judgment is not properly a part of it. Section

210 of the Code clearly enumerates the matters of which the judgment-roll is to consist, and there is no provision that would include such a motion.

The motion to dismiss is allowed.

Dismissed.

SALOMON v. WEBSTER.

1. A contract cannot arise unless the proposition made by one is accepted by the other without any modification whatever.
2. Where in view of the whole evidence the verdict is palpably unwarranted, the verdict will be set aside.
- 3 To instruct a jury that "if they believe," (omitting to add "from the evidence") is objectionable.

Error to County Court of Arapahoe County.

ON the trial of this cause Ralph C. Webster, being duly sworn, testified: "My name is Ralph C. Webster, I am the plaintiff in this suit, and am acquainted with the defendant Salomon. Either in September or October, 1867, the defendant called on me and asked me to take charge of a claim which he had against the United States for corn delivered at Camp Filmore, on the Arkansas river, a little below Pueblo. The conversation was at his store in Denver. He explained the case to me, and said that certain action had been taken, and the claim rejected. Upon his representation of the claim I thought it could be collected. He told me if I collected it he would give me \$1,000. He gave me the papers and memoranda relating to it, and within a few days I started to Washington. I got the claim referred to the inspector-general of the army, General Hardee, who reported it back adversely. I then got additional testimony in New York, and brought it before the board of claims, then sitting in Washington; the board decided it adversely."

Counsel for the plaintiff asked the witness the following question: "Did you employ counsel to assist you in pre-

senting the defendant's claim, and if so, upon what terms?" The defendant by his counsel objected, for the reason that the witness had shown no authority from defendant to employ counsel at his expense; but the court overruled the objection and permitted the witness to answer the question, which he did, as follows: "I employed F. J. D. Fuller as my attorney to carry the claim through the United States supreme court, on appeal from the board of claims." To which ruling and decision of the court in permitting this question to be asked and answered, the defendant by his counsel then and there excepted.

Thereupon the witness further testified: "The defendant did not know of my employing Mr. Fuller by name, but knew I had employed an attorney, and that the attorney was to have \$1,000 if he collected the claim. After I had been two or three months at Washington I wrote to Salomon that his claim was more than he reported it, that I would have to employ an attorney and pay him \$1,000; that I had been to considerable expense, and wanted him to give me \$500 to re-imburse me for that expense. I stated to him also that it would leave him \$2,616.20 after deducting \$1,000 to Fuller and \$500 to me, less some small expenses for taking two or three depositions. After writing this letter, and at the same time, I gave Mr. Fuller a power of attorney containing a power of substitution, to prosecute the case in the court of claims and supreme court."

Witness here handed a letter which is marked B by the court, and he resumed: "This is a letter received by me from the defendant in reply to a letter written by me to Salomon. I went to Denver in the fall of 1869, met Salomon at his store and asked him if he had heard from the claim, as I was anxious to get my \$500, and that \$500 wouldn't pay my actual expenses, not including my trouble. He offered to sell the claim to me for \$2,000. Mr. Salomon never said any thing about my \$500 charge until after he got his claim collected. He then called me into his store and showed me his bill of expenses for over \$400 in addition to Mr.

Fuller's charge of \$1,000, and told me it would not leave me over \$30, \$40, or \$50; I told him I had nothing to do with expenses, and he asked me to show him my paper to that effect; I showed him this letter 'B' and called his attention to his offer to take \$2,616.20 in full for his claim, and he replied that he did not know why he expressed himself in that way, and admitted that I never wrote him any such a proposition; Salomon has never paid me any thing, but offered to pay my account with Salomon Bros. of some \$69 to settle the matter; Salomon got from Fuller over \$3,000, some time in February or March, 1874." Letter "B" was then offered in evidence. To the introduction and reading of which in evidence, the defendant by his counsel objected, for the reason that it was immaterial, and contained no evidence of an agreement by the defendant to pay an additional \$500 to the plaintiff for his services, and because it showed a counter proposition, not accepted by plaintiff, etc., but the court overruled the objection and permitted the letter to be read in evidence. The letter was read to the jury as follows:

DENVER, COL., Nov. 17, 1867.

COL. R. C. WEBSTER, DEADHAM.

Dear Sir — In reply to your favor of the 8th instant, I inclose you several indorsements which I presume will be sufficient. In regard to the moving of Camp Filmore, and the delivery of the corn, I cannot get any affidavits as all the parties military and civil, who were connected, left the Territory. In regard to the 25 per cent commission, I think it is very steep. When I offered you \$1,000 I took it for granted you would have to pay something for influence, etc., and that you would not retain the full amount for your services. It is a great loss to me and I hate like the d—l to lose so much; but if you cannot do any better I will take the amount you offer, to wit, \$2,616.20 in full for my claim, and as you have full power of attorney, settle the d—d thing. If you succeed in settling and get the

money, place above amount to the credit of First National Bank of Denver, with Fourth National Bank of New York, and inform me by telegram as well as letter. Hoping soon to receive news of settlement, and wishing you a pleasant time, I am

Yours Truly,

FRED Z. SALOMON.

P. S. Make inquiries what steps would be necessary to get pay from the government for property destroyed by the red devils. There are many claims of that kind in this country, and if you had the inside track, it may be a good thing for you to take hold of them.

F. Z. S."

On cross-examination this witness testified: "I placed the claim in Fuller's hands in 1869, more than a year after I wrote the letter to which 'B' is an answer; I never paid Fuller any money for the suit; I received letter 'B' prior to placing the claim in Fuller's hands; I was to have \$1,000 if I collected the claim, and nothing if I did not collect it; I had some correspondence with Salomon before placing claim with Fuller; wrote him first that I must have 50 per cent if collected, as I would have to pay an attorney \$1,000, and must have an allowance for my expenses; I made the contract with Fuller to collect the claim for \$1,000, Salomon to pay the expenses; my power of attorney from Salomon only authorized me to collect the debt; I returned to Colorado in the fall of 1869, and at several times after my return, I inquired after the claim of Salomon and told him I was anxious about my \$500, and he never objected to my claim for the \$500, until after the claim was paid; he then called me into the store and informed me that it was allowed and showed me his bill of expenses; I don't think I ever accepted Salomon's proposition to take the \$2,616.20 contained in letter 'B'; my letter to Salomon asking for an additional fee of \$500, and this letter 'B,' which is the answer to it, represents the status of affairs between me and Salomon when I returned from Washington to Colorado. I

may have said in my letter to Salomon, that 'it would leave him \$2,616.20, less expenses,' but I meant that he was to pay the expenses. When Salomon showed me this bill of expenses he said it would not leave much coming to me, not more than \$30 or \$40. I told him I was to have \$500, and had nothing to do with expenses; but Mr. Salomon claims that the agreement was that he was to have \$2,616.20 for his claim and was to bear none of the expenses, and so the matter stands."

Thereupon the plaintiff rested his cause.

The defendant was then sworn in his own behalf, and testified as follows:

"My name is Frederick Z. Salomon, and I am acquainted with the plaintiff since 1867, and am the defendant in this cause. Mr. Webster was going to Washington in 1867 on other business, and knowing he was an old army officer, and thinking he might have influence enough in army quarters in Washington to collect this claim, I showed it to him and explained it, and told him if he would collect it I would give him \$1,000, but that I would not go to any more expense about it, and would pay nothing if he did not succeed in collecting it. He accepted my offer, and took the papers and memoranda concerning the claim with him. I got several letters from him about the claim, and this letter 'B' is my answer to one of them. After the claim was settled, I paid no more attention to those letters, and they have been lost or burnt up. The substance of Mr. Webster's letter to which 'B' is a reply, was that he could do nothing with the claim, and had put it in the hands of an attorney; that he had been to some expense and wanted me to allow him more money. I was unwilling to make that kind of an arrangement and wrote Col. Webster this letter 'B,' in which I make him a proposition to take \$2,616.20 net, in full for claim, leaving him all he could get over that amount, but he never answered this letter. Afterward I got a letter from Mr. Fuller, attorney in Washington, saying Webster had left the claim in his hands for

collection, and requesting me to send him money to pay costs of taking an appeal, affidavits, depositions and such things ; I then took it for granted that Webster had abandoned the claim and from that time I corresponded only with Fuller. After the claim was allowed, I had a conversation with Webster in my store, in which I told him I had got a letter from Fuller saying the claim was allowed, and then showed him a list of expenses incurred by me in prosecuting it, amounting to some \$460 ; he then demanded \$500 of me for his services ; I told him I never agreed to pay him \$500 ; that our agreement was that he was to have \$1,000 if he collected it, and nothing if he did not ; and was to pay his own expenses ; but was willing to settle with him according to my letters or any agreement he could show me ; he then showed me this letter 'B' and I told him I was willing to settle by that, although he had never replied to it, but that it would leave little or nothing coming to him ; Mr. Webster refused to settle by this letter ; my claim was allowed for \$4,116.20, and after paying Fuller \$1,000 and costs, \$460, it left a balance for me of \$2,656.20, which, on the basis of my letter 'B,' would leave just \$40 coming to Webster ; in order to settle the matter and prevent trouble I also offered in addition to give him the amount of his book account with us, then amounting to about \$70 ; he would not settle in that way, and so we parted ; Mr. Webster never alluded to this claim for \$500 in any previous conversation, and I never knew he intended to prefer such a claim against me, until he made the demand himself as I stated ; I never agreed to pay him \$500 or any other additional sum to my first agreement with him, for \$1,000 ; and I never varied or attempted to vary that original agreement, except as stated in my letter 'B,' which Col. Webster never accepted ; Webster never did any thing to collect the claim and never went to any expense about it that I know of ; Mr. Fuller did all the work and I furnished the money needed to collect it ; at the time of that conversation in my store, I did not owe Mr. Webster any thing,

and I do not to-day. He owes me still that book account of \$70."

On cross-examination the witness testified as follows :

"I gave Webster a power of attorney and he wrote me that he had employed Fuller to prosecute the claim for \$1,000 ; I made him no reply to this at the time, as I did not care how I got my claim collected ; I never authorized him to employ an attorney ; the only authority I gave him was in that power of attorney ; I did not care who he employed to collect it or assist him ; Webster never said any thing to me about this \$500 until the claim was paid, and I never even suggested to him that I would give him \$500 ; I got \$40 more than the \$2,616.20 mentioned in letter 'B' ; I never said Webster would be entitled to \$500 when the claim was collected."

The foregoing was all the evidence introduced.

Messrs. CHARLES & DILLON, for plaintiff in error.

Messrs. WELLS, SMITH & MACON, for defendant in error.

THATCHER, C. J. This is an action in assumpsit. The declaration contains only the consolidated common counts. Salomon had a claim against the United States for corn delivered at Camp Filmore, on the Arkansas river. The amount of the claim was \$4,116.20. In October, A. D. 1867, Webster, a few days before he started for Washington, on business of his own, agreed with Salomon to undertake the collection of the claim. In the event of success, Salomon was to pay him \$1,000, otherwise he did not agree to pay him any thing for his services. The claim was presented by Webster before the court of claims, in Washington, and rejected. There is no pretense that Webster ever performed or was entitled to any compensation under the original contract. Upon this point counsel are agreed.

Plaintiff, however, asserts that the contract originally made, and as to whose terms the parties are in accord, was afterward abandoned and another contract substituted,

upon which he sues. Having failed to collect the claim, under the original contract, and desirous of entering into a new agreement with Salomon for the further prosecution of the claim, Webster wrote a letter to Salomon, from Washington, in which he made a new proposition. Oral evidence of the contents of the letter was received, for the reason that the original had been lost. Webster, by this letter, informed Salomon that it would be necessary to employ an attorney for a contingent fee of \$1,000, to prosecute the appeal to the supreme court of the United States; that he (W.) had been to considerable expense; that he (W.) wanted Salomon to pay him \$500; that if he acceded to his request, it would leave him (S.) \$2,616.20, less some small expenses. In answer to this letter, Salomon wrote Webster as follows:

“DENVER, COL., Nov. 17, 1887.

Col. R. C. WEBSTER, DEADHAM:

Dear Sir — * * * In regard to the 25 per cent commission, I think it is very steep. When I offered you \$1,000, I took it for granted you would have to pay something for influence, etc., and that you would not retain the full amount for your services. It is a great loss to me, and I hate like the d—l to lose so much; but if you cannot do any better, I will take the amount you offer, to wit: \$2,616.20, in full for my claim. * * * If you succeed in settling and get the money, *place above amount* to the credit of First National Bank of Denver, with Fourth National Bank of New York, and inform me by telegram as well as letter. Hoping soon to receive news of settlement, and wishing you a pleasant time, I am

Yours, truly,

FRED. Z. SALOMON.”

It will be observed that Salomon did not yield to the terms of the proposition submitted to him by Webster so far as related to the payment of any expenses whatsoever.

By necessary implication, so much of Webster's proposition as concerns expenses, is repudiated, and he submits instead, a counter proposition. It is clearly apparent from Salomon's letter, that by reason of the difficulty attending the collection of the claim, he was willing to accept from Webster \$2,616.20, in full payment of his claim. This exact sum was to be paid into the bank for credit, as directed. The proposition is, we think, free from ambiguity. The amount to be paid Salomon was *net*, exclusive of all expenses incident to the collection. Instead of accepting the identical offer made to him, he modifies it, and re-submits it to Webster, with such modification. This letter did not, therefore, of itself, conclude an agreement. Upon this point the law is clear. Unless the proposition made by one is accepted by the other, *without any modification whatever*, no contract arises. In such case there is no concurrence of parties.

"If the acceptance modifies the proposition in any particular, it amounts to nothing more than a counter proposition. It is not in law an acceptance which will complete the contract." *Jenness v. Mount Hope Ins. Co.*, 53 Me. 23; *Beckwith v. Cheever*, 21 N. H. 41.

There was no further correspondence between the parties. If any contract was concluded, it must have resulted from the acceptance of Salomon's counter proposition. There is some evidence tending to show such acceptance. F. J. D. Fuller was employed by Webster to prosecute the claim before the supreme court. The agreed contingent fee was \$1,000. Fuller wrote to Salomon in relation to it, and from that time forth until the claim was finally collected, all correspondence was carried on between Fuller and Salomon. When due, the fee of \$1,000 was paid by Salomon to Fuller, thus ratifying his employment by Webster. Webster had nothing whatever to do with the collection after he employed Fuller, and whether this employment preceded or followed the receipt of Salomon's counter proposition does not very satisfactorily appear, nor is it very material. When the

claim was collected Salomon paid \$1,000 to Fuller, and offered to pay Webster a sum which with actual expenses incurred amounted to \$500. If accepted by Webster the net balance in Salomon's hands would have been \$2,616.20, the precise sum he agreed to take in satisfaction of his claim. As the expenses incurred were \$460, the balance due Webster was but \$40. Webster, however, insisted that he was entitled to \$500 net in virtue of the substituted contract under which, having failed himself to make the collection, he put the claim in Fuller's hands, and gave no further attention to the matter. There is certainly nothing in the correspondence between Salomon and Webster that even remotely supports his (W.'s) claim for \$500 net. By the verdict of the jury, however, he was allowed the \$500, and interest, \$112.50; total, \$612.50. We are at a loss to know upon what evidence this verdict rests, clearly not upon the correspondence which Webster testifies "represented the status of affairs between him and Salomon when he (W.) returned from Washington to Colorado."

Thus far it will be seen that the parties substantially agree in the material testimony. Upon one point, however, they are in direct conflict. In A. D. 1869, before the claim was collected, Webster testifies that he met Salomon in his store in Denver and asked him if he had heard from the claim, as he was anxious to get his \$500. Salomon was silent as to his demand. From this circumstance, defendant in error seeks to draw the inference that Salomon admitted by his reticence that when the claim should be collected, he (S.) would owe Webster \$500 net. This, to say the least, is an exceedingly remote deduction, wholly at variance with any just inference to be drawn from the correspondence and acts of the parties. Besides, Salomon flatly contradicts Webster in regard to this alleged conversation, and declares that it never occurred. In view of the whole evidence, the verdict is so palpably unwarranted that we cannot permit it to stand. At first blush it is apparent that the jury attached undue significance to the alleged conversation in

Salomon's store, and overlooked much material and uncontradicted evidence adduced at the trial.

In our opinion the court did not err in admitting in evidence Salomon's letter to Webster. It was a link in the chain of testimony, without which a contract between the parties could not have been established. Whether the proposition contained in that letter was accepted by Webster, could only be determined by the jury in the light of the subsequent events to which we have alluded.

The court *inter alia* instructed the jury as follows :

"If the jury believe that this contract was subsequently changed by the parties," etc.

To this form of instruction plaintiff in error objects on the ground that the jury are not thereby required to predicate their belief on the evidence. It is claimed that the jury might fairly conclude from this instruction that they were at liberty to make up their verdict upon supposed facts within their knowledge, whether in evidence or not. This form of instruction is objectionable, and in a case where the evidence is quite evenly balanced, *might* be a ground of reversal.

In *Ewing v. Runkle*, 20 Ill. 464, the doctrine is laid down that juries should be permitted to believe nothing not based on the evidence, and that their minds should always be directed to that and to that alone, as the ground of their belief. The judgment, however, in this case will be reversed on the ground that the verdict is unsupported by evidence.

Dissenting opinion of STONE, J. This was an action by defendant in error, Webster, to recover for alleged services in the collection of a claim of plaintiff in error, Salomon, against the United States. It was agreed that if the claim was collected Webster was to receive \$1,000 for his services. The claim having been rejected by the tribunal before which it was first prosecuted, it became necessary to employ

an attorney to carry the case into the supreme court, and such attorney was employed by Webster for a contingent fee of \$1,000. Webster claimed that to meet this altered state of the case not originally contemplated, a new agreement was made, whereby Salomon agreed to pay him the sum of \$500 for his services, in addition to the \$1,000 to be paid the attorney. The claim was finally allowed by judgment of the supreme court, the plaintiff received the sum so allowed, amounting to \$4,116.20. Salomon paid the agreed fee of \$1,000, to the Washington attorney, and also paid, according to his own showing, something over \$400 for various expenses in the prosecution of the suit, and upon his refusal to pay the sum of \$500 demanded by Webster, this suit was brought to recover, and a judgment for that amount with interest was rendered in the court below, from which Salomon prosecutes his writ of error.

The first error assigned is upon allowing the following question to be put to the defendant in error as a witness: "Did you employ counsel to assist you in prosecuting the defendant's claim, and if so, upon what terms?" This question was objected to for the reason "that the witness had shown no authority from defendant to employ counsel at his expense." I think this question was not objectionable upon the reason assigned. The witness, certainly, was at liberty to employ counsel at his own expense; and if employed at the expense of the plaintiff in error, then the want of previous authority from the plaintiff was not material, provided it was shown that he subsequently sanctioned and ratified such employment.

The defendant in error sought to recover, not upon the original contract, but upon a subsequent agreement. It is conceded that the original contract was not carried out by either party, and it is not denied that an attorney was employed who was paid by the plaintiff in error. The employment of such counsel was, therefore, a fact or circumstance, which, if proved, would tend to establish the making of a subsequent agreement, and as such subsequent

agreement was the main fact sought to be proved, as that upon which the right of recovery was based, this is an additional reason for holding that the question was not improper.

The second error assigned is upon the admission as evidence, of the certain letter marked "B," written by Salomon to Webster. Such portion of this letter as is considered material, is set out in the opinion of the chief justice. The competency of this letter as evidence is questioned by counsel for plaintiff in error, on the alleged ground that it contains no evidence of an agreement by Salomon to pay an additional \$500 to Webster for his services, and because it shows a counter proposition which was never accepted by Webster.

Standing alone, the letter at least shows that Salomon was then willing to assent to a new agreement different from the first in respect to the amount to be paid for collecting the claim. The sum of \$2,616.20, which he states in the letter he is willing to accept in full of his claim, is \$1,500 less than the full amount of the claim. The letter, therefore, expresses a willingness on the part of Salomon to pay \$500 at least in addition to the amount originally agreed to be paid for collecting the claim.

The chief point in issue seems to be whether the \$1,500 here proposed to be paid for services was to cover also all expenses, or whether by any agreement whatever Salomon was to settle the expenses in addition to the amount to be paid for services. The evidence offered in support of the alleged agreement to pay Webster \$500 for his services in addition to the \$1,000 paid to the attorney, was the testimony of Webster himself, together with Salomon's letter and the conduct of the parties respecting the transaction. Salomon in his testimony denied the making of any agreement on his part to pay to Webster the sum of \$500, or any other sum, in addition to the \$1,000 first agreed upon, or that he ever attempted to vary the original agreement except as stated in the letter "B," and which Webster never ac-

cepted; Salomon admitting, however, that after the claim was collected, he expressed to Webster a willingness to settle according to the terms of said letter. Webster testified that the letter "B" was in answer to one he wrote stating the necessity for employing an attorney at a fee of \$1,000, and demanding that \$500 should be paid him, Webster, for his own services and expenses incurred, and adding that it would leave Salomon the sum of \$2,616.20 "less expenses."

Considering the nature of the case, and the character of the evidence, we are agreed, that as one of the links in the chain of evidence tending to show what agreement, if any, was made subsequent to the original one and acted upon afterward, the letter was admissible.

The other errors assigned are based upon the instructions given and refused by the court below. I think the instructions given set the case fairly before the jury and are correctly stated. The one instruction refused was given with a modification by the court, which in my opinion was very properly added.

As to the instruction commencing: "If the jury believe that this contract," etc., I concede that if instead of the usual *formula*, "If the jury believe, from the evidence," the words "from the evidence" were omitted in each and all the instructions given in a case, it would be certainly objectionable, and might be ground for reversal; but where there is a series of instructions, as in this case (where there are ten) the omission of the words in question from one single instruction in the series certainly could not mislead the most ignorant and perverse jury to suppose that they were at liberty to form a belief outside of the evidence in the case, when by every other instruction they were expressly directed to found their belief upon such evidence.

This case has been twice tried in the court below, resulting in a like verdict for defendant in error by the jury in each trial. A question is raised by counsel for defendant in error, whether, under section 24 of the Practice Act, R. S.,

p. 508, another trial of this case can be had ; and it is contended that the language, "if either party may wish to except to the verdict, or for other causes, move for a new trial, or in arrest of judgment, he shall give notice, etc., etc., *but no more than two trials shall be granted to the same party in the same case,*" * * * is to be construed as a limitation upon the number of trials that may be had in any one case, and hence, there having been two trials of this case, no other one can be allowed. I think such a construction would fail to give to the language employed its true meaning and intent. The section relates *inter alia* to the granting of *new* trials, and, after prescribing the requisites of a motion for each new trial, the language follows, that "no more than two trials shall be granted," etc. I think the word "granted" must be taken in a restrictive sense, as limiting the number of trials to be allowed by the *nisi prius* court upon motion for a *new* trial in the same case, and is not to be taken as a limitation upon the allowance of a new trial by the supreme court for error in the court below.

The only evidence in the case is the testimony of the parties, plaintiff and the defendant, together with the letter "B," referred to. This, together with the conduct of the parties, make up the case. The plaintiff below failed to make out a clear and complete case upon any express contract or promise of Salomon to pay the amount sued for ; but from all the evidence, I think it was possible for the jury to have found, as they evidently did, that such a contract was fairly implied. The jury, who are judges of the credibility of the witnesses respectively, as well as the weight to be attached to each portion of the testimony, not unfrequently form an opinion from putting together a large number of mere grains of evidence, gathered from all the circumstances entering into a case, and giving complexion to the whole mass, and it is a matter of no small responsibility for an appellate court, who have not heard the testimony as given in the court below, nor seen the air and

manner of the witnesses on the trial, to assume to say, that upon the testimony alone, the verdict is unwarranted, unless, from the patent want of evidence on one side or the other, the unbiased judicial mind is shocked by the verdict at first blush.

If we concede that the jury refused credence to Salomon's denial of the statements of Webster in the case; if they believed that Webster's repeated demand of the \$500, claimed for his services, was met by such silence on the part of Salomon as to imply a tacit assent to the claim, if they refused to believe that the rather remarkable sum of nearly \$500 outside the attorney's fee of \$1,000 was required to be expended in hearing the case on appeal; or if upon other like hypothesis which their belief from the evidence warranted them in assuming, it is not difficult to reconcile the verdict with the whole evidence in the case.

A mere preponderance of the testimony against the verdict, will not warrant its disturbance, if there is any evidence upon which the verdict might not unreasonably have been found. This is too well settled to require a citation of the authorities here.

The testimony of the two parties respecting the alleged agreement upon which recovery was sought seems to me to be in direct conflict. The rule, as laid down repeatedly by this court, in such cases is, that the verdict of the jury who are to determine the credibility of the witnesses, as well as the weight and preponderance of the evidence, will not be disturbed. *Barker v. Hawley*, 4 Col., and cases there cited.

For these reasons I dissent from the opinion of the majority of the court, that upon the evidence alone the case should be reversed. I think the judgment of the court below should be affirmed.

Reversed.

Instruction "if you believe," omitting "from the evidence." is objectionable: *Ingols v. Plimpton*, 10 Colo. 539.

UTLEY et al. v. THE CLARK-GARDNER LODGE MINING CO.

1. Sec. 213, Gen. Laws, requiring foreign corporations, before they shall be permitted to do business in this State, to file a certificate with the secretary of State, etc., is intended to enforce section 10, article 15 of the State Constitution, and is not in conflict with the Constitution of the United States.
2. A corporation is the creature of local laws. For the recognition of its existence and the enforcement of its contracts without the limits of the sovereignty which created it, it is dependent upon the comity of the several States.
3. The statute is prohibitory in its terms, but the failure of a foreign corporation to comply with its terms, however it may affect its right to hold and enjoy property in this State, does not affect its capacity to sue.
4. A plea in abatement going only to the power of a foreign corporation to maintain its action for trespass, *held* bad on demurrer.
5. When a demurrer is sustained to a plea in abatement and the defendant fails to plead over, he will not be permitted, in an action of trespass *vi et armis*, to prove in mitigation an entry under color of title, nor is he entitled in such case to interpose any substantive defense.

Appeal from District Court of Gilpin County.

THE case is stated in the opinion.

Messrs. BELFORD & REED, for plaintiffs in error.

Mr. L. C. ROCKWELL and Mr. H. B. MORSE, for defendants in error.

ELBERT, J. August 25, 1877, the Clark-Gardner Mining Company of New York filed a declaration in trespass containing two counts. The first count charges the breaking and entering upon claims Nos. 7, 8 and 9 of the Gardner lode and breaking ore, etc. The second count is *de bonis asportatis*.

The defendants filed the following special plea: "And the said Alvin H. Utley and John Burkhardt, by Belford and Reed, their attorneys, come and defend the wrong and injury, when, etc., and pray judgment of said writ, because they say that the said Clark-Gardner Lode Mining Com-

pany is now, and was at the commencement of this suit, a foreign corporation, and that said Clark Gardner Lode Mining Company at the time of the commencement of this suit had not filed in the office of the secretary of State of the State of Colorado, and in the office of the clerk and recorder of the county in which its business is carried on, a certificate signed by the president and secretary of such corporation, duly acknowledged and designating the principal place where the business of said corporation shall be carried on in this State, and designating an authorized agent or agents in this State residing at its principal place of business, upon whom process may be served, and did not at the time this suit was commenced have any known place of business and an authorized agent or agents in the same upon whom process might be served; and this the said defendants are ready to verify, wherefore they pray judgment of the said writ in this suit, and that the same may be quashed," etc.

To this plea, the plaintiff below demurred, the demurrer was sustained, and the defendants stood by their plea.

Section 213, General Laws, p. 151, upon which the plea is based, is as follows:

"Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the secretary of State, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served." * * *

This provision is intended to enforce section 10, article 15 of the Constitution, which declares: "No foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served."

State legislation of this character is held not to be in conflict with that clause of the Constitution of the United States which declares "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" nor with the clause which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States."

A corporation is the creature of local laws; it has no existence or absolute right of recognition outside the limits of the sovereignty which created it.

For the recognition of its existence and the enforcement of its contracts without such limits, it is dependent upon the comity of the several States, and this comity may be extended upon such terms and under such limitations as each State may think wise to prescribe. *Augusta v. Earle*, 13 Peters, 538; *Paul v. Virginia*, 8 Wall. 168.

The Constitution and statutory provisions cited, embody the policy of our State toward foreign corporations. The statute prescribes the terms and conditions upon which they may transact business within the State upon an equal footing with domestic corporations. They shall designate, in a manner prescribed, their principal place of business and an agent or agents residing thereat, upon whom process may be served. In substance, they shall put themselves in a position to be amenable to the process of the State courts. Similar statutes exist in most of the States of the Union, the object being to protect the citizens of the State, dealing with foreign corporations, from the hardship of pursuing their rights in distant jurisdictions.

The terms prescribed cannot be justly characterized as harsh or onerous; on the other hand, they are simple and equitable, and upon compliance the doors are thrown wide open to foreign capital, represented by foreign corporations, to compete in the various industries and businesses of the State, upon an equal footing with domestic corporations.

The statute is prohibitory in its terms. They *shall* file

the designated certificate "before they are authorized or permitted to do any business in this State."

The Oregon statute, substantially like this, is held to be prohibitory. *In re Comstock*, 3 Saw. C. C. 223; *Sample v. Bank of British Columbia*, Chicago Legal News, April 20, 1878.

In the first case, DEADY, J., says: "The purpose of the act is apparent. As has been said, it is to secure the people of the State the right to sue the foreign corporations in the courts of the State; but unless the attorney is appointed before the business is transacted, it will not be attained. In *Rex v. Locksdale*, 1 Burrows, 447, Lord MANSFIELD laid down the rule 'that whether a statute is mandatory or not depends upon whether the thing directed to be done is the essence of the thing required.' Now the appointment of an attorney is the very essence of the thing required in this case. In fact, nothing else is required, and without this statute would be utterly inoperative. This act, being mandatory, is therefore a prohibition against the transaction of business by the bank in this State without first complying with its terms."

That another section prescribes a penalty for failure or neglect to comply with the requirements of the statute does not affect this conclusion. *Cin. Mut., etc., Co. v. Rosenthal*, 55 Ill. 85.

Admitting the statute to be prohibitory, it is insisted that the case at bar presents no occasion for its application; that the plea is in abatement, and goes only to the competency of the plaintiff to sue; and that the institution of its suit by the plaintiff was not an act of business within the prohibition.

What meaning and what limits are to be assigned to the statutory phrase, "to do business," is a matter of elaborate argument by counsel.

A corporation is defined to be "an artificial being, invisible, intangible and existing only in contemplation of law." It can do no acts, either within or without the State which

creates it, except such as are authorized by its charter. To such charter we must look to determine the powers it may lawfully exercise.

Ordinarily they have the power to sue; the power to contract, limited to the objects of the company; and the power to acquire as well as to hold and enjoy property, real and personal, limited to the necessities of the company. Taking language in its ordinary acceptation, a corporation does business by the exercise of its power to contract, its power to acquire and hold property, real and personal and like powers.

By the exercise of these corporate powers, it carries on its corporate business in the ordinary meaning of the term. By their exercise it establishes its business relations, assumes obligations and acquires rights. By its power to sue it does not seek to do business, as that term is generally understood, but to enforce rights springing from business transactions.

By the comity of the States composing the Union a corporation created by the laws of one State may exercise all the enumerated powers in any other State, in the absence of any prohibitory statute or conflicting policy. Story's Con. Law, § 38.

Our prohibitory statute must be interpreted with reference to this general doctrine and language affecting the capacity of a company to contract or acquire real or personal property, must not be enlarged to prohibit the exercise of another and independent power, that might be exercised by virtue of this general rule of comity which existed prior to the adoption of the statute.

The question is, how far is this general rule modified or abridged by the statute. The prohibition extends to doing business before compliance with the terms of the statute. We do not think this an abridgment of the right of a foreign corporation to sue. It extends only to the exercise of the powers by which it may be said to ordinarily transact or carry on its business. To what *extent* the exercise of these powers is affected we do not decide.

The failure, therefore, of the plaintiff company to comply with the terms of the statute, however it may affect its right to hold and enjoy the property, the subject of the trespass, did not affect its capacity to sue. The plea was in abatement and went only to the power of the corporation to maintain its action. The plea to have availed, if at all, should have been in bar of the action. The demurrer was properly sustained.

Upon the assessment of damages, two questions are made :

1st. That the court erred in refusing to allow the defendants to prove in mitigation of damages an entry under color of title.

By not pleading further the defendants admitted all the facts alleged in the declaration, which were well pleaded, and they could not be controverted on the inquest. Nor was it competent for the defendants to interpose any substantive defense. *Town of South Ottawa v. Foster*, 20 Ill. 298.

The declaration, in its first count, alleges ownership of the close and trespass *vi et armis*.

The defendants, by their admission, stood in the position of naked trespassers, without color of right or title. Their offer to show that their entry was under color of title, to reduce the damages, was in conflict with their admissions and was properly rejected.

2d. It is insisted that, as there was no re-entry by the plaintiff after ouster, it could only recover nominal damages.

This objection goes only to a recovery on the first count, and we do not examine it as a recovery was admissible under the second count.

As to the chattels therein mentioned, the title and right of possession of the plaintiff were admitted, and the defendants could not be heard to question either on the inquest.

The judgment of the court below is

Affirmed.

FOREIGN CORPORATIONS DOING BUSINESS IN THE STATE without compliance with the statute may notwithstanding sue in the state courts: *Tabor v. Goss & P. Mfg. Co.* 11 Colo. 42; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 730.

THATCHER et al. v. ROCKWELL.

1. Ordinarily a plea *pais darrein continuance* is a waiver of all the former pleas. When filed, not as a substitute, but as a supplemental plea, by leave of the court, and so treated at the trial, its effect is not to waive the other pleas.
2. Under the Revised Statutes of the United States, the jurisdiction of the Federal courts is exclusive of the State courts in matters and proceedings in bankruptcy, but this statutory provision does not operate to divest the State courts of jurisdiction in independent suits by or against the assignee in bankruptcy.
3. Where suits are *pending* in the name of the bankrupt before he is adjudicated to be such, they may be prosecuted to judgment, either in the name of the bankrupt, or in the name of the assignee if he elects to have himself substituted. Such suits do not abate by reason of the bankruptcy.
4. Section 2 of the act of June 22, 1874, amendatory of the Bankrupt Act of 1867, neither operated to confer jurisdiction upon the State courts, nor to abridge it as to the class of actions therein named. Its only effect was to empower Federal courts of original jurisdiction to direct certain suits to be brought in the courts of the State where the bankrupt resided.
5. If, after adjudication, the action, before pending in the name of the bankrupt, be prosecuted to judgment in his name, he is only a nominal plaintiff; and payment to a nominal plaintiff by the judgment defendant, with notice, either actual or constructive, that he was not the real party in interest, would not satisfy the judgment.
6. In construing a charge to a jury, each instruction is to be considered in connection with the entire charge, and if, considering it as a whole, this court is satisfied that the jury was not improperly advised as to any material point in the case, the judgment will not be reversed on account of the charge.
7. There can be no set-off where the claims are not mutual. A separate demand cannot be set-off against a joint demand.
8. An agreement, if it be not collateral, but in the nature of an original agreement to pay the debt of another, founded on a sufficient consideration received by the promisor, is not within the provisions of the statute of frauds, and, therefore, need not be in writing; but if the agreement to answer for the debt of another be wholly collateral, it must be in writing.

Appeal from District Court of Gilpin County.

ASSUMPSIT. The declaration consisted of a special count, and the common counts for money had and received,

money loaned and money found due on an account stated. The defendant demurred to the special count; the demurrer was sustained. To the common counts the defendant interposed the pleas of the general issue, payment and set-off. At a subsequent term, to which the cause had been continued, leave was given defendants to file an additional plea, which plea was, in substance, as follows:

"That in the year 1867, the banking house of Warren Hussey & Co. were doing business as bankers with a firm known as J. P. Whitney & Co., composed of one J. P. Whitney, William A. Whiting and plaintiff, and that the business of the latter firm was conducted by said Whiting, who drew check upon the bank of Hussey & Co.; that in November, 1867, the said firm had a settlement among themselves, and that it was then found that the said Whiting had used the money or a portion of it for his own use, and the said Whitney & Rockwell thereupon insisted he should make it good, or that Hussey & Co. should deduct such sum from the debits of said firm, and take the note of said Whiting for the amount he had thus used, to which Hussey & Co. then assented, upon the assurance and promises of both Whitney & Rockwell, that in consideration of the premises they would see that said note was paid; that thereupon Whiting made his note for \$3,000, bearing date November 8, 1867, and the same was delivered to Hussey & Co., and the bank account was then corrected by deducting such sum from the debits of said firm of J. P. W. & Co., and that Hussey & Co. never discharged J. P. W. & Co. from liability, but took such note on express agreement of Whitney & Rockwell to see it paid; that some time thereafter, plaintiff and said Whitney came to Hussey & Co., and informed them that Whiting had sold and conveyed to plaintiff all of his real estate and mining property, and had also sold and delivered to him a large amount of personal property, consisting of stock in the Bullion and Inca Mining Companies and other property, and that such sale and conveyance had been made in order

to provide for the payment of the debts of the said Whiting, and that it was in trust for that purpose, to which statement Rockwell assented; and thereupon agreed to pay the note of the said Whiting in consideration of such sale and receipt of the property as aforesaid, to which Hussey & Co. assented, and ever after held the said Whiting discharged from the payment of said note, and looked only to Rockwell therefor; that said Whiting was soon after taken sick and died, and that no steps were ever taken against his estate; that defendants became the successors of Hussey & Co., and took said note in good faith, paying therefor upward of \$4,000, and the note was duly assigned to them, and that at the times, in the declaration mentioned, defendants were the owners of the note, and that it was due and unpaid, and that the moneys mentioned in declaration, when received by them, were applied upon the said *note*, the payment of which had been assumed by the plaintiff."

The plaintiff replied, denying payment, also denying set-off, and, as a further replication to the plea of set-off, replied the statute of limitations. The replication to the additional plea denied each and every allegation therein. Issue was joined on the replications.

Leave was then given defendants to file a supplemental plea to the effect that: "Plaintiff was adjudged a bankrupt April 26, 1876, under the act of Congress of March 2, 1867, in the United States district court of the southern district of the State of Illinois, the appointment and qualification of assignee in bankruptcy, the execution by register of the assignment, advertisement by assignee, filing for record in the county of Gilpin, the conveyance by operation of law of all rights of property and choses in action of the said plaintiff to said assignee, and that right of action was then wholly in George Fisher, the said assignee."

To this plea the plaintiff replied, admitting the adjudication in bankruptcy April 26th, 1876, and the appointment and qualification of the assignee, and the conveyance by register, and the record of such conveyance, but,

replying further, alleged that the claim in suit did not pass to the assignee — because, he says: “That heretofore, to wit, on or about the first day of November, 1875, said Rockwell, for a good and valuable consideration assigned, in writing, with Lewis C. Rockwell, the half of said claim, and at or about the same time he assigned to Kate Rockwell the other half of said claim, and said defendants were duly notified of said assignment of said claim at the time the same was made, and on and after the said assignment the said Watson B. Rockwell had no right or interest in and to the said claim now in suit, except to prosecute the same for the use and benefit of the said Lewis C. and Kate Rockwell, and that said Lewis C. and Kate Rockwell are the owners of the claim, and that neither Watson B. Rockwell nor George Fisher, assignee, have any right or title or interest in said claim, or the money to be derived therefrom. And that said Fisher has ever since his appointment been aware of and has full knowledge of the assignment of the claim to Lewis C. and Kate Rockwell, and does not claim any right thereto.”

To this replication the defendants rejoined, denying all the allegations therein.

The record shows a stipulation “that it was agreed by the parties to the suit that the firm of Cash, Rockwell & Co. owned and operated certain reduction works in Gilpin county during 1870 and a portion of 1871; that the bank account of C., R. & Co. was kept with the defendants, then engaged in the banking business under the name of Thatcher, Standly & Co. That June 12th, 1871, the defendants were the holders of two notes of Cash, Rockwell & Co., of \$5,000 each, secured by trust deed and drawing interest at eighteen per cent per year, and that on the 19th of June, 1871, one of the firm, to wit, Robert Cash, paid to said defendants enough money to pay all of the principal and interest due on said notes, and also to pay all accounts which the defendants had or held against the firm of C., R. & Co., and then and there gave to said Cash a receipt, as follows, to wit:

‘Received, Central City, June 19th, 1871, of Robert Cash, ten thousand dollars, in full of all accounts, notes and demands to date, against the firm of Cash, Rockwell & Co.

\$10,000.00.

THATCHER, STANDLY & Co.’”

. Which stipulation was read in evidence.

Watson B. Rockwell, sworn: I am nominal plaintiff in this suit; have known Joseph A. Thatcher eleven years; know Joseph Standly; they did a banking business as Thatcher, Standly & Co.; I, together with Robert and James Cash, made and delivered to T., S. & Co., a note for several thousand dollars — first one in March, 1871, for the purpose of balancing an over-drawn account; C., R. & Co. were engaged in reducing ores in the county; works started about the first of April, 1870; continued until about 20th June, 1871; I went away about two weeks after the works started, and, with the exception of two or three months, I was absent until the next March; I was here in the summer of 1871 about three months; it was understood between myself and Cash that he was to take charge of the works; we gave T., S. & Co. two notes of \$5,000 each on June 12th, 1871, signed by our individual names; we put them in to pay the note already due for seven thousand, and for money to work with, and we gave the two notes for the loan of ten thousand dollars, the balance over what we then owed was a working capital; on the 19th of June, 1871, I went to Boulder and returned on 22d; I left for the east February 3d, 1873, and I returned October, 1874; in August I had been absent eighteen months; about the first of October I met Mr. Thatcher, and he asked me to call at his house * * * I went east in February, 1872, and I remained there eighteen months and returned in August, 1873; I don't recollect whether I went east again before January, 1875; I went to London in January, 1875; I had the conversation with Thatcher about the first of October, 1874; Thatcher introduced the subject by reading a letter he had received from Robert Cash—a very insulting and threatening letter. * *

After reading the letter he stated that on a certain occasion Robert Cash came to him and proposed to get the money to pay these notes for \$10,000 from Prof. Hill, Cash to abandon the works and agree not to operate in the reduction of ores in the county where he would come in competition with Hill; if they could obtain the money, the first money was to go to T., S. & Co., to pay the notes of \$5,000 each; if more than enough to pay, then the balance was to go to Robert Cash, and I was not to be paid any of the money, but the notes were to be held in force over me, and the whole amount collected, if possible, from me, and paid to Robert Cash, and Cash agreed to give Thatcher \$1,000 for his influence with Prof. Hill; Thatcher said he agreed to this, and did all he could to bring it about, and that, as the result, Hill paid to Cash in their bank \$10,000, which was applied toward the payment of these notes; he stated that so far as collecting the whole amount from me, he never intended to carry that out, and that he was acting for me as a friend. * * * The notes were not canceled, and as I knew he collected from me \$2,820 after the notes were paid, he went on to collect from me when I was absent my share of this \$10,000, I did not know it had been paid; he claimed at this time that I had made some promise to pay the debt of Mr. Whiting, and he stated that he had applied it in that way; he thought in consideration of what he had done in saving me from paying the \$10,000 I should allow the \$2,820 to be applied in that way, whether I was under obligation to do so or not; he admitted he had applied it on the notes he held against Mr. Whiting, my father-in-law. * * * This was the first intimation I had of it, or suspected any thing of the kind; the receipt read to jury (see stipulation) is the receipt Cash showed to me; at this time Cash claimed he had paid my portion of the \$10,000 to Thatcher, and that I was owing him therefor, and for interest thereon, some \$3,000."

Letter of Thatcher, with statement, was here admitted and read as follows :

“ Statement. — Cash, Rockwell & Co. Notes
to July 2, 1872; June 12, 1871, two notes,
\$5,000 each..... \$10,000 00
Interest paid to September 2, 1871 :
By cash of R. & Co..... \$273 46
“ “ Robert Cash..... 3,000 00
3,273 46
Interest on \$6,726.54 from September 2, 1871, to
July 2, 1872, ten months..... 1,008 97
Due July 2, 1872 7,735 71

MR. W. B. ROCKWELL :

Dear Sir — Mr. Cash says he will undertake, with your assistance, to clear up all interest due on notes, and pay all balance on one note on or before August 1, in the following manner, the balance can run a while longer if necessary. This is the proposition: You pay one-quarter of the \$2,735.51 — say \$683.88; you pay one-quarter of \$3,000 paid by him last September, \$750, making \$1,433.88. He will pay the balance necessary to cancel first note, \$1,301.63. This he claims would be in the proportion of three-quarters to your one-quarter. For instance, he has paid individually say,

September, 1871	\$3,000 00
Will pay now.....	1,301 63
You will pay.....	1,433 88
Making total payment	\$5,735 51
One-fourth of which is \$1,433.88.	

I must insist that this much be done, and believe you will make the effort to help this payment in some way, to at least this extent.

Yours, truly,

J. A. THATCHER.”

Witness continued: "I received this letter in New York in July, 1872; the notes had been paid in June, 1871; at that time he had no claim or demand that I know of against C. R. & Co.; no part or portion of the 'Statement' was correct; I did not then know the notes were paid."

The following letter of the plaintiff to E. J. Giddings was identified by the witness and read in evidence:

"LONDON, Eng., *November 27, 1872.*

DEAR BRO. E. J. * * *

I have arranged for \$3,000 at the bank of the Manhattan Company in New York, or will have it there soon, and I inclose in this two checks against it payable to Thatcher & Co., one for \$1,570.93, and the other \$1,429.07, and for the following purposes: The first one to pay the interest on my share of the Cash & Rockwell notes to the 15th of December and my share of the balance due at that time on one note, to wit:

Amount due September 2, 1871.....	\$6, 726 54
Interest on same to December 15, 1872.....	1, 567 19
	\$8, 283 73
Deduct one note.....	5, 000 00
	\$3, 283 73
One-fourth of same.....	\$820 93
One-quarter of \$3,000 paid by Cash..	750 00
Due from me December 15, 1872.....	\$1, 570 93

Mr. Thatcher will understand the above. Now when Mr. Cash is ready to pay his proportion of the interest on the whole amount up to December 15, and the balance of the one note, I want that check for \$1,570.93 used to pay my proportion. If Mr. Cash should not be ready to pay his proportion at once, I want the amount placed to my credit on Thatcher, Standley & Co.'s books, with the understand-

ing that the amount is placed there for the purpose of making such payment whenever Cash pays his proportion, and will be used for no other purpose, and I hereby authorize and desire you to check it out for that purpose, or any proportion of it, whenever Cash pays his proportion. And being placed there virtually as a payment, Mr. Thatcher will of course agree not to charge me further interest on that amount. You and he will both understand why I do not want any indorsement on the note, excepting payments made by both parties. Probably for the same reason that Cash does not.

Now with the other amount I wish to make a special arrangement with T., S. & Co., if acceptable to them. I wish to deposit the \$1,429.07 check to my individual account with them, *not* as a payment on the other note, but with the understanding that as long as it remains there, or \$1,250 of it, my one-fourth of the other note, that they will treat it as they voluntarily did the amount I left with them last year, that is, allow me the same interest on it they charge me on the note. I do not intend, if I can avoid it, to draw out any portion of \$1,250, until it is done for the purpose of paying the other note, but just now I am not in a position financially, to use it for that purpose, and in case of emergency I must reserve the privilege of checking out any portion or all of it. I have no doubt Mr. T. & Co. will accede to my wishes in this respect; also, I wish further to propose to Mr. Thatcher that whenever Mr. Cash is ready to pay the other note, his three-fourths of it, that he accept it and cancel the note, and for my share, \$1,250, I will give them my note secured by deed of trust on my portion of the mill, which embraces that wing and *all* the machinery. This I believe Mr. T. will do, under these circumstances; the engine and boiler alone are worth that. If he desires before making the statement to Mr. Cash, that he will relinquish the note upon his paying three-fourths of it, let him read the original agreement between Cash & Brother and Mrs. R., so he will understand how her improvements

there are connected with Cash & Co. You will see that she or her representatives has the right at any time to remove the machinery, etc., and if Mr. T. should accept this last proposition, let him ask his attorney if that agreement between the Cash's and Mrs. R. is sufficient for her to be secure in her rights, standing as they do, upon land claimed or owned by Mr. Cash. It might be advisable to have the agreement recorded, or that portion of it covering the right of property.

I should esteem it a favor if Mr. T. would get Mr. Butler's advice on that, if he is their attorney, and if satisfied in the security of it, I trust he will at once give Mr. Cash the opportunity of paying his proportion of the other note. In case this is done, Mrs. R. better execute the deed of trust and I will sign the note, and in order to have every thing ready then, I will send a note which can be used if required. You will please let Mr. Thatcher read what I have written in regard to this matter. And as I have before written, I wish he would take charge of Mrs. R.'s interest in the mill, and I will say to you especially, do not let that be run in any way, subjecting me to any liability of loss during my absence. Get legal advice, and, if necessary, a notice must be put in the paper that I will not be responsible for any debts contracted by Cash & Co. Before doing this, however, speak to Mr. Cash about it. But if not considered necessary by Mr. Teller, I rather you would do neither, that is, neither advertise it or speak to Cash about it, or say any thing about it any way.

Perhaps Cash, starting up again with a new partner and under a new style of firm, Cash & Co., before it was Cash, Rockwell & Co., will be quite sufficient to clear me of all liability, as it can be shown that neither myself nor Mrs. R. has had any thing to do with this last movement in any way.

Please notify Messrs. Thatcher, Standley & Co. personally, that I will not be responsible for the debts of Cash & Co., but they will please say nothing about this to others. If Cash & Co. should do business at the other bank, I wish

you would also ascertain of them if they consider me one of the firm, and if so, notify them the same.

Yours, truly,

W. B. ROCKWELL."

The following letter from Thatcher to Rockwell was read in evidence :

"CENTRAL CITY, *April 4th*, 1872.

WATSON B. ROCKWELL, Cairo, Illinois :

Dear Sir — Do you hear from Mr. Cash these times? do you think he will pay part of the balance on our debt? I wish you would stir him up, and in some way help us some on our claim. Truly I never saw money so close here since I have been in business.

(Signed)

J. A. THATCHER."

The following stipulation and letters were also read in evidence :

"STATE OF COLORADO, }
County of Gilpin. } ss. :

In the District Court in and for Gilpin County ; to the September Term, 1877.

Watson B. Rockwell
v.
Joseph A. Thatcher and Joseph Standley.

It is hereby stipulated that Elijah J. Giddings would, if on the witness stand in this case, testify as follows :

1st. That he, Giddings, received from Watson B. Rockwell in due course of mail a letter dated London, England, Nov. 27, 1872 (and now marked Exhibit "A").

2d. That such letter contained two checks drawn by said Rockwell in favor of Thatcher, Standley & Co., on a bank in New York, one check being for \$1,578.93, the other for \$1,421.07.

3d. That upon the receipt of said letter he showed Thatcher the instructions contained therein, and delivered to T. S. & Co. their checks as Rockwell's agent.

4th. That afterward, and before the 28th day of January, 1873, Giddings and Thatcher had several talks regarding the disposition of the money specified in said checks; that Thatcher wanted the amount of the two checks applied to the payment of what Thatcher represented to be two unpaid notes of Cash, Rockwell & Co., but that said Giddings on behalf of Rockwell objected to having this done, as it was contrary to the instructions of Rockwell. That Thatcher wrote Giddings two letters regarding this matter, one of which is in pencil and without date (but is now marked Exhibit "B;") the other is dated January 28, 1873, and is marked Exhibit "C.")

That after receiving these letters and having these talks, and without receiving any further instructions from Rockwell, he did permit Thatcher to apply the money on what he supposed were these unpaid notes of Cash, Rockwell & Co., or at least \$2,820.92 of such money, and this may be read in evidence.

H. M. & W. TELLER,
Defendant's Attorneys."

"CENTRAL CITY, Col., Jan. 28, 1873.

E. J. GIDDINGS, Esq., Denver, Col. :

Dear Sir—Yours 25th, is to hand, and contents noted. I have no intention of changing my understanding, or having you change your instructions concerning Mr. Rockwell's deposit. My suggestion is for the benefit of Mr. R. in getting himself relieved from the whole 'thing' entirely, and if you, as his agent, and Mrs. R. (who has had some talk with me before your letter came), should insist on the strict letter of Mr. R.'s instructions, then you may embarrass the settlement with C. and this I wanted to explain to you in person when I was down. You being absent, and I in a hurry, did not attempt it in my note to you.

You see Cash's part amounts to over \$5,000, and a week or ten days ago he asked me if he could raise \$4,000 money if *his* note secured on works would be taken for balance. This I declined, told him I already had that security, and must if the matter was fixed up have the money or a new security, that was tangible and could be used, etc., etc.; he had no other in Colorado to offer, and so concluded to raise the money, if R. was ready to pay his, etc., by February 1st. Now you see if I take Mr. R.'s note secured on same property or a part of the same, it would certainly cause a 'rumpus' between Cash and I; and besides, there might be other unsettled debts, account, etc., etc., either outstanding against C. & R. or between themselves, and, therefore, I would rather not have any further lien or claim on the works or any part of them. It might involve me in difficulties with either C. or R., or somebody else; and again, if I took the security and trouble arose between C. and R., I would be forced into siding with R., when I could do more good if trouble arises between them, by occupying a neutral ground.

It certainly will make no difference if I agree to loan or advance Mr. R. the \$1,250, or any part of it any time he may want to use it; if this matter is paid now by simply taking his paper for it with what security he himself considers good for such an amount, or as the machinery is in Mrs. R.'s name, I will agree to take her name with Mr. R.'s for the \$1,250 any time he may want it, and for any reasonable time, on any part of the amount, if not needed, so much the better. The security on the machinery I cannot consistently take and do not want, and this is my reason for suggesting that Mr. R. pay all his part now, and have these old notes and mortgages destroyed.

Yours, very truly,

THATCHER."

"Dear Gid. — Cash has made an agreement to take up his part of those notes, Feb'y 1st, or about then. I shall

see that they are paid in full before anybody is released. It will take about the \$3,000 to pay Rockwell's part, and if I can get Cash to pay his, I want your check on Rockwell's account for his part. Can I go ahead and close this matter up on this understanding? Please ans., as I think it very important that Mr. R. get off that paper as soon as possible.

Yours, hastily,

THATCHER."

Witness continued: "At this time there was no indebtedness of C., R. & Co. to T., S. & Co. * * * In pursuance of these statements and letters of Thatcher, he got of me, to apply on the C., R. & Co. notes, \$2,820.93, about December, 1872; I was induced to pay it by the letters from Giddings and Mrs. R. in regard to what Thatcher stated to them, and Thatcher's statements and letters to me; I believed these statements; I assigned a part of the claim in suit to L. C. Rockwell; the claim referred to in the assignment is the claim against Thatcher — the subject-matter in litigation between Thatcher and myself at that time;" the article of assignment bears date November 4, 1875; recites an indebtedness to L. C. Rockwell from W. B. Rockwell and his inability to pay, and concludes: "I hereby sell and transfer and assign unto said Rockwell my interest in and to half the claim I now have in suit in the district court of Gilpin county against Joseph A. Thatcher and Joseph Standley, for the work said Rockwell has already done and what he may hereafter do in said cases until said Rockwell shall be paid for his services in said cases.

W. B. ROCKWELL."

The witness continued: "Have paid L. C. Rockwell nothing since assignment was made; Kate Rockwell is my wife; I was indebted to her often for a number of years; she bought property and had property obtained from her father when he first came to the country; I used money belonging to her, and was indebted to her at the time I made the payment, and the amount I paid I considered half hers

and charged it to her in the account I was keeping with her; I considered half this claim hers; I gave her to understand from the commencement that one-half of it belonged to her; that she was to have one-half if it was collected on account of what I owed her; I told her that at different times; at the time I assigned to L. C. Rockwell I did not assign the whole, because half belonged to her; if the claim was mine, one-half belonged to her; it must have been a year or two previous to my bankruptcy that I talked with her; I do not think my wife signed the trust deed to secure the notes."

Cross-examination: "The title to property on which trust deed was made was in my wife; she did not sign trust deed; I did; my wife and I had equal parts in the C., R. & Co. property, but agreement signed only by Mrs. Rockwell. * * The \$2,820.93 I sent to Thatcher was my individual money; no part of it was Mrs. Rockwell's money; I don't recollect when I first talked with Mrs. Rockwell about it after I had the talk with Thatcher; after the suit to recover I told her it was understood between us that if any thing was recovered one-half should be hers; it was after I began suit or about that time; can't tell how much I was indebted to her; I was indebted to her for various things; for money and for exchange of mining property, etc., I think as much as \$3,000; because when I made the assignment the account stood to her credit more than \$1,000; I put in a note of \$275 to Mrs. Rockwell * * I told her if I got any thing in this suit she should have one-half; I made no contract in writing, nor assignment in writing; Thatcher told me that he had applied the money toward the payment of the note he held against Whiting; he claimed I had agreed, or practically agreed, to pay it; that I ought to pay it; he handed out the note, and I saw it was indorsed, and I simply said, 'I see.' * * * I had one other conversation with Thatcher in the spring of 1875." (Paper shown witness admitted to be a part of schedule of plaintiff in bankruptcy.) "I then returned the claim of L. C. R. as so much due him; if it is so stated then, I do not

recollect now ; I returned the claim as so much secured by the assignment of this claim against Thatcher ; and the assignment to Rockwell is the only security I gave him ; I did swear that there was no other indebtedness existing against me than those named in schedules ; the reason I did not put in the amount due Mrs. Rockwell was that my attorney said it might as well be left out ; I put in the \$275 because it was a note ; I did not put in the \$1,000 in schedule because I knew it would not be claimed." Defendant's attorney here asked of the witness : "When you made this assignment to L. C. Rockwell, did you intend it as an assignment of the whole claim or only an assignment to secure Rockwell's debt, whatever that might be?" to which plaintiff objected that it was immaterial and not proper cross-examination, and the court sustained such objection, and the defendants then and there excepted. "In the schedule of bankruptcy I reported this debt to L. C. Rockwell as secured by this claim against Thatcher's schedule made May 26, 1876."

Re direct examination : "Mr. Fisher, the assignee in bankruptcy, has been out here ; it is with his knowledge and consent ; he examined all the papers and came out here to examine the matter ; he knew of the assignment to my wife and considers it proper ; I had no intention of going into bankruptcy when I made the assignment to my wife or to L. C. Rockwell ; I have computed the interest on \$2,820 93, the sum paid, from Jan. 1, 1873, which is \$1,337.59."

L. C. Rockwell testified that he notified Thatcher in November, 1875, of the assignment.

The defendants introduced Joseph A. Thatcher, who testified : "I am one of defendants, and know plaintiff, and I knew William A. Whiting in his life-time ; he resided in Central ; I knew firm of Hussey & Co. ; they did business here from 1863 to 1870, banking ; he kept a bank account with Hussey & Co., in the name of 'William A. Whiting, agent', J. P. Whitney and W. B. Rockwell were, or appeared to be, interested in that account ; Whiting and Rock-

well came to the bank to look over that account in November, 1867; the account had a credit at that time, it was not overdrawn during the time it was on the books; they said Whiting had used about \$3,000 of the money drawn out for his own use; I told them that was no affair of ours; I did not know any thing about that; they wished me to take Whiting's individual note and credit the account of 'Whiting, agent;' I refused to do it, and sent for Mr. Palmer (one of the firm of Hussey & Co.); I did not have any interest in the firm; Palmer came, and Rockwell, Palmer and myself had a conversation about the matter; Rockwell urged Palmer to do this, stating that Whiting had been indiscreet in the use of money, and had used Whitney's money for his own purposes, money that belonged to the account of Whiting, agent; Palmer refused, because we were then safe; Mr. Rockwell then told Palmer that Whiting had put into his hands as trustee, or turned over to him all his personal property and real estate, enumerating it, mentioning a lot of stock in Bullion Company of a par value of \$100,000—house and lot and mining property, and that he (R.) would go to New York and Boston and sell it at once; he said I will pay; I assumed to pay Mr. Whiting's debts and will pay Whitney the amount due him, and will pay the \$3,000 here."

Question by L. C. Rockwell: "Rockwell assumed to pay Whiting's debts or Whitney's?"

Answer: "He was going to pay Whitney's; Whiting was indebted to Whitney, as well as to Hussey & Co.; he said he proposed to pay this very soon; that he had a partial offer for the stock of Whiting, and that he would pay this \$3,000 and that he would give a written obligation on his part to pay this \$3,000, but as he did not know how soon he could sell the stock, he and Palmer could not agree when written agreement should become due—when he could pay it; we then considered Rockwell's word as good as his note; the firm of Hussey & Co. then took the note of Whiting and credited the account of 'Whiting, agent;' I wrote to Rockwell about the note while he was in Boston, asking

him to pay the note ; he was there a long time ; it might have been six months ; I don't recollect that I got any answer from him ; the note run on ; I understood Rockwell was disposing of the Whiting property and paying Whiting's debts, but he paid nothing on this note, but was doing considerable business with us, having frequently more than \$3,000 to his credit ; in 1870, on the first of January, it became the property of Thatcher, Standley & Co., these defendants ; they took it for the full amount of the claim, paying \$3,000 for it ; we considered it Rockwell's paper, and perfectly good ; when I received the \$2,820.93, I put it on the note, and I credited on bills receivable February 11, 1873 ; I indorsed the \$2,820.93 on the note, and credited on bills receivable in the usual way ; got the money of Giddings ; after the money was credited, I first talked with Rockwell about it some time in September, 1874 ; I told Rockwell I had applied the money Giddings paid me on that note ; I showed it to him at my house, and showed him the balance due on the note ; he seemed pleased that the amount was paid, and made no objection to it ; never said a word in opposition to it ; he never, during the three or four years the note had run, claimed that he was not liable on it ; he never refused to pay it ; I think I first had words with him about the payment of this note in May or June, 1875 ; he sent me word ; he wrote a letter, note, or something ; it was put in the mail ; the letter was destroyed because I supposed subsequent conversations with R. made it unnecessary to keep it ; Rockwell, in that note, said : ' However gratified he was at the settlement of the Whiting matter ; that however willing he was to have this matter settled as I had settled it, by applying the \$2,820 to the note, his circumstances then would not permit him to allow me to do so without making a demand for recovery — or something of that sort ; that he was poor, had lost every thing since this settlement, and wanted me to pay back the money I had credited on the note ; ' I notified Mr. Rockwell that I had a \$736 note that was due ; the day after I received this letter I

notified R. that his wife's note for \$736 was lying unpaid in the First National Bank, and I wanted him to pay at once; he came to see me next day after that; he apologized for making this demand upon me, and asked pardon, etc.; we talked the matter over fully — the whole circumstances of the payment of the paper; he seemed satisfied with the settlement I had made; asked me to excuse his writing such a letter, and asked what I was going to do about his wife's note; I said, Mr. Rockwell, if you propose to act decently in this matter, I will let this paper run until it suits your convenience to meet it; the matter I spoke of was the whole settlement I made of the application of money on the Whiting note; Mr. Rockwell accepted of my extension, and said it was all right; Mr. Rockwell was satisfied about the matter, and I gave him an extension on the paper; it was not paid for some two or three months afterward; that was the reason I destroyed the letter Rockwell wrote me; I supposed the matter settled; I extended the time of payment to no definite time; it was paid July 28; this conversation was in May."

Witness was here asked to explain the letters read, etc., and he thereupon recited the transaction as to payment of the \$10,000, etc., substantially as detailed by Rockwell, with the further statement that it was suggested by Cash that Thatcher get Rockwell to pay the one-fourth and apply it on the Whiting note, and then Cash would not allow witness to make any indorsement on the two \$5,000 notes, and that it is the custom of banks to *hold* paper after it has been paid by one party to collect for the party against others equally liable on it, and that was the cause of my writing those letters; "I said it was the custom for banks to hold it and collect off of the other parties without making it known it had been paid, so as to make those contribute toward it."

On cross-examination, the witness testified: "Those notes had been paid when the letters were written; I wrote them for the purpose of making him pay the balance on the

Whiting note ; he had postponed the payment so long I had no confidence in his making good his word ; I did not tell Giddings and Mr. Rockwell after I got the money what I did with it, because Cash did not *want* I should do so. * * *

I supposed Whiting and Rockwell were partners ; they were engaged in business here ; Rockwell came to bank and got a statement of how many checks were out of Whiting's, and kept an eye on his account continually ; Whitney never told me he was a partner, but they were continually doing business as that done by partners ; Whiting would draw drafts and Rockwell would also draw drafts, and they went with the account of ' Whiting, agent ;' I don't recollect that Rockwell or Whiting ever promised to pay me or T., S. & Co., except in the conversation I had with Rockwell. Rockwell said he would pay it in a short time, and that he had the means to pay it of Whiting's in his hands ; Whiting was considered perfectly good when the note was executed. * * *

Rockwell told me (Whiting) had put it (his property) into his hands for the purpose of paying his debts ; every dollar he had ; and Whiting told me the same thing." Plaintiff here offered a letter of Thatcher's to Rockwell, which was read, of which Thatcher says : "This letter is true thus far, when it was written, June 10th, 1870. T., S. & Co. did not go into existence till July 1, 1870, but we were looking over the affairs and it was supposed that I was ready to exchange that note, and it fell to my part." The letter says : "In the sale Mr. Whiting's note falls individually to me, and cannot I rely upon something from that ; I feel I can count on your continued efforts ; I assure you it would help me greatly if the debt could be added to my credit in the new firm."

On re-direct examination the witness testified he had written three or four letters to Rockwell about paying the note, and that Rockwell had never refused to pay it ; he said he was willing to pay it.

W. B. Rockwell, recalled: "Whiting died in May, 1871;" defendants introduced petition in U. S. district court in bankruptcy of W. B. R.; and in schedule No. 2, made by W. B. R., identified by him when examined, in which schedule of creditors, holding securities, was Lewis C. Rockwell, security. Interest in claim against J. A. Thatcher, suit pending in district court, Gilpin county, Col.; value of security claim \$1,400; amount of debt \$455.

In schedule 3: list of assets of said Rockwell, under head of "choses in action"; "suit pending in district court, Gilpin county, Col., against Jos. A. Thatcher of Central City, to recover \$2,800 and interest, in which the petitioner has a half interest," both of which were signed by W. B. Rockwell.

Defendant rests and plaintiff recalls W. B. R., who testified that when he made assignment to L. C. R. he took account as L. C. R. showed it to him from the books, and made assignment accordingly, and that he thought the account correct, and made out according to the last bill rendered him. He then proceeded to explain why he wrote to Shipman, etc., stating contract, and that Whiting was owing Whitney \$26,000, and that Whitney was going to foreclose mortgage on the house he lived in; "Whitney proposed to me to assume the debt of Whiting to him, and he would give me two or three years' time to pay, and that I should take of Mr. Whiting all the property he held then as security, and he, Whiting, must transfer the same to me, and have my personal obligation beside; I had no time to consult Shipman; I bought the property without any conditions whatever; it was an absolute sale; I think Mr. Shipman must have forgotten something; I never denied that I purchased it; I wrote him I did not buy it as a speculation, but because of the position Whiting was in; that it was more of a security than a purchase, though it was an absolute purchase and transfer; I never told any man I had promised to pay any thing except the Whiting debt; I never promised to pay any other; I never told McCord; I

had the property in trust; I remember having a conversation with McC., but I did not tell him I had taken property in trust; I said if I realized as much as \$100,000 from it I would pay his claim; Whitney's debt was \$26,500; I made nothing out of it; I don't think Whiting and Whitney were ever partners; they were working together and owned mining property together, and sold and organized companies; I understood from Whitney they were not partners; I got probably 1,000 or more claims of undeveloped mining property; they had no marketable value. As to Thatcher's testimony, he said: I went into bank and Palmer and T. were in front of the counter, and we had some conversation, and P. asked me about the claim of Whiting's note of \$3,000; I told him; Mr. Thatcher asked me about the purchase, and I told him I had bought Whiting out; and he wanted to know what the probability was of Whiting's paying the note; I said if I realized a large amount out of the sale; I don't think T. ever asked me to pay the note, in fact, I know he did not; Palmer asked me if I would not positively agree to pay the note; * * I told him I would not; that I was under no obligation to pay; he asked if I would not agree to pay some part of it, in writing, if he would give up the note, but I refused to do it; I never promised to pay it either verbally or in writing; I heard T.'s testimony about conversation in the bank as to application of money paid in by Giddings; I had before that written to T. demanding a return of this money, but hearing nothing I called at the bank, and he asked me in; he expressed himself hurt at the course I had taken; he thought I ought to be satisfied with what he had done and let him have this \$2,800; I did not express myself satisfied with the disposition he had made of it; I did not ratify the disposition he had made of it. In the first conversation we had at his house, I thought I would hear all I could without saying a word; I made no reply whatever, other than simply to say that I understood what he said; the last thing he did was to show me the note; I said, 'Yes, I see,'

my desire was to get all the information I could on the subject before taking any action ; I am positive I never promised to pay the Whiting note to anybody ; I have a copy of a portion of the letter I wrote to Thatcher about this W. note—a part of the letter—the latter portion of it ; at the conversation with T. there was not a word said about forbearing to sue on \$736 note.” The copy of portion of letter was read as follows :

“CENTRAL CITY, Col., *May 22, 1875.*

Whatever disposition I might have to pay Mr. Whiting's debts, were I in different circumstances, my present financial condition is such that I cannot consent that you should apply the amount I paid you upon the Cash & R. note to the payment of your claim against the estate of Mr. Whiting, and I must now ask that amount, with interest thereon at the rate of 18 per cent per annum.”

“I never apologized for writing this letter ; I had no interest in the account of ‘Whiting, agent,’ when credited with the \$3,000 note, either directly or indirectly. I never promised I would pay the Whiting debt. I did not know when the note was given, nor before it was given.”

On cross-examination he testified : “I think Young called my attention to the \$736 note. After I wrote the letter to Thatcher, the conversation with Thatcher was a few days after I wrote the letter to him. I cannot tell when I paid the \$736. I think some little time after the conversation with Thatcher in the bank—some weeks, I think, Thatcher spoke to me about paying the W. note, three or four times, and he wrote me once ; I don't remember whether I made any answer or not ; I don't know that I ever denied that I was liable to pay the W. note ; T. never claimed I was positively liable until after the application of the money ; the agreed price for the property of Whiting was, I was to pay the J. P. Whitney debt, \$26,500, and some \$1,500 or \$1,600 that Whiting had checked out of bank and used the money belonging to Bullion Co.; I gave my draft on New York

for the amount ; I agreed to pay *that* and the Whitney debt ; I sold the Bullion stock for \$25,000 ; the house and lot was disposed of to Henry Lucius for \$3,000 ; I sold all the mill sites—there was a good many of them ; all of the mining claims and mill sites were put into a company and stocked ; I think the company was stocked at \$2,000,000, and I had one-eighth. This stock was never in my hands and it was of no value.”

On re-direct, witness said : “The total amount due after deducting one month’s interest would be \$4,127.19.”

The foregoing is substantially the testimony in the case given by Thatcher and Rockwell. It is not deemed necessary to make any further statement of the testimony.

Among the instructions upon which error was assigned by the appellants, and not substantially given in the opinion, was the following :

“The court instructs the jury that the defendants have pleaded the indebtedness of Rockwell upon the note given by Whiting as an offset in this case, and that the burthen is upon them to prove every fact necessary to establish Rockwell’s liability upon said Whiting note, and if they fail to prove every fact necessary to establish the liability of Rockwell to pay said note, by a preponderance of testimony, then they have not established the offset and the plaintiff is entitled to recover the amount of money received by Thatcher and Standley, belonging to Rockwell, and interest thereon at ten per cent per annum till the present time.”

The jury found a verdict for the plaintiff in the sum of \$4,100. A motion for a new trial was interposed by the defendant and overruled ; judgment was entered on the verdict, and the defendants prosecute this appeal.

Messrs. H. M. & W. TELLER ; Messrs. BUTLER, WRIGHT & KING, for appellants

Messrs. BELFORD & REED, and Mr. L. C. ROCKWELL, for appellees.

THATCHER, C. J. The appellants here were defendants in the court below. One of the principal questions presented by the record in this case concerns the plea of *puis darrein continuance*, and the evidence introduced under the issue formed by the plaintiff's replication thereto, and the defendants' rejoinder to such replication. By this plea it was set up that plaintiff had been adjudged a bankrupt (since the last continuance of the cause) in United States district court of the southern district of the State of Illinois, the appointment and qualification of one Fisher as his assignee in bankruptcy; that the register in bankruptcy made, executed and delivered to the said assignee an instrument in writing, conveying to him "all the estate, real and personal, together with all books, deeds, and papers relating thereto, of the said plaintiff," and that said assignment was recorded in the office of recorder of deeds of said Gilpin county, September 18, 1876, "whereby the said assignee became and is vested with the title to all the property and estate of the said plaintiff for the use and benefit of the plaintiff's creditors, and that the said plaintiff became divested of all title to said property, including the claim in controversy." Defendants then pray judgment if the said plaintiff sought further to have or maintain his action. To this plea a demurrer was interposed and overruled. The plaintiff then replied confessing the adjudication in bankruptcy, the appointment and qualification of the assignee, and the conveyance by register, and the record of such conveyance, but denies that the claim in controversy passed to the assignee; alleges that the plaintiff, for a valuable consideration, assigned in writing in November, A. D. 1875, to Lewis C. Rockwell, one-half of said claim, and to Kate Rockwell, at about the same time the other half of said claim; that defendants were duly notified of such assignment; that said assignment was well known to the assignee in bankruptcy ever since the appointment; that by reason of the premises the said plaintiff ceased to have any right or interest in and to the said claim or suit, except to prose-

oute the same for the use and benefit of Lewis C. Rockwell and Kate Rockwell." A rejoinder was filed denying the material allegations in said replication.

Ordinarily the plea of *puis darrein continuance* is a waiver of all the former pleas. It is a substitute for, and a retraction of all others upon which no proceedings are afterward had. Gould's Plead., ch. 6, § 122 *et seq.*; Steven's Plead., p. 98.

In this case, however, by leave of court, on motion of the defendants, the plea of *puis darrein continuance* was filed not as a substitute, but as a *supplemental* plea, and as such it was treated at the trial and in all the subsequent proceedings, without objection on part of plaintiff. Its effect was not, therefore, in this instance to waive the other plea.

Was the suit maintainable in a State court? Doubtless in a direct proceeding or matter in bankruptcy the jurisdiction of the circuit and district courts of the United States is exclusive. R. S., U. S., § 711. The State courts are in no proper sense courts of bankruptcy, nor can the suit before us be considered as a proceeding in bankruptcy, even after Rockwell was adjudged a bankrupt. It is an independent suit, and although in a certain aspect its prosecution might be said to be in aid of the bankruptcy proceeding, it is entirely distinct from it. *Wiswall et al. v. Campbell et al.*, 3 Otto, 348. As it is no part of the bankruptcy proceeding, it cannot be said that the section of the Revised Statutes cited *supra*, which provides that the jurisdiction of the courts of the United States of all matters and proceedings in bankruptcy shall be exclusive of the courts of the several States, operates to divest the State courts of jurisdiction in independent suits by or against the assignee. Unless by express words or necessary implication the State courts are, by the act, divested of jurisdiction in these independent suits, they have authority to hear and determine them. The jurisdiction of a State court is based upon the Constitution and laws of the State, and not upon

an act of Congress. The right is given by an act of Congress, and may be protected by either the State or Federal courts. Their jurisdiction in this respect, within constitutional and statutory limits, is concurrent. To this effect have been the decisions construing the Bankruptcy Act, before the adoption of the Revised Statutes. *Cook v. Whipple*, 55 N. Y. 150 ; *Eyster v. Gaff*, 1 Otto, 521 ; *Clafin v. Houseman, assignee*, 3 id. 130.

Considering this suit an independent proceeding (*Wiswall et al. v. Campbell et al., supra*) we find nothing in the Revised Statutes or subsequent legislation which, in our opinion, affects in any way the jurisdiction of State courts over actions *pending* in the name of the bankrupt before he was adjudicated to be such.

The decisions of the State courts are conflicting as to the true construction of section two of the act of June 22, 1874, amendatory of the Bankrupt Act of 1867, which reads as follows :

“That section one of said act be, and it is hereby amended by adding thereto the following words: ‘Provided, that the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contra-distinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides, having jurisdiction of claims of such nature and amount.’ ”

If, when W. B. Rockwell was adjudicated a bankrupt, he had any interest in the claim in suit, if he was not at that time a mere naked trustee, the beneficial interest in the chose in action having been *bona fide* transferred long prior thereto to others, under some of the authorities, the suit could not be prosecuted in the State courts under the section just quoted, either in the name of the bankrupt or of the assignee. In *Olcott, Assignee, v. McLean et al.*, 16 Bankruptcy R. 80, the court (supreme court of New York, first department) held that the effect of this provision was to limit the jurisdiction of the State courts to the class of

actions therein named ; that Congress by providing that the collection of debts, not exceeding in amount the sum of five hundred dollars, might be allowed to be prosecuted in courts of the State where the bankrupt resides, having jurisdiction of claims of such nature and amount, intended, and by necessary implication declared, that the State courts should be limited and restricted to that class of cases arising under the provisions of the bankruptcy law ; that by this amendment the State courts were deprived of all other authority than that mentioned in it, over actions of this description, and that there was no saving provision in the Revised Statutes which prevented it from including pending actions. The doctrine of this case was re-announced by Judge HALLETT, in *Halleck et al. v. Tritch, Assignee*, reported Chicago Legal News, March 30, 1878 ; but the opinion of the learned judge in that case was *obiter*, as the amount in controversy was within the jurisdiction of the court, even under said section two. We cannot yield our assent to this construction of the statute. It was not, within the reasonable interpretation of the language employed, the intention of Congress to either confer or abridge the jurisdiction of the State courts. Their attention was evidently directed to the accumulation of cases in the Federal courts of original jurisdiction, in which the amount in controversy was comparatively small, but which they were bound to hear and determine. Before the amendment they were powerless to order that debts of the class named should be collected in the State courts. By the amendment they are authorized to refuse to entertain actions at common law of the class described in the amendment, and to direct that they shall be brought in the courts of the State, where the bankrupt resides, having jurisdiction of claims of such nature and amount. *Goodrich v. Wilson*, 119 Mass. 434.

We are, therefore, of opinion that the State court was not ousted of its jurisdiction by the bankruptcy of W. B. Rockwell. If, as averred in the replication to the plea of *puis darrein continuance*, the plaintiff had *bona fide* long

before his bankruptcy, parted with all his interest in the chose in action, clearly the assignee would have no property or right of property in the pending suit, belonging to the bankrupt at the date of the assignment. Such a chose in action would not pass to the assignee. The bankrupt would stand in the light of a naked trustee. In him would be the legal title only, without any beneficial interest that could inure to the creditors. In such case the assignee in bankruptcy, not being interested as trustee for the creditors, has no duty to perform, and the action is properly brought and prosecuted in the name of the bankrupt. *Carpenter et al. v. Marnel*, 3 Bos. & Pul. 40; *Hynson v. Burton*, 5 Ark. 494; *Blin v. Pierce*, 20 Vt. 25. May not an action brought before the commencement of bankruptcy proceedings thereafter be prosecuted in the name of the bankrupt (the assignee not seeking to be substituted) even though the judgment obtained should inure in part or exclusively to the benefit of the bankrupt's creditors? If this question be resolved in the affirmative, the issue as to whether W. B. Rockwell had transferred his interest in the suit to others is immaterial, and the evidence and instructions thereunder need not be considered.

Section 5047 of U. S. R. S. provides: "If at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of a debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, *if he requires it*, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had originally been commenced by him."

This provision applies exclusively to pending actions. The idea that such actions should abate by reason of the bankruptcy is here clearly negatived. "It is a mistake," says the supreme court of the United States in *Eyster v. Gaff et al.*, 3 Otto, 524, "to suppose that the bankrupt law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is ad-

judged a bankrupt. There is nothing in the act which sanctions such a proposition."

It seems to be contemplated that the assignee may permit the action to be prosecuted to judgment in the name of the bankrupt, or, if he so elects, he may have himself substituted for the bankrupt. It is only where the assignee *requires* it that the act declares he shall be admitted to prosecute the action in his own name. It is not in the power of the defendants to compel the assignee to substitute his name for that of the bankrupt. Here the assignee, neither by petition or otherwise, sought to be made a party or to take part in the case. The bankrupt was in any view only a nominal plaintiff and payment to a nominal plaintiff by the judgment defendant, with notice, actual or constructive, that he was not the real party in interest, would not satisfy the judgment. The defendants are not prejudiced by the failure of the assignee to have himself substituted for the bankrupt. They were deprived of no ground of defense that would have been open to them, had the action been prosecuted in the assignee's name. *Foster v. Wylie*, 60 Me. 109; *Southern Express Co. v. Connor*, 49 Ga. 417.

We are, therefore, drawn to the conclusion, that whether the alleged assignment of the chose in action, one-half to L. C. Rockwell, and the other half to Kate Rockwell, was valid or void, the action was well enough prosecuted to judgment in the name of the bankrupt plaintiff, the assignee in bankruptcy having a knowledge of the existence of the claim and of its prior alleged assignment to others. The defendants can, if in doubt, take proper steps to determine to whom the judgment shall be paid.

The evidence upon which the plaintiff bases his original right to recover is substantially uncontradicted. Watson B. Rockwell was a member of the firm of Cash, Rockwell & Co. The firm owned and operated certain reduction works in Gilpin county during the year 1870, and a portion of the year 1871. They kept their bank account with the defend-

ants, who were doing business under the style of Thatcher, Standley & Co., June 12, 1871. Defendants held two notes, executed by Cash, Rockwell & Co., each for \$5,000, the payment of which notes was secured by a deed of trust on the reduction works of Cash, Rockwell & Co.

A week later, Robert Cash, a member of the firm, out of the proceeds of the sale of firm property, liquidated said notes and all accounts which the defendants had or held against Cash, Rockwell & Co. The defendants gave their receipt to Cash in full of all demands against the firm. Mr. Cash was the managing partner. Plaintiff spent most of his time abroad and was not familiar with the business affairs of the firm. He had not been apprised by Mr. Cash that the bank indebtedness had been paid. With an adroitness worthy of a better cause, and for a purpose which subsequent events make apparent, Joseph A. Thatcher, in July, 1872, more than a year after Robert Cash had paid the amount of the notes to the bank, wrote to the plaintiff, then being in New York, a fictitious statement of the bank's account with Cash, Rockwell & Co., and not only carefully concealed the fact of the payment of the firm indebtedness to the bank, but importunately demanded payment of the plaintiff. Before that time, April 4, 1872, he had written to plaintiff at Cairo, Illinois, urging him to stir Cash up "and to pay some part of the claim." He had also written to Giddings, who was acting in some matters as plaintiff's agent, making the same misrepresentations to him. By such subterfuges and false pretenses, Joseph A. Thatcher induced plaintiff to pay \$2,820.93 to be applied upon the two notes. By his subsequent correspondence with Giddings, he refers to the two *unpaid* notes, and endeavors to have him induce plaintiff to make another payment. There is no attempt to deny that the money whose recovery back is sought by the plaintiff was obtained by the bank from him illegally. There is no attempt to justify the tergiversations of Joseph A. Thatcher. The fact stands out in bold relief and uncontroverted that by fraudulent means he came into possession

of the money. That upon the plaintiff's evidence he is entitled to recover it back with legal interest, there can be no shadow of doubt, unless the defendants interpose a good defense.

Under their pleas they introduced evidence tending to show that they were authorized to apply the money remitted on a certain other note. A Mr. Whiting, residing in Central City, kept an account with the banking firm of Hussey & Co., in the name of "William A. Whiting, agent." Thatcher testifies that plaintiff appeared to be interested in that account.

In November, 1867, plaintiff and Whiting called at the bank to look over the account. It was claimed that Whiting, without authority, had drawn from that account about \$3,000 for his own use. For this sum, Hussey & Co. took the note of Whiting, and credited the account of "Whiting, agent." Thatcher testifies that the inducement to accept Whiting's note was the assurance of plaintiff that he would pay the note out of the proceeds of the sale of certain real and personal property that had been "turned over to him by Whiting." There was no written agreement to assume the debt. The evidence is widely conflicting as to whether the sale to Rockwell was absolute or only in trust, for the payment of certain debts. The Whiting note subsequently became the property of either Thatcher or Thatcher & Standley. Thatcher applied the money, which he had so dexterously obtained from plaintiff, on the Whiting note, but concealed that fact from plaintiff until September or October, 1874. Then, for the first time, Thatcher apprised plaintiff of the ruse he had adopted to secure partial payment of the Whiting note; that all his letters to him (R.) touching the indebtedness of Cash, Rockwell & Co. were untruthful; that said notes had been paid more than three years before; that he had at once, in fact, applied the money received from him on the Whiting note; and had for a purpose never canceled the Cash, Rockwell & Co. notes.

This unexpected revelation naturally took the plaintiff by surprise, and after hearing Thatcher recount the whole transaction, and when he handed out the Whiting note to show the plaintiff that he had indorsed thereon a credit of \$2,820.93, the plaintiff simply responded, "I see."

May 22, 1875, from Central City, plaintiff wrote to Thatcher as follows :

"CENTRAL CITY, Col., May 22, 1875.

Whatever disposition I might have to pay Mr. Whiting's debts, were I in different circumstances, my present financial condition is such that *I cannot consent* that you should apply the amount I paid you upon the Cash & R. notes, to the payment of your claim against the estate of Mr. Whiting, and I must now ask that amount with interest thereon at the rate of 18 per cent per annum."

The appellants do not seek a reversal of the judgment on the ground that it is unsupported by evidence, but they complain of the admission of improper evidence, and assign for error the giving and refusing certain instructions. It is unnecessary to discuss the question as to whether Kate Rockwell, the wife of the plaintiff, was a competent witness, as in our view of the case, as we have already endeavored to show, the issue to which her testimony was directed was immaterial.

The giving of the following instruction is assigned for error :

"The court instructs the jury that if they believe from the evidence that Rockwell, or Giddings for Rockwell, was induced to pay, and did pay into Thatcher, Standley & Co., on February 11, 1873, a sum of money to apply on Rockwell's portion of the Cash, Rockwell & Co. notes, upon representations of Thatcher, that such notes had not been paid, when in fact, such notes had been paid, and he (Thatcher) knew that fact ; and if you believe that when he made these representations he knew them to be false and untrue, and Rockwell, Giddings, and Mrs. Rockwell had

reason to believe such statements and representations of Thatcher to be true, and relied and acted thereon. If you find these to be the facts from the evidence, Thatcher was guilty of practicing a fraud upon them, and the plaintiff can now recover from defendants the money thus paid, with interest thereon at the rate of ten per cent per annum from the day of payment until now."

The chief objection urged to this instruction is, that it rests the plaintiff's right to recover upon proof of the fraud practiced by the bank in procuring possession of the money, and entirely ignores the question of set-off as claimed by defendants. This objection would be valid if the jury had not also been instructed upon the question of set-off. Reading this instruction in connection with instruction number five it will be discovered that the jury were properly charged as to the defense of set-off. In construing a charge, each instruction is to be considered in connection with the entire charge, and if considering it as a whole, this court is satisfied that the jury was not improperly advised as to any material point in the case, the judgment should not be reversed on the ground of an erroneous charge. *Union Gold Mining Co. v. Rocky Mt. Nat. Bank*, 2 Col. 565.

The instruction "that if Thatcher was the owner of the Whiting note at the time of the commencement of this suit, it was no defense to this suit if you believe from the evidence that Rockwell is liable to Thatcher for the amount of the note, unless the plaintiff subsequently to the application of the money on the Whiting note assented thereto, ratified the application of the same," tended in no way to mislead the jury to the prejudice of the defendants. The evidence as to whether Thatcher individually, or Thatcher and Standley owned the Whiting note is somewhat conflicting. The instruction but asserts the general doctrine that there can be no set-off where the claims are not mutual, that a separate demand cannot be set off against a joint demand. *Burgwin et al. v. Babcock et al.*, 11 Ill. 28.

The instruction that mere silence on Rockwell's part,

when notified by Thatcher of the application of the money, will not amount to a ratification of Thatcher's unauthorized acts in such application; that there must be some affirmance of the act to bind Rockwell, was, we think, warranted by the evidence. Thatcher having illegally obtained possession of the money by an artifice, it ought not to be said that because Rockwell elected to enforce his rights through the courts rather than to make a fruitless demand of Thatcher at the very time the fraud was made known to him, he was estopped by his silence and temporary inaction to deny a ratification of Thatcher's act in unlawfully appropriating his (Rockwell's) money. It is, however, in evidence, as we have seen, that, before bringing the suit, Rockwell, by letter, demanded the return of the money. We should, even had there been no such letter, hesitate to announce the doctrine that the jury would be at liberty to infer that mere temporary silence, under the circumstances detailed, would amount to a ratification.

Although the twelfth instruction is somewhat loosely worded, the jury, we think, could not fail to understand it. It recognizes the rule that an agreement, if it be not collateral, but in the nature of an original agreement to pay the debt of another, founded on a sufficient consideration received by the promisor himself, is not within the provisions of the statute, and, therefore, need not be in writing; but if the agreement to answer for the debt of another be wholly collateral, it must be in writing.

Discovering no error in the record that would warrant a reversal of the cause, the judgment of the court below is

Affirmed.

ADJUDICATION IN BANKRUPTCY WILL NOT BAR prior action where the assignees consent to its prosecution in the bankrupt's name, or the claim sued on was transferred four months before the proceedings in bankruptcy to the party who sues: *Thatcher v. Rockwell*, 105 U. S. 467, affirming the judgment in the principal case.

EACH INSTRUCTION SHOULD BE CONSIDERED IN CONNECTION with whole charge, and if the jury, in this light, has not been improperly advised, the judgment will not be reversed: *Finerty v. Fritz*, 6 Colo. 137; *Behymer v. Cook*, 7 Colo. 385; *Dosenback v. Baymer*, 13 Colo. 455.

THERE CAN BE NO SET-OFF WHERE CLAIMS ARE NOT MUTUAL, as in the case of a separate demand against a joint demand: *Thathelmer v. Crow*, 11 Colo. 404.

AGREEMENT IS NOT WITHIN THE STATUTE OF FRATS requiring a writing, where it consists of an original promise to pay the debt of another, and is founded on a sufficient consideration: *Anderson v. Spence*, 72 Ind. 314.

CLAYTON et al. v. CLAYTON, HEIR, etc

1. A decree rendered upon constructive service, under the provisions of the statute (R. S., p. 95, § 15), is provisional only ; it is subject upon petition of the defendant within the time limited to be modified or vacated upon a hearing on the merits. The section contemplates cases where there has been constructive service only, not cases of defective constructive service ; it affects the decree as a final decree, not as a valid decree.
2. It is well settled that the jurisdiction of a court may be the subject of inquiry where its record is sought to be interposed by a party claiming a benefit therefrom.
3. Where by statute constructive service by publication is substituted for personal service, and the court proceeds against an absent defendant, not a citizen of the State, the statute must be strictly pursued.
4. The return of summons *non inventus* on the same day it was issued will not support a notice by publication, and the court has no authority to proceed to hear and determine the cause ; and where the defendant in such record objected to its introduction as evidence against her in another action upon the ground that the court had no jurisdiction to render the decree therein, *held*, that the objection was well taken.
5. Marriage may be proved in civil cases other than actions for seduction, by reputation, declarations, and conduct of the parties, and other circumstances usually accompanying that relation.
6. Where a portion of an invalid record was offered in evidence, and the objection made did not challenge its validity but was based upon untenable grounds, *held*, that the portion offered was properly admitted, and, *held*, that there was no rule requiring the introduction of the whole record by the party who sought to avail himself of a part of it only.

Appeal from District Court of Gilpin County.

EJECTMENT—Declaration ordinary form claiming as heir at law ; plea, general issue On the first day of March, A. D. 1867, James W. Clayton procured summons to be issued out of the office of the clerk of the district court of Gilpin county, against Sarah A. Clayton, his wife, on a bill for divorce. The respondent was a non-resident, and on the same day the summons was issued it was returned *non inventus* by the sheriff. The complainant thereupon procured an order of notice by publication requiring the respondent to appear and answer at the ensuing April

term. On the fourth day of April the bill was taken *pro confesso*, and reference to the master ordered to take proof. On the twenty-sixth day of June following, it being one of the days of the April term, the report of the master was filed, and on that same day a decree was signed granting a divorce in accordance with the prayer of the complainant's bill. The only witness produced before the master, as appears from the report, was the complainant, who, being duly sworn, testified :

"My name is James W. Clayton, and I am the complainant in this cause; reside in Nevada, in Gilpin county, Colorado Territory; the defendant, Sarah A. Clayton, and I were married on the 3d day of May, A. D. 1855; I have resided in this, Gilpin county, since the summer of 1860; the defendant came to this county with me in April, 1862, and resided here with me until the fore part of October of the same year, and the defendant being dissatisfied with the country, I took her back to Illinois in October, 1862; she did not seem more dissatisfied with the country than any other; she has since October, 1862 (except a short time spent in Eastern Ohio) resided in the State of Illinois; two years ago the spring last past, I was in Illinois, where the defendant resides, and asked her to come to Colorado Territory and live with me, and she refused so to do, and still continues to live separate and apart from my house; I have always been able and willing to provide and furnish the defendant with a good and comfortable home, and supply and furnish the same in a comfortable manner and always did while the defendant lived with me, provide a comfortable house and home for her, and in all respects provided her from the day of our marriage, until she neglected to live with me, with all the necessities and comforts of life, and in all respects treated her in a kind, considerate manner, as a husband should treat a wife."

At the April term, A. D. 1876, the appellee as the heir at law of James W. Clayton, commenced this action in ejectment in the district court of Gilpin county, against Sarah

A. Clayton, administratrix, and James Clark administrator, of the estate of James W. Clayton, deceased, to recover possession of a certain lode claim, mill site and other property, in Nevada mining district. On the trial in the district court, the first witness, A. M. Jones, called on behalf of the plaintiff, testified as to the possession of James W. Clayton in his life-time, of the property in dispute, and that he knew Sarah A. Clayton, the plaintiff. "James W. Clayton's first wife."

The plaintiff then offered in evidence the Master's report, containing the deposition of James W. Clayton, as above set forth. The defendants objected and alleged as the grounds of their objection, that *the statements of Clayton could not bind them, the defendants*, and that, if the plaintiff put in part, she must put in the whole record and testimony; the objection was overruled and the defendants excepted. After reading the Master's report, the witness Jones was recalled and testified: "I know the Sarah A. Clayton spoken of in this testimony, who lived with James W. Clayton in 1862, called his wife. She lived with him. I lived within two hundred or three hundred feet of them."

Question—"Did Mr. Clayton call her his wife?"

To this question defendants objected, because it was "not the proper way to prove that the plaintiff was ever the wife of James W. Clayton." The court overruled the objection and the defendants excepted.

Answer—"He called her his wife. I was in the house frequently. They had one child, which they treated as their own child. Mr. Clayton is reported to have been killed down the Platte."

The plaintiff then called James Clark, who testified:

"I am, I suppose, one of the defendants. I knew James W. Clayton in his life-time. Mrs. Clayton and myself are the administrators of his estate. I knew the mill site occupied by him in his life-time. He occupied it from 1860 until he was killed in 1874. He also occupied all the property described in the declaration as being on the American Flag

lode, for same length of time. Myself and Mrs. Clayton are now exercising acts of ownership over the property; have done so since our appointment in December, 1874. I know Sarah A. Clayton, the plaintiff, his first wife, but not very well. Saw her a few times; saw her and Mr. Clayton at his house. I think they had one child." Defendants objected to statement of witness that he "knew Clayton's first wife, this was not the way to prove the marriage."

George K. Sabin was called for the plaintiff, and testified: "I knew James W. Clayton and Sarah A. Clayton. I lived in Nevada from 1860 to 1865."

Cross-examined: "I do not know what you mean by the first and second Mrs. Clayton. I know the present Mrs. Clayton, one of the defendants. Mr. Clayton treated her as his wife. I have been at their house often since he was married to the present Mrs. Clayton, defendant. He was living with her at the time of his death. They lived together until he was killed."

The defendants here admitted the *locus in quo* to be as laid in the declaration, and the plaintiff rested. Defendants then moved the court for a nonsuit "because plaintiff has not proved that she was the wife of James W. Clayton in his life-time, and because the proof was not sufficient to maintain the case on her part."

The court overruled the motion, to which the defendants excepted.

The defendants, to maintain the issue upon their part, then offered in evidence the decree of divorce rendered on the 26th day of June, 1868, between James W. Clayton and the plaintiff.

The plaintiff objected, "because the court that rendered this decision had no jurisdiction of the person of Sarah A. Clayton, and the record so shows, and the decree for that reason is absolutely void, and furnishes no protection to the defendants in this cause, and they must first show what proceedings were instituted to show upon what this decree is based."

The objection was sustained, and the defendants excepted. The defendants then offered the record in evidence, beginning with the summons, to the introduction of each part as offered, the plaintiff specifically objected, the objections were sustained and exceptions reserved by the defendants. The defendants then offered in evidence the following certificate:

"GOLDEN CITY, C. T., *Sept.* 3, 1868.

This certifies that I this day joined in matrimony James W. Clayton and Sarah A. Slate, both of Colorado.

Signed, B. T. VINCENT, P. E. Denver Dist."

And properly certified as being recorded in book N, page 4, records of Jefferson county, November 20, 1868, under the hand and seal of the county clerk of said county, to which plaintiff objected and the court sustained the objection; the evidence was excluded and defendants excepted.

The plaintiff made no objection that it was not the original, and admitted that B. T. Vincent was authorized to perform the marriage ceremony, and that the above-named Sarah Slate is one of the defendants herein, now called Sarah A. Clayton, and that she and James W. Clayton lived together as man and wife to the time of his death: also, that James Clark and Sarah A. Clayton have been duly appointed and qualified as administrator and administratrix of the estate of James W. Clayton, deceased.

Upon the conclusion of the testimony the defendants requested the court to give the jury the following instruction:

"That the plaintiff in this case cannot attack the decree rendered in the case of James W. Clayton against Sarah A. Clayton at the May term, A. D. 1868, of the district court of Gilpin county in this suit, and if defendant in that suit was not summoned or notified, as prescribed by the statute then in force, yet the defendant not having attempted to review or reverse such decree or in anywise to annul the same, and more than three years since its rendition having

elapsed, it must now, so far as the defendants named in the declaration are concerned, be deemed and adjudged confirmed against such defendant." The court refused to give such instruction, and defendants excepted.

The court instructed the jury to find the defendants guilty and that the plaintiff was the owner of and entitled to the possession of one undivided half of 150 feet in length of the lode claimed and the mill site as described in plaintiff's declaration, and that they should find the defendants not guilty as to the other property described, and the jury so found. A motion for a new trial was entered and overruled and judgment rendered on the verdict. The defendants appealed to this court.

Messrs. H. M. & W. TELLER, for appellants.

Mr. L. C. ROCKWELL, for appellee.

ELBERT, J. Under the provisions of section 15 of the Chancery Act (R. S., p. 95), a decree rendered upon constructive service is *provisional* only. Although final in form, it is not so in fact, but is subject, upon petition of the defendant within the three years, to be modified or vacated, upon a hearing upon the merits. At the expiration of the three years, there being no interposition by the defendant, it is confirmed to the extent that any defense on the merits is precluded. *Lyons et al. v. Robbins*, 46 Ill. 277; *Southern Bank, etc. v. Humphrey*, 47 id. 227; *Sale v. Fike*, 54 id. 292; *Lawrence v. Lawrence*, 73 id. 577.

The section has in contemplation cases where there has been constructive service *only*, not cases of defective constructive service. It affects the status of the decree as a final decree—not its status as a valid decree. In this view the section has no bearing upon the question of the admissibility in evidence of the record in the divorce suit instituted by James W. Clayton against the appellee.

Under the rulings in the case of *Palmer v. Cowdrey*, 2 Col. 1, and *Vance's Heirs v. Maroney* (*ante*, p. 47), the

return of the summons in the divorce case before the return day would have been fatal on review by an appellate tribunal. It was there held that a return *non inventus* before the return day of the writ would not support a notice by publication, and left the court without authority to proceed to judgment. Without questioning the rulings in these cases, counsel for appellant insist that the record cannot be attacked collaterally.

It is well settled that the jurisdiction of a court may be the subject of inquiry when its record is sought to be interposed by a party claiming a benefit therefrom. *Williamson v. Berry*, 8 How. 541.*

Where, by statute, constructive service by publication is substituted for personal service, and a court proceeds against an absent defendant, not a citizen of the State, the provisions of the statute must be strictly pursued. The rule is essential to the protection of parties without the jurisdiction of the court.

Whether under such a statute the record must show affirmatively the jurisdictional facts, or whether in the silence of the record any presumption can be indulged to support the judgment of a court of general jurisdiction, we need not determine. Clearly, where the record shows affirmatively want of jurisdiction, no presumption can be indulged. *Galpin v. Page*, 18 Wall. 365; S. C., 3 Saw. C. C. R. 117.

The invalidity of the record offered in evidence in the case at bar was self-established. It shows affirmatively the non-residence of the defendant, and the return of the summons *non inventus*, on the same day it was issued. In such case the publication of notice was insufficient under the statute to vest the court with authority to proceed to hear and determine the cause, and it was competent for the defendant to object that the provisions of the law under which a decree had been entered against her had not been pursued, and that the court rendering the decree had no jurisdiction. The record offered was properly rejected.

That hardship may result to parties acting in good faith

upon such a decree cannot avail against the greater hardship of concluding parties by adjudications of their most sacred rights in proceedings of which they have no actual notice, and to which they have never appeared.

The evidence that James W. Clayton lived with the plaintiff and recognized her as his wife, was admissible to establish that relation. Marriage may be proven in civil cases, other than actions for seduction, by reputation, declarations, and conduct of the parties, and other circumstances usually accompanying that relation. 2 Greenl. Ev., §§ 461, 462, and cases there cited.

For the purpose of showing the marriage of the plaintiff with James W. Clayton, the report of the master in the divorce suit containing the written examination of James W. Clayton under oath was offered in evidence by the plaintiff and admitted by the court.

Had the defendant objected to the master's report as being no part of a valid record, it would have been incumbent on the plaintiff to have shown that it was taken in a depending cause, regularly before the court, and within its jurisdiction. 2 Phillips' Ev. 219.* This would have resulted in the view which the court below took of the proceedings in the divorce case, in the exclusion of the master's report as a record, although it would have been admissible as a voluntary affidavit of James W. Clayton, containing an admission or statement respecting his marriage with the plaintiff. 1 Greenl. Ev., § 516; 2 Phillips' Ev. 211.* But no objection was urged challenging its character as a record; on the other hand, the entire defense proceeded upon the theory that the proceedings in the divorce suit were valid. The first objection to the report was "because it shows it is the testimony of James W. Clayton, and his statements cannot bind these defendants." This objection was properly overruled, as all the parties claimed through James W. Clayton, and stood in the relation of privies to him. Nor was the second objection tenable.

Its character as a record being admitted, there was no

rule that required the plaintiff to introduce the entire record in order to avail himself of a part of it.

There was no error, therefore, in admitting the master's report over the objections urged against it, and we are not called upon to consider objections not urged in the court below. The foregoing are the principal assignments urged by the appellants, and all that we deem it necessary to consider.

Judgment affirmed.

NOTICE BY PUBLICATION.—Return *non inventus* before the return day is not sufficient to support a notice by publication: *Israel v. Arthur*, 7 Colo. 7; *Chesley v. Crayton*, 110 U. S. 708.
 JURISDICTION.—NO PRESUMPTION IS INDULGED in favor of jurisdiction where the record affirmatively shows that the court did not have jurisdiction of the person: *San Juan & St. L. M. & S. Co. v. Pinch*, 6 Colo. 219; *Israel v. Arthur*, 7 Colo. 8, 12.
 EVIDENCE.—SWORN TESTIMONY OF PARTY to an action may be used as an admission against him: *Buddes v. Spangler*, 12 Colo. 223.

BLORE v. HOCKADAY.

The best that can be said of an order that fixes the amount of an undertaking, but not the time in which it is to be filed is, that by intendment, it is an order to file the undertaking *instante*.

Appeal from District Court of Boulder County.

THE case is stated in the opinion.

MR. ORRIS BLAKE and MR. RICHARD H. WHITLEY now moved to dismiss the appeal.

MR. PLATT ROGERS, *contra*.

Per Curiam. The order made by the judge in vacation fixed the amount of the undertaking, but did not fix in terms a time within which the undertaking should be filed. The undertaking was filed fourteen days after the date of the order, and after service of notice of appeal.

Section 351 of the Code provides that the amount of the undertaking and the time within which it shall be filed shall be prescribed by the court or judge. Exercise of the power here conferred upon the court or judge is antecedent and essential, and we cannot see how in its absence the appellant can proceed as of course to file his undertaking at any time within the six months.

The best that can be said of an order that fixes the amount of an undertaking but not the time in which it is to be filed is that by intendment it is an order to file the undertaking instanter. Any other holding would result in hardship to the appellee and leave the provisions of the section nugatory. It would allow the appellant, in the absence of an order of the court or judge fixing the time within which the undertaking shall be filed, the whole period prescribed by law in which appeals may be taken, and practically necessitate the attendance of the appellee at the clerk's office every day of that period if he would avail himself of the right to except to the sufficiency of the sureties, given by section 358 of the Code.

The motion to dismiss is allowed.

Dismissed.

WHITSETT v. KERSHOW et al.

1. A court of chancery may decree that a conveyance absolute in form is to have the force and effect of a mortgage or trust. But where it is sought, as against a deed absolute, to establish a trust by parol evidence alone, to take the case out of the statute of frauds, the contract must be established by clear, certain and conclusive proofs. The same principle applies when it is sought to take the case out of the statute on the ground of part performance of the parol contract.
2. In the absence of fraud, mistake or undue influence, one ought not to gainsay his own deed, which he has deliberately executed.
3. The burden of proof in such case is on the complainant, who must rebut the presumption that the writing speaks the final agreement, by the clearest and most satisfactory evidence.
4. Under the statute (Laws 1870, p. 62), a complainant in a bill in equity may not of his own motion, and in his own behalf, testify to any material fact in the case, when the adverse parties are defending as heirs. Nor will it alter the case, when a general objection is made before the witness is sworn, whether the testimony elicited was upon the direct or cross-examination.
5. Oral testimony, uncorroborated, of admissions made by the deceased grantee in this case, *held*, insufficient to warrant a reconveyance.

6. It may be competent for a court of chancery to make a decree in favor of a complainant under the prayer for general relief, when the specific relief prayed for is denied, and even where the complainant may have a legal remedy, if the legal remedy be difficult or obstructed.
7. A court of chancery will generally entertain jurisdiction to adjust all matters connected with or arising out of a cause of which it has rightful possession, especially where the action involves a claim against heirs, or relates to the settling of estates.
8. Where a claim for money, due the complainant, is connected with the subject-matter of a suit in equity to procure a reconveyance, and arises out of the original transaction respecting the conveyance of the land in question, such claim may become an appropriate subject for adjudication in a court of equity.
9. Where money thus due the complainant was appropriated by the estate, held, that it created a debt which became an equitable lien upon the estate in the hands of the heirs, and, also, that under the statute it was a lien at law upon the real and personal estate, to be first satisfied out of the personal assets, but that in such case the administrator should be made a party to such suit.

Appeal from District Court of Arapahoe County.

THIS was a suit in equity brought by Richard E. Whitsett, the appellant, against Elizabeth M. Kershow and John N. and John S. Filmore, the appellees, heirs at law of John S. Filmore, deceased, praying a conveyance by them to him of certain real estate in the city of Denver. The bill substantially shows: That in August, 1861, the complainant was appointed by the governor of the Territory of Colorado adjutant-general; that he performed the duties about nine or ten months; that about the same time the governor also appointed John S. Filmore paymaster; that about November 8th, 1862, Filmore was appointed assistant paymaster in the army of the United States; that complainant received from said Filmore \$824.41, as part payment of salary, etc., as adjutant general, and gave said Filmore his pay accounts therefor; that about June 4, 1862, said Filmore apprised complainant that the government of the United States declined to allow him the said payments; that unless complainant indemnified him in case the said Filmore should fail in receiving credit by the United States for same,

he would be compelled to suffer loss to the amount of such payment, and requested complainant to furnish him security for the amount so paid.

That in consequence of such representations, complainant on June 4, 1862, executed to said Filmore a deed absolute in form of the undivided one-half of lots 15 and 16, block 45, East Denver, and two-thirds of lots 1 and 2, block 46, described, etc., etc., solely for securing and indemnifying said Filmore against loss of the amount paid to complainant, etc., in case he should be denied credit therefor in settlement of his accounts with United States.

That at the time of giving the information aforesaid to complainant, touching the refusal of the government to allow said payments, said Filmore stated that the government might thereafter allow the same, and agreed that in such event, he would reconvey to complainant said lots, etc.; that about December 25, 1864, said Filmore died intestate, leaving his widow, Elizabeth M., and two minor-children, John Norman, about the age of 8, and John Septer, about the age of 6; that about May, 1868, said Elizabeth married Jere. Kershow, Esq.; that after the death of said Filmore, and before the marriage of said widow, Amos Steck, administrator of John S. Filmore, filed upon said lots as trustee for the said widow and minor children, and in pursuance of such filing, deeds for said property were by the probate judge issued and delivered to said Steck under and by virtue of an act of Congress, approved May 28, 1864, and the laws of said Territory, etc., he having theretofore entered said lands, in trust, etc., as provided in said act of Congress. That Feb. 15, 1868, Steck conveyed said lots to Rogers, then administrator, in trust for the use of the said Elizabeth M. and said minor children. That January 6, 1868, said Rogers conveyed to said Elizabeth M., then administratrix, etc., in trust for the heirs at law of said J. S. Filmore; that the payment by said J. S. Filmore to complainant has finally been credited and allowed by the United States, in the settlement of the accounts of said Filmore

as paymaster as aforesaid ; that since such allowance and credit complainant has applied to said Elizabeth to reconvey to him said premises, etc.

Prays that said Elizabeth M., John Norman, and John Septer be summoned and required to answer, etc., but not on oath ; and that said Elizabeth be required to convey to complainant said premises ; in default the master to convey. Prayer for general relief, etc.

Elizabeth M. Kershow was appointed guardian *ad litem* to infant defendants. Answer of infants in common form.

Answer of Elizabeth M. Kershow. Admits the conveyance by complainant to J. S. Filmore, as charged in the bill ; denies that it was for the purpose charged ; denies the promise of Filmore, charged, to reconvey ; admits the death of J. S. Filmore intestate, at the time charged ; admits the heirship and successorship charged ; admits her marriage with Kershow ; admits the filing by Steck as charged ; the conveyance by Steck to Rogers and Rogers to respondent ; admits that all said conveyances were upon the trusts charged ; denies the demand for reconveyance by complainant charged, or that complainant was entitled to such reconveyance ; neither admits nor denies the residue of bill, and calls for strict proof.

Alleges that June 3, 1861, complainant conveyed said lots to Stout, and at the date of his conveyance to J. S. Filmore, had no title or claim to said lots ; that J. S. Filmore was compelled to purchase of Stout, and paid therefor \$700 ; that said J. S. Filmore acquired his right to claim said lots under the act of Congress, etc., and through the title acquired from Stout, and not from said complainant.

The defendant also pleaded the statute of frauds. The case was referred to the master to take proofs. The cause was heard upon the bill, answer and master's report, and a decree rendered dismissing the bill. To reverse this decree Whitsett appealed to this court. The evidence, deemed material, is stated in the opinion.

Messrs. WELLS, SMITH & MACON, for appellant.

Messrs. CHARLES & DILLON, for appellees.

STONE, J. Notwithstanding the great contrariety of decisions upon the subject, it may be considered as well settled that upon proper proofs of intent of the parties, a court of chancery may decree that a conveyance absolute in form is to have the force and effect of a mortgage or trust. 2 Lead. Cas. Eq. 1013; Bispham's Eq., § 155; 2 Wash. Real Prop. (4th ed.) 49; *Lindaur v. Cummings, Ex'r*, 57 Ill. 195. But it is equally well settled that where it is sought as against a deed, absolute in terms, to establish a trust by parol evidence alone, in order to take the case out of the statute of frauds, the contract must be established by clear, certain and conclusive proof, unequivocal in all its terms. *Johnson v. Quarles*, 46 Mo. 426; *Nevius v. Dunlap*, 33 N. Y. 680; *Lindaur v. Cummings, Ex'r, supra*; 2 Lead. Cas. Eq. 980-993, and cases cited. The principle is the same as that applied where it is sought to take a case out of the statute on the ground of part performance of a parol contract. 1 Story's Eq. Jur., § 764. The strictness of this rule rests upon the same principles as underlie the statute of frauds itself. In the absence of fraud, mistake and undue influence, it is said that a man ought not to gainsay his own deed, or any writing which he has deliberately executed; and that "a grantor who makes an absolute conveyance intending that the beneficial interest shall remain in him, is guilty of a gross folly or actuated by a sinister design, and cannot reasonably ask that the rules of law should be suspended to extricate him from the situation in which he has voluntarily placed himself." 2 Lead. Cas. Eq. 978.

This branch of equity jurisdiction requires nice discrimination, and will not be exercised unless all the facts relied on to give relief are established beyond a reasonable doubt, and this even where the ground of relief is mistake. *Nevius v. Dunlap, supra*; 1 Story's Eq. Jur., § 157. The burden

of proof is throughout on the complainant, who must rebut the presumption that the writing speaks the final agreement, by the clearest and most satisfactory evidence. Story's Eq., § 157 ; 2 Lead. Cas. Eq. 980.

It is sought to be shown in this case by parol evidence alone, that an absolute deed made by complainant in 1862, to Filmore, deceased, conveying certain lots in the now city of Denver, was intended as security for a sum of money advanced by the deceased as paymaster in the army, to complainant, on account of salary as adjutant-general, upon a verbal agreement that the property was to be reconveyed when the account for such salary should be allowed by the government.

Against a general objection to his competency as a witness in the case, the complainant testified before the master in his own behalf, in support of all the material allegations in the bill, and the first question presented for our consideration is, as to the competency of this testimony.

The first section of the act of Feb. 11, 1870, relating to the competency of witnesses in civil cases, takes away the disqualification, by which, at common law, parties to civil actions and persons interested in the event thereof were not permitted to testify, and renders them competent, except as thereafter provided in the act. Section two of said act provides that "no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, lunatic or distracted person, or as the executor or administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending, and also, except in the following cases, namely," then follows a number of specified cases, none of which, however, apply to this

case as heard in the court below. Under this section we think the complainant was clearly incompetent to testify as a witness in the case.

But it is contended by counsel for appellant, that if incompetent to testify as to the agreement respecting the conveyance between the deceased and the complainant, the latter was nevertheless competent to testify to the identity of certain exhibits ; and that his evidence upon cross-examination thereto was also admissible. Upon the additional briefs filed upon this point, we have more fully investigated the law in order to determine whether the complainant was competent to testify in this case for any purpose whatever.

In Massachusetts, under a statute that admits parties to testify, except "where one of the original parties to the contract or cause of action in issue and on trial, is dead," etc., it is held that the test of competency is "the contract or cause of action in issue and on trial ;" not the fact to which the party is called to testify ; that if the cause of action was a matter transacted with a person who has deceased, the other party to that transaction being also a party to the suit, is not admitted as a witness at all, and cannot testify to any fact in the case. *Granger v. Bassett*, 98 Mass. 468.

In New York, where the statute prohibits a party from testifying touching a "transaction" or a "communication" between the party testifying and a deceased person, which relates to the subject of the litigation, it was held that the defendant could not testify to the identification of letters written by himself to the intestate, or that such letters were found amongst the papers of the deceased, in order to show that the latter had received and retained them ; such letters relating to the claim in controversy. *Ressiquie v. Mason*, 58 Barb. 99.

In Missouri, under a statute like that of Massachusetts, the holding has been the same as that in *Granger v. Bassett*, *supra* ; *Johnson v. Quarles*, 46 Mo. 429 ; *Looker v. Davis*, 47 id. 145.

While the language of the statutes of the States referred to, rendering incompetent the testimony of such witnesses, as to certain matters in issue in the action, is construed by the courts, in the cases cited above, to exclude the witness for any and all purposes, with still greater conclusiveness it must follow by the express terms of the language of the disqualifying section of our own statute, that no party to such action "shall be allowed to testify therein of his own motion," etc.; that, except in the cases where such party is expressly rendered competent, he is disqualified from testifying to any fact in the case. Accordingly we find that the supreme court of Illinois, in construing the statute of 1867 of that State, which in its language and provisions is identical with our own, hold that the statute is not of doubtful meaning, and that under its operation no party to any civil action, suit or proceeding, or person directly interested in the result thereof, should be allowed to testify therein of his own motion, or in his own behalf, when any adverse party sues or defends as executor, administrator, heir, legatee, or devisee, of any such deceased person, except in the cases specified in the statute as exceptions to the prohibitory clauses. *Boynnton v. Phelps*, 52 Ill. 218; *Merritt v. Atkins*, 59 id. 20; *Stone v. Cook*, 79 id. 428; *Alexander v. Hoffman*, 70 id. 117; *Langley v. Dodsworth*, 81 id. 87; *Branger v. Lucy*, 82 id. 92.

Hence, when such party is offered as a witness, and before he is admitted to testify, it should be made to appear from his status in the case whether he is brought within any of the enumerated exceptions to the disqualifying section of the statute.

In this view the complainant being both a party in the action, and directly interested, and seeking to testify on his own motion, and in his own behalf, wherein the adverse parties were defending as heirs of the deceased Filmore, the complainant was clearly incompetent to testify, not only as to the verbal contract alleged to have been made between the deceased in his life-time and the same com-

plainant, but being put upon the stand to testify generally he was not a competent witness to testify to any material fact in the case. Nor does it alter the case that certain evidence was given by such witness upon cross-examination, being disqualified by statute as a witness altogether. And before going upon the stand, a general objection having been made by the defendants to his testifying in the case on the ground of his incompetency, whatever testimony he gave, whether upon direct or cross-examination, must fall together, and cannot be considered in the case. The object of the statute is obviously to place the parties to a contract upon an equal footing as witnesses respecting such contract; which clearly would not be the case, if, when the mouth of one was closed in death, the other were allowed to give his version of the transaction beyond the power of contradiction from the deceased party. Setting aside the testimony of the complainant as to his having paid to Filmore the amount due to Stout, which the deed "K" was given to secure, we may take the evidence of Charles Cheever that said amount was paid to Stout by Filmore as implying that the latter paid the same as of his own money, but in view of the further testimony of Charles Cheever, that Filmore was fully informed of the execution of the prior conveyance of Whitsett to Stout by deed "K" and of the bond of Stout to re-convey, and of the intent of those instruments, that it was all talked over between Filmore and the witness Cheever at the time Filmore took the deed from Stout and paid the amount due him from Whitsett, we think it immaterial whether Whitsett furnished the money so paid to Stout or not, since we may conclude that Filmore accepted the deed from Whitsett to the property subject to the Stout deed as a prior lien which would not impair the consideration of the transaction between Filmore and Whitsett.

The main question then is, disregarding the incompetent testimony of the complainant, are the allegations of the bill respecting the transaction between the deceased and the complainant proved by the evidence in the case?

Clayton testified that Filmore told him that he had advanced money to Whitsett on account of the latter's salary as adjutant-general, and that the government had refused to allow the account. That, in another conversation, Filmore stated that he could get certain property of Whitsett in settlement of the account, and asked witness his opinion as to what the property was worth. That in a third conversation, Filmore stated to witness that "he had taken the property for the account." That he "had received the property in settlement." In answer to the question upon cross-examination whether Filmore stated that the property was taken in full settlement or not, the witness says: "My recollection is, that was in settlement in full."

Dudley testifies in substance as follows: I was assistant quartermaster; Filmore paid me salary; he told me that amount paid me had been stopped against him in his account at Washington; subsequently, in several conversations, he requested me to refund the amount, but as I was unable to do so, I deeded him lots in Denver upon his promise to hold the property in security and re-deed to me if the account was allowed. He told me that he had a similar understanding with Whitsett as to his account, and that W. was going to deed, or had deeded to him property as security for the salary paid W. which had also been stopped, and that if the account was allowed, he, F., was to re-convey to W. I think he said that W. was going to secure him by deeding some property, and thought I ought to do the same; I am positive that if these accounts were allowed he wasto re-deed to me, and that he had a similar arrangement with W.; think one of those conversations was on the day I executed my deed.

D. A. Cheever, as to this point, testifies: "I heard a conversation between Filmore and Whitsett in which W. admitted that he owed Filmore overpay received by him as salary; the talk was in reference to the lots opposite the mint which 'were to be deeded by W. to F. in payment of that overpay;' the conversation was to the effect that W.

should make a transfer of the property to re-imburse F. for salary paid W. for which F. had received no return, because it was improperly paid, or paid without authority."

Ex-Governor Gilpin testifies: "I learned from F. that as paymaster, he endeavored to, and did fortify himself by taking real estate security for money paid by him."

Charles G. Cheever, upon the same point, says: "I was the county clerk and recorder and was also agent of F. to collect rents, and to have charge of his property; a deed from F. to W. of property (same as described in bill of complaint) was delivered to me by F. for record. When he brought the deed to me F. stated that 'he had taken the property contained in this deed on account of settling or securing moneys as salary paid by him, Major Filmore, to Mr. Whitsett as adjutant-general, which moneys had been disallowed by the United States government;' I am positive I give the substance of the words used."

This was all the testimony in the case (aside from that of complainant himself) respecting the character of the conveyance, not evidenced by the deed itself. Measuring this, in view of the rules and principles we have noted at the outset, we deem it of too vague a character to overthrow the legal effect of the conveyance.

By reference to the testimony, it will be observed that Clayton says the conveyance was spoken of as made "in settlement in full," of the salary advanced W. D. A. Cheever says the deed was to be made in "payment of the over-pay," and to "re-imburse F. for salary paid W.," and for which W. "admitted owing F." Dudley is uncertain whether the Whitsett conveyance had been made, or was to be made, but understood that an arrangement similar to one with himself had been made, or was to be made with W.; while Charles G. Cheever says that F. declared to him that he had taken the deed from W. "on account of settling or securing moneys paid as salary" to W. Not a single witness is able to state with certainty that Filmore admitted the deed to have been made as a security merely. Upon

oral testimony so uncertain, ambiguous and conflicting as this, for the purpose of proving the declarations of a deceased party, alleged to have been made twelve years before, we certainly would not be warranted in decreeing to change the legal character of a written instrument, executed under seal voluntarily, by the party now seeking to change its terms as against heirs of the property under such conveyance, and without proof of fraud, accident or mistake, as an element affecting the purpose or validity of the deed. *Lindaur v. Cummings, Ex'r*, 57 Ill. 200; *Johnson v. Quarles*, 46 Mo. 427; *Nevius v. Dunlap*, 33 N. Y. 680. Indeed, it is held in *Johnson v. Quarles*, and *Lindaur v. Cummings, Ex'r, supra*, that such admissions alone as are now sought to be proved are insufficient to establish the contract, or ground of relief, such as is here prayed. In *Johnson v. Quarles*, the court say: "Evidence of such declarations, it is true, is admissible; but it never amounts to direct proof of the facts claimed to have been admitted by those declarations, and it is sometimes doubted whether it ought to be received at all, when introduced for the purpose of divesting a title created by deed. If, however, these declarations were properly sustained by other circumstances, as by evidence that the claimant's money was placed in the hands of the deceased for investment, and that the property was treated by the parties interested as their property, or by any other facts pointing to them as the equitable owners, they would warrant us in sustaining the claim."

In the case before us it is noticeable that there is a total absence of any testimony in corroboration of the truth of the admissions sought to be proved, such as that the complainant ever treated the property conveyed as his own, or by the payment of taxes, or assuming charge and care of the property, or by any other conduct that he ever sought to make it manifest that he was still the equitable owner thereof, during the eight years that elapsed between the date of the conveyance and the commencement of the action. As to this branch of the case, therefore, the court

below did not err in refusing to decree a reconveyance of the property in question.

But it is insisted, by counsel for appellant, that the court below erred in refusing to decree, as alternative relief, the payment by defendants to complainant the amount of money which was finally allowed by the government as due complainant upon his account as salary.

The record discloses the fact that this amount, \$824.41, due Whitsett on his salary account as adjutant-general, was allowed by the government, but credited to the account of Filmore. At his death, Filmore was indebted to the United States in a large amount, and when the Whitsett account was allowed, it was credited to Filmore's account as paymaster, and was applied in reducing, to that extent, the indebtedness of Filmore. To this amount, with legal interest thereon from the date of allowance of said sum by the government in the account of the deceased therefor, the appellant, Whitsett, is justly entitled. It is contended, however, by counsel for appellees, that for this claim, the appellant had a legal remedy; and that, besides, it cannot be decreed in this action for the reason that the bill does not specifically ask for such alternate relief. We think it is clearly competent for a court of equity to make such decree under the prayer for general relief, and even where the specific relief prayed for in the bill is denied. *Capps v. Holt*, 5 Jones' Eq. (N. C.) 153; *Hawley v. Sheldon*, Harrington's Ch. 420; *Parkhurst et al. v. Van Courtland*, 1 Johns. Ch. 274.

Whenever the remedy, though legal, is difficult or obstructed, or lost without fault of the party seeking, or inadequate, a court of chancery, to prevent litigation, circuity of action or inconvenience, will generally entertain jurisdiction to adjust all matters connected with, or arising out of a cause of which it has rightful possession; and this especially where the action involves a claim against heirs, or relates to the settling of estates. *Queen v. Drummond*, 31 Md. 71; *Ellis v. Gosney's Heirs*, 1 J. J. Marsh. 347*;

Steele v. Hoagland, 39 Ill. 264; *Pratt v. Law*, 9 Cranch, 494; *Nagle v. Newton*, 22 Gratt. 819; *Coz's Heirs v. Stroud*, 2 Bibb, 273; *Schilling et al. v. Rominger* (*ante*, p. 100): 1 Story's Eq. Jur., § 457.

The claim for this money is connected with the subject matter of the suit, and arises out of the original transaction respecting the payment by F. of the salary of W., the conveyance of the land in question being one branch of the same transaction. Nor was the legal remedy of W. to recover the amount from the estate without difficulty at its inception. Under our statute the claim was required to be preferred against the estate within one year after letters of administration were granted, while this account was not allowed, so as to give W. such right of action therefor until nearly four years after Filmore's death, and after such letters had been granted. For a similar reason it was held in Massachusetts, that a suit in equity might be maintained in the nature of a creditor's bill against the executor and devisees, where, under the statute, the period of limitation for proof of debts had expired. *Fairfield v. Fairfield*, 15 Gray, 596. Through the efforts of Whitsett chiefly, his vouchers were allowed; and yet when allowed the money passed to the estate, and the heirs received the benefit of it. It became vested in the estate, but in the nature of a trust for the benefit of Whitsett, and is, therefore, an appropriate subject for adjudication in a court of equity. 1 Story's Eq., §§ 532-535.

The amount of money due W., and thus appropriated by the estate, created a debt which became an equitable lien upon the estate in the hands of the heirs (*Morris v. Mowatt*, 2 Paige's Ch. 590), and such debts become, under statutes like our own, liens at law upon the estate, personal and real, but to be first satisfied out of the personal assets. *Vansycle v. Richardson*, 13 Ill. 173, and cases cited. But the administrator of the estate of the deceased was not made a party defendant in this suit, and has not, therefore, had his day in court as such personal representative of the

deceased, and since we conceive it necessary that the administrator, if there be one, should be made a party defendant before final decree can be rendered for the payment of money out of the assets of the estate, in order that such payment may be made from the personal assets, if there are any, the decree of the court below will be reversed and the cause remanded with directions that the complainant have leave to amend his bill so as to make the administrator a party defendant; and to amend in other respects as he may be advised, without prejudice to the testimony already taken; and that upon such further proceedings being had, as may be necessary, a decree be rendered not inconsistent with the views herein expressed.

Reversed and remanded.

THATCHER, C. J. I concur in the result.

Mr. Justice ELBERT having been of counsel in the court below, did not sit in this case.

IN EQUITY, COMPLAINANT MAY NOT TESTIFY of his own motion and in his own behalf, when the adverse parties are defending as heirs: *Githam v. French*, 8 Colo. 159.
DEED ABSOLUTE IN FORM MAY BE SHOWN to be mortgage, but the proof must be beyond a reasonable doubt: *Bohm v. Bohm*, 9 Colo. 111; *Townsend v. Petersen*, 12 Colo. 494.

LUNDIN, Adm'r, etc., v. KANSAS PACIFIC RAILWAY Co.

The repeal of the act of 1872, giving compensatory damages for injuries resulting in death, through the negligence of a railway company, to be recovered by the administrator, does not take away any accrued right which, by authority of law and in the manner pointed out by statute, had been previously asserted. Section eleven of the Bill of Rights, prohibiting retrospective legislation, operates, as to pending causes under the statute, as a saving clause incorporated into the repealing statute.

Error to District Court of Arapahoe County.

THE case is stated in the opinion.

MESSRS. BROWNE & PUTNAM, for plaintiff in error.

MR. ALFRED SAYRE, for defendant in error.

THATCHER, C. J. In October, A. D. 1872, this action was

brought by the plaintiff in error against the railway company, under the act of February 8, 1872 (Session Laws, p. 117). The case was once tried in the district court, and the judgment then rendered in favor of the plaintiff was reversed by the late territorial supreme court for errors in the record, and the cause remanded (3 Col. 94). In June, 1877, the cause was again called for trial, and during its progress, after a portion of the plaintiff's evidence had been heard, on motion of defendant, the case was dismissed on the ground that the statute on which the action was founded had just been repealed. General Laws, p. 342.

We had occasion to investigate the question here presented very fully in the *Denver, South Park & Pacific Railway Co. v. Benjamin Woodward* (ante, p. 162). In that case the repealed statute and the repealing act now under consideration, were both examined, and the court arrived at the conclusion that the provision in our Constitution (sec. 11 of the Bill of Rights), prohibiting retrospective legislation, operates, as to pending causes of the character of the one now before us, as a saving clause incorporated into the repealing statute.

Upon the principle announced in that opinion, this case was improperly dismissed.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

EICHOLTZ v. WILBUR et al.

1. Causes commenced before, and prosecuted to judgment since the Code went into effect, may be appealed to this court under the former system of practice (when an appeal would lie) or under the Code at the election of the appellant.
2. Under the old system where the appeal was not made thirty days before the next ensuing term of this court, the appellant was not required to file a certified transcript of the record in this court on or before the third day of the term.

3. After an appeal was perfected under the old system and the cause was pending in this court, *held*, that the court below was without jurisdiction to enter new orders with a view to an appeal under the Code.

Appeal from District Court of Arapahoe County.

MESSRS. CHARLES & DILLON, for appellee, now moved to dismiss the appeal.

Mr. E. P. JACOBSON, *contra*.

Per Curiam. Causes commenced before, and prosecuted to judgment since the Code went into effect, may be appealed to this court either under its provisions or under the former system of practice (in a case where an appeal would lie under *that* system) at the election of the appellant. Code, § 446. *Hattie J. Conner v. The Estate of James Conner* (*ante*, p. 74).

An appeal was prayed under the former system of practice February 28th, A. D. 1878, and allowed on condition that appellants, within thirty days, file a bond in the sum of five thousand dollars. March 25th, A. D. 1878, in compliance with the order of court, the requisite bond was filed. Upon the filing of the bond, and not before, the appeal was perfected—made in the sense of the statute. As only eight days intervened between the date last named and the return day of the then ensuing April term of court, the appellants were not required to file with the clerk the transcript by or before the third day of that term. It is only when the appeal has been perfected thirty days prior to the next ensuing term, that appellants are required to lodge an authenticated copy of the record in the office of the clerk of this court by the third day thereof. R. S., p. 513. They were, therefore, in that respect, not in default. *Breed v. First National Bank of Central*, 3 Col. 470.

We therefore conclude that the appeal is properly pending in this court under the former system of practice. Abortive attempts were also made to bring the cause into this court by an appeal under the Code. In our view, after

the appeal was perfected under the former system, the cause was then pending here, and the court below was without jurisdiction to enter new orders with a view to a Code appeal. *Harrison v. Trader and Wife*, 29 Ark. 97; *Love v. Dickson*, 8 Martin's R. 440 (N. S. La.); *Levi v. Karrick*, 15 Iowa, 444; *Spaulding v. Milwaukee & Horicon R. R. Co.*, 11 Wis. 158.

The motion to dismiss the appeal will be denied.

Motion denied.

WHEN APPEAL IS PERFECTED, CAUSE IS PENDING in the appellate court: *Colorado Springs Co. v. Cowell*, 6 Colo. 76.

CODY v. FILLEY et al.

1. When the time is fixed within which one seeking an appeal shall file his statement of appeal, he must, to avail himself of the provisions of section 340 of the Code, prepare and file the statement and give notice to the opposite party or his attorneys before the expiration of the time fixed.
2. When the notice was not served until the day subsequent to the filing of the statement, the statement having been filed on the last day of the time limited, *held*, that the notice came too late, and that the statement must be disregarded.
3. To be considered in this court, the statement on appeal must be agreed upon by the parties, or settled by the judge, and so certified. It cannot rest solely upon *ex parte* affidavits as a mode of authentication when the trial was had since the adoption of the Code.

Appeal from District Court of Gilpin County.

Mr. WILLARD TELLER, for appellee, now moved to strike out the statement in this cause "because the same was not filed and notice thereof served in apt time, and the same was not settled as by law prescribed."

Messrs. BUTLER, WRIGHT & KING, *contra*.

Per Curiam. September 18th, 1878, the court, by an order, fixed forty days within which the appellant might file his statement on appeal, and undertaking. Within the

time limited by the Code, or within such further time as the court or judge may grant, the appellant, if he wishes to avail himself of the provisions of section 340 of the Code, is required to prepare a statement, *and* file the same, *and* give notice to the opposite party or his attorney of such filing. These several acts, connected by the copulative conjunction, must, in contemplation of the statute, all be performed before the time prescribed has expired. Two statements were prepared and filed. The principal statement was filed October 28, 1878, the last day limited by order of court. Not until a subsequent day was the notice served upon the opposite party. It came too late. The statement must, therefore, be disregarded. *Harper v. Minor*, 27 Cal. 107; *Kavanagh v. Mans*, 28 id. 261; *Bryan v. Maume*, id. 241.

Upon another ground also the statement cannot be considered. The statement was not settled by the court or judge, nor was it agreed upon by the parties, and so certified by them. *Harley v. Young*, 4 Cal. 284; *McIntyre v. Willis*, 20 id. 177.

It rests solely upon the *ex parte* affidavits of attorneys, a mode of authentication not recognized by the Code, unless in cases where trials have been had since it was adopted. § 195, Code.

The exceptions, sought to be preserved by the statement, were taken, if at all in this case, more than three years before said statement was verified, and they are, therefore, without validity under the Code.

The statement, therefore, verified by the affidavits of Hugh Butler and James B. Belford, attorneys for appellant, will be stricken from the record.

The additional statement on appeal signed by Judge BECK must also be expunged for the reason that notice that the same had been prepared and filed, was not given to the appellee either within the time prescribed by the Code, nor within the time as extended by order of court.

Motion allowed.

IN RE BROWN.

Where one was attached for contempt in refusing to obey an order of the district court to pay over to an administrator certain moneys belonging to an estate, and the court, upon examination, discharged the respondent from the attachment, and then committed her to jail till she should obey the order, *held*, that the respondent having appeared, purged the contempt and been discharged without day, the court was without jurisdiction to take any further action in the attachment proceeding, and the commitment was absolutely void.

PETITION for *habeas corpus*. The record in this case which was by agreement of counsel admitted as the return to the writ of *habeas corpus* shows substantially that James Warrant, administrator of the estate of Robert T. Warrant, deceased, filed his affidavit in the county court of Pueblo county, under section 2871 of the General Laws, to the effect that Sarah J. Brown, the petitioner, had in her possession about \$304 in money and certain other personal property belonging to the estate of Robert T. Warrant which she refused to account for or deliver to the administrator. She was cited to appear before the county court and show cause why she should not deliver up the property mentioned. At the August term, 1877, the respondent appeared in the county court, and, upon hearing, the court adjudged her not guilty as alleged in the affidavit. The administrator prayed and perfected an appeal to the district court, and upon proceedings had in that court, it was ordered that the respondent deliver up \$303 to the administrator upon demand. Upon refusal she was attached for contempt.

The proceedings upon the attachment are stated in the opinion.

Mr. CHARLES E. GAST, for petitioner.

Mr. A. A. BRADFORD, for respondent.

ELBERT, J. This case is presented on demurrer *ore tenus*, to the sheriff's return; the record in the case below being admitted as the return by agreement of counsel.

The petitioner, Sarah J. Brown, is held by a mittimus issued by the district court of the third judicial district, in a proceeding had under the provisions of § 84, ch. 103, Gen. Laws, 961.

The order made by the court upon the hearing under this section was, "that Sarah J. Brown immediately deliver the said sum of \$303 to the said James H. Warrant upon his demand therefor." Upon a return of demand and refusal to obey the order of the court, the petitioner was attached for contempt.

A hearing was had on the 3d day of January, 1879, and the following order made:

"This day came the defendant, Sarah J. Brown, in obedience to the writ of attachment heretofore, to wit: on the 27th day of April, A. D. 1878, issued against said defendant to show cause why she should not be punished for contempt of this court in refusing to obey and comply with the order of this court made on the 26th day of April, A. D. 1878, requiring said defendant to immediately deliver the sum of three hundred and three dollars to James H. Warrant, administrator of the estate of Robert T. Warrant, deceased, which it has duly appeared, and yet does appear to the court, is the property of the said Robert T. Warrant, deceased, and said defendant, Sarah J. Brown, having been sworn to make true answers to all such questions as the court should ask concerning the alleged contempt, was interrogated and examined by the court, and, thereupon, being fully advised in the premises: *It is ordered by the court that the defendant be discharged from the said writ of attachment, and that she go thereof without day.* And it is further ordered that a warrant of commitment issue under the seal of this court to the sheriff of Pueblo county, requiring him, the said sheriff, to take and safely keep and imprison the said Sarah J. Brown in the common jail of Pueblo county until she shall obey and comply with the said order of this court requiring her to pay the said James H. Warrant, administrator of the estate of Robert T. War-

rant, deceased, said sum of money appearing to be the property of said Robert T. Warrant, deceased, and that thereafter she be discharged; and that she pay the costs of these proceedings. And it is further ordered that there be a stay of these proceedings for the space of twenty days from this date."

The proceeding was as for contempt in disobeying the order of the court. It was a proper method by which to enforce obedience to the order made by the court (Code, 121, 122, §§ 321, 323, 333).

The petitioner having appeared and purged the contempt and been discharged by the court without day, the court was without jurisdiction to take any further action in, or make any further order upon the attachment proceeding. It was closed, and the subsequent order committing the petitioner to prison, was without any proceeding to support it. It was without authority of law, and is utterly void.

The demurrer is sustained, and the order of discharge will be entered.

Demurrer sustained.

HARRIS v. DURAN.

1. Since the statute of 1877 (Gen. Laws, § 595) a county judge assuming to act as *ex officio* justice of the peace is without authority of law.
2. An appeal taken to the county court from a county judge sitting as a justice of the peace is nugatory. In such case, however, by following the appeal and consenting to trial, the county court having jurisdiction of the subject-matter, the appellee may waive his right to object to the jurisdiction over the person. If he would have this court review the ruling of the court below denying his motion to dismiss the appeal, he must reserve an exception to such ruling.

Error to County Court of Ouray County.

THE case is stated in the opinion.

Mr. C. S. THOMAS, for plaintiff in error.

Messrs. E. MILES, G. W. ANDREWS & WM. STORY, for defendant in error.

THATCHER, C. J. On the 14th day of July, A. D. 1877, Abram Cutler, then being county judge of Ouray county, assuming to act *ex officio* as a justice of the peace issued a summons for Harris to appear before him to answer the suit of Duran for failure to pay him a certain demand not exceeding three hundred dollars.

On the twentieth day of the same month, the cause coming on to be heard, Cutler, in his assumed capacity of justice of the peace, gave judgment against Harris for \$207 $\frac{1}{2}$ and costs, from which Harris appealed to the county court. On the trial in the county court, Cutler, in the capacity of county judge, rendered judgment on the verdict of the jury against Harris for \$145 $\frac{1}{2}$ and costs. The case is brought to this court on error, and reversal of the judgment is sought on the sole ground that the court below had no jurisdiction to hear and determine the cause.

Prior to the first session of the State legislature, probate judges were vested with the same powers and jurisdiction conferred by law upon justices of the peace. R. S., 1868, p. 522, § 3.

By the schedule to the State Constitution, the provisions of law above cited then in force were made applicable to county judges, until repealed. §§ 1 and 9 of the Schedule. March 22d, 1877, the statute conferring the jurisdiction of justices of the peace upon county judges, was repealed. Gen. Laws, p. 260, § 25. This repealing statute went into effect ninety days after its enactment. As the summons was not issued in this case until July 14th, 1877, by the county judge, assuming to act as *ex officio* justice of the peace, it was without authority of law. The whole proceeding was nugatory. The pretended judgment was *coram non judice*. There was no judicial determination from which an appeal might be taken.

The appellee, however, followed the pretended appeal.

Both parties duly appeared in court, one to prosecute, and the other to defend the cause. And although the record discloses that the defendant subsequently made a motion to dismiss the appeal and case, which was denied, there being no bill of exceptions, it does not appear that the defendant excepted to this ruling. The record, however, affirmatively shows that the defendant afterward consented to the trial of the case before the county court and invoked its jurisdiction. We find the following record entry: "And thereupon, upon motion of the *defendant* a venire was issued," etc. The suit stood as though it had never before been brought, and was then pending for the first time in the county court, which, beyond question, had jurisdiction of the subject-matter of the controversy.

It was competent for the defendant to waive a mere personal privilege by voluntarily entering his appearance in the cause, and as he proceeded to trial in this case, which was within the jurisdiction of the court, without reserving an exception, we cannot now entertain an objection not properly taken in the court below.

The judgment of the lower court is

Affirmed.

DE LA MAR et al. v. HURD.

1. A bill of exceptions, to be considered, must be signed and sealed by the judge.
2. Faults in pleading are, in some cases, aided by pleading over. Thus in a complaint for wrongful detainer, which showed privity between the plaintiff and one defendant only, and the defendants, husband and wife, filed a joint and several answer, the husband alleging no separate right in himself, but defending his possession by allegations of his wife's right, *held*, that the husband, though not a party to the original contract, had, by his answer, put himself in the position of a privy for the purposes of the action.

Error to Probate Court of Clear Creek County.

THE case is stated in the opinion. .

Mr. FRANK DE LA MAR, for plaintiffs in error.

Mr. W. S. ROCKWELL and Mr. L. C. ROCKWELL, for defendant in error.

ELBERT, J. This is an action of wrongful detainer under section 3 of the act concerning forcible entry and detainer. R. S., p. 332.

What purports to be a bill of exceptions is neither signed nor sealed by the judge, and cannot be considered.

Under the assignments it only remains to consider the sufficiency of the complaint.

To the complaint it is objected, that, while it shows privity between the plaintiff and the defendant, Fannie A. De La Mar, it shows no privity between the plaintiff and the defendant, Frank De La Mar, her husband.

The defendants appeared in the action and filed a joint and several answer. The defendant, Frank De La Mar, alleged no separate or distinct right or title in himself, but defended his possession by allegations of the right and title of his wife, Fannie A. De La Mar.

If it be conceded that privity between the plaintiff and defendant is essential to the maintenance of an action under this section, we are of the opinion that the privity of one of the defendants will support it where the co-defendant claims in right of the defendant that is privy. Though not privy to the original contract between the parties, he, by his answer, puts himself in a position of a privy for the purposes of the action.

The answer in this respect aided the complaint, and taken in connection therewith, entitled the plaintiff to judgment upon proper evidence. Gould's Plead., p. 154, § 192.

The judgment of the court below is

Affirmed.

BILL OF EXCEPTIONS, TO BE CONSIDERED, MUST BE SIGNED AND SEALED by the judge: *Reed v. Cates*, 11 Colo. 53; *Gutrie v. People*, 11 Colo. 233; *Marshall E. M. Co. v. Kirtley*, 8 Colo. 110. DEFECTIVE COMPLAINT, NOT DEFENDED TO, may be cured by subsequent pleadings: *Colorado & G. R. Co. v. People*, 5 Colo. 41; *Bushnell v. Crooke & M. Co.* 12 Colo. 250.

PIPE v. SMITH.

1. It is competent to make certain the subject-matter of an exception in a deed made in general terms, by evidence *aliunde*.
2. Where general terms of description are used in a deed of conveyance, parol evidence is admissible to apply it to the subject-matter; and when the subject-matter of an exception is described in general terms, the same rule applies.

Appeal from District Court of Jefferson County.

ENSIGN B. SMITH, the appellee, commenced an action of ejectment in the district court of Jefferson county against Pipe, the appellant, at the May term, 1873. The plaintiff claimed title in fee to lots numbered one to six, inclusive, in block numbered nine in Bush and Fisher's addition to the town of Golden. The defendant appeared and pleaded the general issue. Upon the trial, as appears by the bill of exceptions, the plaintiff offered in evidence: First, a patent from the government of the United States to Henry Altman, probate judge of Jefferson county and Territory of Colorado, and his successors and assigns, in trust, etc., to the east half of the south-east quarter of section twenty-eight, and the west half of the south-west quarter of section twenty-seven, in township three south, range seventy west, in pursuance of the town site entry of Golden City, under the act of Congress approved May 23, 1844, entitled, "An act for the relief of the citizens of towns upon the lands of the United States under certain circumstances," which patent bears date the first day of September, A. D. 1866. Second, a deed duly acknowledged and recorded from Joseph Mann, probate judge, to him, plaintiff; to the introduction of which defendant objected, because there was no evidence that Judge Mann, who was then acting in the capacity of a trustee, had complied with the law in the execution of such deed; second, because there was no evidence to show that the said E. B. Smith, grantee in said deed, or any person under whom he claimed, had

filed or presented any claim in writing before the probate judge to the property mentioned in said deed, within the time required by law, or that the said Smith ever filed any such statement or claim in writing for said premises before said probate judge; third, because there was no evidence to show that the said Smith was in the occupation of said property at the time the town site of Golden City was entered or at any other time, or that he was in the possession of said property at any time. The court overruled the objections and allowed the deed to be read in evidence, to which ruling the defendant then and there excepted. It was here admitted that the said Joseph Mann was probate judge at the time the said deed was executed. The deed is in the words and figures following, to wit: "This deed, made this eleventh day of October, in the year of our Lord one thousand eight hundred and sixty-nine, between Joseph Mann, probate judge, in and for the county of Jefferson and Territory of Colorado, party of the first part, and Ensign B. Smith, of said county, of the second part, witnesseth: that the said party of the first part, for and in consideration of thirty-five dollars and thirty-seven cents, to him in hand paid, and for the fulfillment of the trusts in the probate judge reposed, in the entry of the town site of Golden City at the United States land office, hath remised, released and quit claimed, and by these presents do remise, release and quit claim unto the said party of the second part and to his heirs and assigns forever, all the following described land, situate in the county of Jefferson, and Territory of Colorado, to wit: Commencing at the north-east corner of the north west quarter of the south-west quarter of section No. (27) twenty-seven, in town (3) three south, range (70) seventy west, running thence west (20) twenty chains, thence south (2) two chains, thence south ($34^{\circ} 30'$) thirty-four degrees and thirty minutes, (28^1) twenty-three and one-quarter chains, thence east (7) seven chains, thence north (20) twenty chains, to the place of beginning, containing 28 30-100 acres, the same being on the east side

of East street in the town of Golden City; and a portion of the north-west quarter of the south-west quarter of section 27, township 3 south, range 70 west, together with all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above-described premises, and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the above-mentioned and described premises, together with the appurtenances, unto said party of the second part, his heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

(Signed,)
[SEAL]

JOSEPH MANN,
Probate Judge."

The defendant admitted "that the lots in dispute in this case are a part of the land described in the said deed from Joseph Mann, probate judge, to Ensign B. Smith, just read in evidence, and that the defendant was at the date of the commencement of this suit, and still is, in possession of said lots."

The plaintiff here rested his case.

The defendant then offered and read in evidence a deed of conveyance in words and figures as follows: "This deed, made this twenty third day of December, in the year of our Lord one thousand eight hundred and sixty-four, between Jonas M. Johnson, probate judge [holding lands in trust for the occupants of lots in Golden City] of the county of Jefferson and Territory of Colorado of the first part, and William A. H. Loveland [according to an agreement entered into by the settlers of said town] of the county of Jefferson and Territory of Colorado of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of five hundred dollars to the said party of the first part, in hand paid by the said party of the second part, the receipt whereof is hereby confessed, hath granted,

bargained, sold and conveyed, and by these presents doth grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns forever, all the following described lots or parcels of land, situate, lying and being in the county of Jefferson and Territory of Colorado, to wit: The east half of the south-east quarter of section twenty-eight, the west half of the south-west quarter of section twenty-seven, the east half of the north-east quarter of section thirty-three, and the west half of the north-west quarter of section thirty-four, township three south, range seventy west, *excepting what lots has heretofore been deeded to occupants or settlers, and what now remains in litigation and the title yet undetermined by the probate judge, holding them in trust for the occupants of the town site of Golden City under the pre-emption laws of Congress, for the use of the occupants thereof*; to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise appertaining, and all the estate, right, title, interest and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever. And the said party of the first part, the aforesaid tracts or parcel of land and premises unto the said party of the second part, his heirs and assigns, against the claim or claims of all and every person whatsoever, doth and will warrant and forever defend by these presents.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written

(Signed,)
[SEAL]

JONAS M. JOHNSON,
Probate Judge.

Signed, sealed and delivered in presence of A. O. Patterson."

This deed had been duly acknowledged and recorded on the day of the date thereof. The defendant here introduced

and read in evidence thirteen other deeds and a title bond, showing a claim of title from William A. H. Loveland to and connecting himself with such title. The defendant then offered in evidence two plats, to wit: one of Fisher's new survey of the town of Golden City, and the other the plat of Bush and Fisher's addition to Golden City, and, "to shorten the record, the plaintiff admits that the said plats both cover the same land, and such land is that part of the south-west quarter of section twenty-seven of Golden City town site lying east of East street, and the same land described in the deed from Mann, probate judge, to Ensign B. Smith, heretofore read in evidence. And the plaintiff here further admits that the said land, as included in said Fisher's new survey, was divided off into blocks and numbered respectively, blocks 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49."

And the defendant here rested.

The plaintiff, by way of rebuttal, here proved by A. D. Jameson that "witness is county judge of Jefferson county, Colorado. This book marked 'B' is one of the books of record of the probate court of said Jefferson county. The nine papers contained in this wrapper marked 'G' are records and files in the said county judge's office, or papers in the case of *Hine v. Smith*, formerly pending in the probate court of said county, and are all the papers witness can find belonging to said case in said office, after making diligent search for same." Plaintiff here offered in evidence the said nine papers in said wrapper marked 'G,' referred to by witness Jameson, and which papers for convenience are designated as Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 9, respectively, and paper No. 1, being a number of different papers attached together; the said different papers, composing paper No. 1, are here designated as A, B, C, D, E, F and H, to which papers and each thereof, and to each of said papers lettered as aforesaid, the defendant objected as evidence and to the same being read, for the following reasons, to wit: "1st. Because the same and each and every

thereof are immaterial, irrelevant and not competent testimony. 2d. Because the same are offered as a whole and not separately. 3d. Because the same do not constitute proper rebuttal testimony. 4th. Because neither the same nor either thereof show any reference to the lots in dispute in this suit. 5th. Because it cannot be ascertained or determined from said papers what particular piece of land, if any, was in dispute between Hine and Smith in that suit. 6th. Because it cannot be determined from those numbers of said papers which were in existence before December 23, 1864, what land was in dispute, if any, between said Hine and Smith, that is to say, none of the said papers which were in existence before or on the 23d day of December, 1864, the day the deed from J. M. Johnson, probate judge, to W. A. H. Loveland was made and delivered, and which was read in evidence by the defendant herein, shows what land or lots, if any, was in dispute or litigation in said suit of *Hine v. Smith*, and none of the said papers filed in said cause after said deed was delivered to Loveland can bind Loveland or his assignee. 7th. Because so far as the statement of the said Hine, filed in said cause, is concerned, and which was the only paper in existence at the date of the Loveland deed, which gives, or pretends to give, a description of the land in dispute in said suit of *Hine v. Smith*, and which statement is paper lettered 'A,' the same does not describe any particular piece of land so that the same may be located thereby. 8th. Because the said papers fall short of establishing the fact that the particular lots or lands in question in this suit were in litigation when the said deed from the probate judge to Loveland was executed and delivered, and are therefore immaterial and not relevant testimony."

The objections were overruled, and exceptions reserved. The said papers were substantially as follows:

No. 1.—"A"

Petition of Hine to the probate judge to the effect that

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the petitioner "is the owner and occupant of a portion of the west half of south-west quarter of section (27) twenty-seven, and east half of the south-east quarter of section twenty-eight, entered and included in the town site of Golden City, Jefferson county, C. T., owned and occupied by your petitioner. Your petitioner therefore prays that a deed for the above-mentioned tract of land may issue conveying said property to your petitioner in pursuance of law.

GOLDEN CITY, *December 5th, 1864.*

(Signed,)

HENRY B. HINE.

Continued until next term. J. M. Johnson, probate judge. Indorsed, Henry B. Hine, applicant for deed, Colorado Territory, *Jefferson Territory.*
Filed December 5th, 1864.

C. C. CARPENTER, *Clerk,*
By A. O. PATTERSON, *Deputy."*

"B."

"On the 16th day of January, 1862, D. K. Wall pre-empted the following described property, as described by E. L. Berthoud, county surveyor, to wit: Beginning at a stone lying on the north side of Clear creek, where Tucker Gulch creek enters Clear creek, and from said stone north 86° east, $8\frac{1}{2}$ chains to a post, thence north 50° east, $4\frac{1}{2}$ chains to a pine post, thence north 30° west, 10 chains to a large cottonwood $40\frac{2}{3}$ from Clear creek, thence north $34\frac{1}{2}$ east, 5 chains to another large cottonwood 50 links from Clear creek, thence north 39° east, $4\frac{1}{2}$ chains to another large cottonwood 70 links from Clear creek, thence north 21° east, $7\frac{1}{2}$ chains to a stone mound, thence north 20 chains to stone mound, thence west true course, 40 chains, to another stone mound, thence south $22\frac{1}{4}$ west, $11\frac{1}{2}$ chains to the north-east corner of Golden City town site, thence along said boundary to place of beginning, $38\frac{1}{2}$ chains, with course of $50^{\circ} 31'$ east, said land containing $143\frac{2}{3}$ acres. The above pre-emption is recorded in book B, page 271, and dated January 16th, A.

D. 1862. Wall to Hine deed, on the 25th day of June, 1862, D. K. Wall conveys, by deed of record, the above-described property to H. B. Hine, for \$2,000.00. Deed is duly recorded in book 'D,' pages 171 and 172."

Certificate of county clerk and recorder to the correctness of the foregoing, and that the title remained in Hine on the 31st day of December, 1864.

"C."

Certificate of county surveyor of the correctness of survey, and the following certificate of the county clerk.

"TERRITORY OF COLORADO, }
County of Jefferson. } ss.:

I, C. C. Carpenter, clerk of said county, do hereby certify that that portion of the north-west one-fourth, of south-west one-fourth, Sec. 27, T. 3 S., R. 70 west, embracing 28 30-100, according to the within claim or farm originally entered by D. K. Wall, and duly recorded in book B, page 271, and dated January 16th, A. D. 1862 (copy of said entry is herewith attached), and I further certify that the said 28 30-100 acres is embraced in the entry of the town site of Golden City.

In witness whereof I have hereunto set my hand and seal of said county this 2d day of January, 1865.

C. C. CARPENTER, *Clerk.*

By A. O. PATTERSON, *Deputy.*

Commencing at the north-east corner of the north-west quarter of the south-west quarter, section 27, township 3 south, range 70 west, running thence west 20 chains, thence south 2 chains, thence south 34° 30', 23½ chains, thence east 7 chains, thence north 20 chains to the place of beginning, containing 28 30-100 acres."

"D."

Appeal bond from Hine to Smith, reciting, "that, whereas Henry B. Hine lately obtained a decree in the probate

court in and for the county of Jefferson, and Territory of Colorado, for the title to a certain piece of land held in trust for the occupants of the towns ite of Golden City. Now if the said Ensign B. Smith shall prosecute his suit with effect or shall pay whatever damages and costs may be adjudged against him, then this obligation to be void, otherwise to remain in full force and effect." Duly signed and approved January 10, 1865.

"E."

Summons and sheriff's return of service, commanding the appearance of Smith before the probate court to answer the claim of Hine to land described as "28 acres in section 27, town 3, range 70 west, and lying in the town plat of Golden City."

"F."

"In the matter of the application of Henry Hine, on application to pre-empt certain lands, parcels of the town site of Golden City, Ensign B. Smith, summoned by the order of the probate judge of Jefferson county, Colorado Territory, moves the said probate judge to dismiss the said proceeding for the following reasons: First, because said application is not made within the time required by law; second, because said proceedings should have been by bill in chancery, and for other good and sufficient reasons of record. Wherefore he claims that said application may be dismissed.

(Signed,)

BROWNE, HUNT & COCHRAN,
Attorneys for Smith.

Overruled.

J. M. JOHNSON, *Probate Judge.*

Indorsed: Henry B. Hines, application to pre-empt part of Golden City.

Motion to dismiss, filed January 2d, A. D. 1865.

C. C. CARPENTER, *Clerk.*

By J. O. ALLEN, *Acting Deputy.*"

"H."

Subpœna issued January 2, 1865, for certain witnesses to appear before the probate court to testify on behalf of Hine in a cause pending in said court, "wherein H. B. Hine is plaintiff, and E. B. Smith is defendant."

No. 2.

"JEFFERSON COUNTY, }
Colorado Territory. } ss.:

In the matter of the claim of H. B. Hine and E. B. Smith for a title to a portion of the Golden City town site. It appearing that the original papers in the cause before said probate judge have been sent up to the supreme court and are now on file in the office of the clerk of said court, and they being necessary for the trial of said matter and can only be withdrawn by leave of said court, it is therefore stipulated that the hearing of said cause set for the 8th inst. be continued until said papers can be so withdrawn by leave of said supreme court, either party having leave to file amended petitions in said cause at any time before time.

(Signed)

S. E. BROWNE, *Att'y for Smith.*ALFRED SAYRE, *Att'y for Hine.*"

No. 3

"Summons to Smith and Hine to appear before the probate judge of Jefferson county on the 9th day of April, 1866, to contest their respective rights to the north-west quarter of the south-west quarter of section twenty-seven, township three (3) south, range seventy (70) west, being a portion of the town site of Golden City, in said county, under an act entitled 'An act prescribing rules and regulations for the execution of the trust arising under the act of Congress entitled 'An act for the relief of citizens of towns upon lands of the United States under certain circumstances,' approved March 11, 1864. Served by reading to Smith, Hine 'not found.'"

No. 4.

"JEFFERSON COUNTY, }
Colorado Territory. } ss.:

Before the probate judge. In the matter of the claim of Henry B. Hine and Ensign B. Smith for title to certain parts of the Golden City town site. It is hereby stipulated and agreed by and between the said Henry B. Hine and Ensign B. Smith, that the probate judge of said county of Jefferson shall convey to the said Ensign B. Smith the premises described in the several claims of said parties by such deed of conveyance as is authorized by law, and that the said Ensign B. Smith pay to the said probate judge the costs and expenses of making such conveyance, and also the sum due for the value of such premises as provided by the statute of said Territory of Colorado in that behalf.

(Signed)

ENSIGN B. SMITH,

By SAM. E. BROWNE, *his Attorney.*

HENRY B. HINE,

By ALFRED SAYRE, *his Attorney.*

Indorsed, *Hine v. Smith.*

Stipulation, filed October 2, 1869.

J. MANN, *Probate Judge.*"

No. 5.

"*Ensign B. Smith*, appellant, v. *Henry B. Hine*, appellee. Appeal from judge of probate of Jefferson county. January term, 1865.

The appellee, who was the petitioner below, filed his statement with the probate judge of Jefferson county, claiming to own and occupy the premises described therein in pursuance of the act of Congress of the 23d May, 1844, authorizing the entry in the land office of the proper land district a portion of the public domain in trust for the several use of citizens in towns situated on the public lands. The petition is dated the 5th day of December, 1865, and recites that petitioner is the owner and occupant of a por-

tion of sections 27 and 28, entered and included in the town site of Golden City, and prays the probate judge to execute a deed to him for the land therein described. The appellant, Smith, appeared before the probate judge and contested the claim of the petitioner, but upon what ground the record does not show, inasmuch as no statement of the claim of Smith to the land in question appears to have been filed by him. The determination of the probate judge was made in behalf of the appellee to the land described, at the January term of the probate court, 1865, from which determination Smith appealed to this court. We find no assignment of errors filed in this court, but in lieu thereof a brief filed by the counsel for the appellee, to which no counter brief was interposed. We are disposed to overlook the neglect to file an assignment of errors in this particular case, but we announce that in the future, in every case where the usual plea shall be wanting, the appeal will be summarily dismissed without further inquiry. This being a special proceeding out of the usual course, and in some sense, an anomalous one, we waive the irregularity in this instance of not formally assigning errors to be relied upon by the appellant. There is nothing on the face of the record from which we can ascertain the time when the entry was made in the land office of the United States by the probate judge, nor is it shown by the papers in the cause what section or part of sections of the public domain were so entered by the proper evidence in such case.

It is claimed that this proceeding was instituted under the special act of the legislative assembly, approved 3d of March, 1864, and that the appeal therefor should have been taken to the district court of the proper district; but we think the application was made under the general act of 11th of March, 1864, because in his petition Hine does not describe himself as residing on the land in dispute at the time of the entry by the probate judge, and as having been a party to the agreement mentioned in the first section of special act of 3d March, 1864. Under either act it was

clearly incumbent, upon the appellee Hine, particularly to set out and define the lands and specify the lots which he sought to have conveyed to him. The petition of the claimant is the foundation of the whole proceeding. It answers for the declaration in the cause, and it does not specify by metes and bounds the lands claimed by him with such certainty that the probate judge could execute a proper conveyance to the claimant. The evidence in the case introduced by the appellee specifically described the lands claimed, but it may as well have embraced any other portion of sections 27 and 28 as the portion designated. The claim or statement of the claim of Hine is the pleading in the case, and the plea and evidence must agree. The evidence adduced enlarges and defines the statement, and it is from the evidence, and not from the statement or claim filed, that the probate judge could accurately describe in the conveyance the land adjudged by him to the claimant Hine. Inasmuch as we think the petition or statement of Hine to be the basis of the whole proceeding, we do not find it necessary to consider other objections urged by the parties, but remand the cause, with leave to the appellee to amend his petition or statement, and for such other proceedings after such amendment as may be deemed necessary in the premises.

By the Court. Proceedings reversed with costs and cause remanded. The chief justice, having been of counsel, did not sit in the case.

Indorsed : *E. B. Smith v. Henry B. Hine.*

Opinion filed January 18th, 1869.

M. L. HERR, Clerk."

No. 6.

" TERRITORY OF COLORADO, }
County of Jefferson. } ss. :

To the sheriff of Jefferson county : You will give notice to Ensign B. Smith and Henry B. Hine, adverse claimants to certain lots or parcels of land in the Golden City town

site. Whereas, Ensign B. Smith has this day filed in the probate court of Jefferson county the decision of the supreme court of Colorado Territory, remanding said cause to the probate court for a new trial, Now you, Ensign B. Smith and Henry B. Hine, will each of you be and appear before the probate judge of Jefferson county, at his office in Golden City, on the 6th day of July, A. D. 1869, at ten o'clock, A. M., of said day, when and where your proofs and allegations will be heard in reference to said adverse claim.

Witness, J. M. Johnson, probate judge, and *ex-officio* clerk of the probate court at Golden City, Jefferson county, this 24th day of June, A. D. 1869.

[SEAL.]

J. M. JOHNSON, *Probate Judge.*"

This citation was served by the sheriff June 25th 1869, by personal service on Smith, and notice to Alfred Sayre, attorney of Hine.

No. 7.

"In the matter of Henry B. Hine, who claims a certain portion of the town site of Golden City, vs. Ensign B. Smith. Petition to the probate court or judge of Jefferson county for title. And now comes the said Ensign B. Smith, and files with the probate judge of said county the certificate of the clerk of the supreme court annulling and reversing the former order of the said probate court in the premises, and prays tha the may be permitted to file his claim for the title to said premises described in the evidence in said proceedings, and that the probate judge will forthwith cause such other and further proceedings in the premises to be taken on the part and behalf of the said Henry B. Hine, as are ordered and directed in the judgment of the supreme court of Colorado Territory in that behalf, by a short day to be named in such order, and issue citation thereon.

S. E. BROWNE,

Attorney for E. B. Smith, the claimant and contestant."

Indorsed : Filed January 24, 1869.

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No. 8.

"In the Supreme Court of the Territory of Colorado, at the July term thereof, A. D. 1868, *Ensign B. Smith, appellant, v. Henry B. Hine, appellee*. Appeal from probate court, Jefferson county. This cause having been argued and submitted to the court heretofore, and at the July term, A. D. 1867, and hereupon all and singular the premises being seen, and by the said court before the justices thereof, now here fully understood, and mature deliberation being thereupon had, it appears to the said court that in the record, and proceedings aforesaid, there is manifest error. Therefore it is considered that the judgment aforesaid for the errors aforesaid, be revoked, reversed and altogether held for naught and that the said appellant be restored to all things which he hath lost by occasion of said judgment. And it is further considered that said appellant do have and recover of and from the said appellee the sum of —— dollars and —— cents, for his costs and charges by him laid out and expended in the prosecution of the aforesaid appeal, by the said court now here adjudged to the said appellant with his assent, and that execution issue therefor; and it is further ordered that this cause be remanded. The chief justice, having been of counsel, did not sit in this cause.

Certificate of the clerk of the Supreme Court that the foregoing order was made and entered of record in said court in said cause January 18th, 1869."

Filed June 24, 1869.

No. 9.

"To the Hon. JONAS M. JOHNSON, probate judge of Jefferson county, in the Territory of Colorado :

I, Ensign B. Smith, of said county, do hereby file my claim for title to a certain portion of the Golden City town site, in said county, and which is particularly and fully described on the plat or map herewith filed, marked 'A,' and in the description thereof, also herewith filed, marked

'B,' and both of which are made a part of this petition. And the said claimant further says that he claims title to the said land and premises by virtue of settlement, occupancy, and lasting and valuable improvements made thereon by his grantor and purchased by him. Said claimant further says that he occupied and cultivated said premises for four years, and paid all taxes assessed against the said premises for said period. He files this claim as an amendment to his former claim on the 25th day of May, A. D. 1866, and in pursuance of the judgment of the Supreme Court of said Territory.

(Signed,)

E. B. SMITH.

Beginning at the north-east corner of Golden City town site, as established by N. P. Reynolds, county surveyor, or which north-east corner of town is also the north-east corner of the west one-half of south-west quarter, section 27, town No. 3 south, range 70 west, and from said corner west true course 20 chains to a one-quarter section corner, thence south true course 2 chains 28 links, to a stake, thence along east side of East street as originally laid out and as shown in plat on record in Jefferson county, south 35° 30' east 21 chains 74 links to a stake, thence east true course 7 chains 52 links to a corner on east boundary of town site, thence north true course 20 chains to the point of beginning: said tract of land containing 29 and 65-100 acres, more or less, and surveyed and lines run with a variation of 15° east.

E. L. BERTHOUD, *Engineer*.

Indorsed: Filed July 2d, 1869.

J. M. JOHNSON, *Probate Judge*."

The plaintiff then offered an entry in evidence in book "B," referred to by witness Jameson, on page 119, to which the defendant objected, because the same was irrelevant, immaterial and incompetent testimony, but the court overruled the said objection and allowed the said entry to be read in evidence, to which ruling of the court the defend-

ant then and there excepted, which entry is in the words and figures following, to wit: "Henry B. Hine and Ensign B. Smith, contestants to certain lands in Golden City town site, before J. M. JOHNSON, probate judge. Suit remanded with leave to appellee to amend petition. By agreement of parties, suit was set for Friday, the 23d of August. Hine, by his attorney, Alfred Sayre, asked for subpoena, and which was issued. July 23d, Henry B. Hine appeared, by Alfred Sayre, his attorney, and E. B. Smith by Browne and Mechling, his attorneys, and by agreement of counsel this cause is continued for sixty days, or until September the 2d, 1869, at ten o'clock A. M.

Attest, J. M. JOHNSON, *Probate Judge.*"

The plaintiff then offered in evidence an entry on page 17 of said book "B," to which the defendant objected, because the same was incompetent, irrelevant and immaterial evidence, but the court overruled the said objections and allowed the said entry to be read in evidence, to which ruling of the court the defendant then and there excepted: said entry is in the words and figures following, to wit: "*Henry B. Hine, v. E. B. Smith.* In chancery. January term. And now, on this second day of the term comes plaintiff by his attorney, and E. B. Smith by his attorney, whereupon plaintiff moves the court to give judgment for plaintiff (defendant not having set up any claim in writing nor deposited the money as required by statute), and grant deed for the land claimed in plaintiff's petition; whereupon the court, after examining the petition and evidence, and the money having been tendered as required by section — ordered the petition granted and a deed to be made to Henry B. Hine, plaintiff; whereupon the defendant gave notice of appeal.

Attest, J. M. JOHNSON, *Probate Judge.*

Transcript made February 7th, 1867."

The plaintiff then called J. M. Johnson as a witness, who testified that he was probate judge of Jefferson county in

1864, and as such probate judge executed the deed to Loveland, introduced in evidence by the defendant. The following question was here asked witness: "What lands were in litigation at the time you executed the Loveland deed? To which the defendant objected, because not the best evidence, incompetent, irrelevant and immaterial; that if there was any land in litigation, the record of the suits was the best evidence, and the same could not be shown by parol, but the court overruled said objections, to which ruling the defendant then and there excepted — witness answered: There was the first lot on the corner, where Everett's Bank is, and these fifteen acres on the east side of East street, the same land that Smith claims now. *Question*: Who was litigating about that land? Objected to by defendant, because not competent, material or rebuttal testimony, but the court overruled said objections, to which ruling the defendant then and there excepted. *Answer*: Mr. Hine and Mr. Smith. The trial was commenced before me, before the Loveland deed was made. *Question*: Did Mr. Loveland, at the time you made this deed, claim that land at all that Smith and Hine were litigating about? To which defendant objected because not competent, material or relevant, and not rebuttal, but the court overruled said objections, to which ruling of the court the defendant then and there excepted. *Answer*: No, sir, there was no claim set up by anybody except these two men before me. Here the papers in wrapper 'G,' heretofore introduced, were handed this witness, who said part of these were filed before me and part not. I went out of office before that litigation was finally determined. This entry in book 'B,' page 17, is in my handwriting, and concerns this land, was made in suit between Hine and Smith, and entry on page 119 is also in my handwriting. *Question*: Was it with reference to this land and these lots which you say were in litigation that you made the exceptions in the Loveland deed? To which the defendant objected because neither competent, material or relevant, but the court overruled the said objections, to

which ruling the defendant then and there excepted. *Answer*: Of course it was."

Here the evidence was closed, but afterward, on the 21st of November, 1877, on motion of the plaintiff, the case was re-opened and the plaintiff introduced Joseph Mann as a witness, who testified as follows: I was probate judge of Jefferson county in 1868 or 1869, am not certain which. The following question was then asked witness: "Was there a matter in controversy before you while you were probate judge, between Hine and Smith in reference to land? To which question the defendant objected, because the evidence sought was not the best evidence, not competent, could not be proved by parol, but the court overruled said objections, to which ruling the defendant then and there excepted. *Answer*: There had been before I came into office. There was a stipulation filed before me between Hine and Smith. I never tried any matter between them. This is the stipulation, referring to one of the papers in wrapper 'G,' and is paper No. 4. I made a deed to Smith in pursuance of that stipulation. I do not think I made any record of the matter."

Jonas M. Johnson was then sworn on part of plaintiff, and said: "I do not recollect whether I made any other entry in suit of *Hine v. Smith*, than those on pages 17 and 119 of book 'B.'"

Question: "Can you describe the land in controversy between Hine and Smith? To which the defendant objected, because the evidence sought was not the best evidence, and is incompetent, irrelevant and immaterial. Such fact cannot be established by parol. But the court overruled said objections, to which ruling the defendant then and there excepted. *Answer*: It is a portion of section twenty-seven, lying between the east line of the part of the subdivision of the quarter on East street; is a part of the south-west quarter of said section, that part which lies east of East street. *Question*: Did Mr. Hine file along with his petition, subsequently or before you decided the

case, a survey showing the land he claimed? To which defendant objected, because immaterial and not the best evidence, but the court overruled the said objections, to which ruling the defendant then and there excepted.

Answer: Before I made the decision there was a survey bill of this particular portion filed before me by Hine, which described particularly the piece of land I have mentioned that lies east of East street, in section twenty-seven; I can tell why I know it was filed; when he first applied for this land, he applied for the whole as farming land; I told him I had no right to give a deed for that, but must confine it to what is in the town of Golden City; he then got a surveyor and made a survey bill of this particular portion, and had it filed with the court; this must have been before I gave a decision; I could not say now, but I suppose it was before then, because otherwise I would not have given a decision; there was no house on that land at that time except the remains of the house of the original proprietor of the land, David K. Wall. On cross-examination witness said, I do not remember whether the survey bill was filed before the 23d day of December or not; I do not think it was filed after the case had been decided by the supreme court, but am quite confident it was done before then; that part of said town site lying east of East street was not then laid off into lots and blocks, nor at any time prior thereto."

Here the plaintiff, E. B. Smith, was sworn in his own behalf, and testified: "I was present at the trial of the suit between Hine and myself before J. M. Johnson, probate judge, but do not recollect particularly the evidence given in that case. *Question:* Was there a survey given in evidence at that time? To which the defendant objected, because such evidence is immaterial, irrelevant and not competent, but the court overruled said objections, to which ruling of the court defendant then and there excepted. *Answer:* I think there was; I know when that survey was made, but cannot now give the date. *Question:* Of what land was

that survey given in evidence? To which defendant objected, because not the best evidence, incompetent and immaterial, but the court overruled the said objections, to which ruling the defendant then and there excepted. *Answer*: The portion of section twenty-seven lying east of East street. *Question*: Describe that land, if you can. To which question the defendant objected, because incompetent, irrelevant and immaterial, and not the best evidence, but the court overruled said objections, to which ruling the defendant then and there excepted. *Answer*: It is the west half of the south-west quarter, I think, of section twenty-seven, that lies east of East street."

Here the plaintiff read in evidence a private act of the legislative assembly of Colorado Territory, entitled "An act to legalize and confirm the entry of the town site of Golden City approved March 3d, 1864, found on pages 213 and 214, Session Laws of 1864.

The defendant here read in evidence certified copy from the register and receiver's office of the town site entry of Golden City, showing that such entry was made on the 18th day of January, 1864, whereupon the court found the issues in favor of the plaintiff, to which finding the defendant then and there excepted, and thereupon the court gave judgment upon said finding in favor of the plaintiff, to which judgment the defendant then and there excepted.

To reverse this judgment the defendant below prayed an appeal to this court.

Messrs. WILLARD TELLER and A. H. DE FRANCE, for appellant.

Mr. JOHN W. BLACKBURN, for appellee.

ELBERT, J. The deed made by the probate judge to Loveland excepted from the grant "what lots have heretofore been conveyed and what now remain in litigation, and the title yet undetermined by the probate judge, holding them in trust for the occupants of the town site of Golden

City, under the pre-emption laws of Congress, for the use of the occupants thereof."

It was competent to make certain the subject-matter of this exception by evidence *aliunde*. The exception in the deed being of lands in litigation and undetermined by the probate judge, the record and files in the case of *Hine v. Smith*, pending before the probate judge at the date of the deed to Loveland, was the best evidence to show what lands were in controversy in that case, with a view of showing the subject-matter of the exception.

We think that the records and files put in evidence sufficiently described and made certain the lands in litigation, and thus definitely ascertained the subject-matter of the exception. The "written statement" of Smith, and the plat and survey of the surveyor Davis, according to Johnson's testimony presumably filed by Hine, described by metes and bounds the lands in controversy. It is objected that these documents were not in the case at the date of Loveland's deed, and cannot be used as evidence against him or his grantees. This is not tenable. They both appear to have been put in and used in the progress of the litigation for the purpose of accurately and definitely describing the lands litigated. They do not change, but make definite and certain the description of the lands claimed in Hine's petition, which was pending at the date of the deed. They do not substantially enlarge the acreage, for this is named as 28 acres in the summons issued prior to the deed. The plat and survey fix the acreage at 28 30-100 acres; the statement at 29 65-100 acres. Substantially they describe the same land. The metes and bounds of the statement include the 28 30-100 acres described in the survey and plat of Davis and one acre more. The deed made by the probate Judge MANN to the plaintiff Smith as the result of this litigation, adopts the metes and bounds of the Davis plat and survey, and conveys 28 30-100 acres.

Doubtless any fraudulent change by way of amendment of the pleadings affecting substantially the amount of land

in litigation, or shifting the boundaries so as to include other and more valuable lands, would afford grounds for the interposition of a court of equity, but in the absence of any such showing or suspicion of fraud, the files mentioned were admissible as evidence against Loveland and his grantees, for the purpose of showing the subject-matter of the exception in the deed.

In addition to the record and files in the case of *Hine v. Smith*, parol evidence was introduced for the same purpose. This is assigned for error.

The rule is, that where general terms of description are used in a contract or conveyance, parol evidence is admissible to apply it to the subject-matter. 1 Greenl. on Ev., § 286 *et seq.*, and cases cited.

In the case of *Gerrish v. Twome*, 3 Gray, 87, BIGELOW, J., states the rule more at length, as follows: "Whenever, in a contract or conveyance, an estate is specifically and fully described by monuments, bounds and admeasurements, no evidence *de hors* the writing can be admitted to show the intention of the parties in making the contract or conveyance, or to prove what estate is comprehended by the written description. But where general terms only are used to designate the subject-matter of the agreement or conveyance, or the description is of a nature to call for evidence to ascertain the relative situation, nature and qualities of the estate, then parol evidence is not only admissible, but is absolutely essential to ascertain the true meaning of the instrument, and to determine its true application with reference to extrinsic circumstances and objects. In such cases, parol evidence is not used to vary, contradict or control the written contract of the parties, but to apply it to the subject-matter, and thereby render certain what would otherwise be doubtful and indefinite. For this reason any evidence which tends to indicate the nature of the subject-matter included in a written contract, which would otherwise be uncertain or ambiguous, and to determine its application relatively to other objects, is admissible as afford-

ing just means of interpretation of the intention of the parties."

An exception in a deed is the taking of something out of the thing granted which would otherwise pass by the deed, and, in general terms, it is said that it ought to be stated and described as fully and accurately as if the grantee were the grantor of the thing excepted, and the grantor in the deed were made the grantee in the exception. Whatever may pass by words of grant may be excepted by like words and the same consequences attach to such an exception as would attach had it been a grant. 3 Wash. R. P. 431, 435.

Having reference to the character of an exception in a conveyance, the same general rule as to the admissibility of parol evidence must apply. Where the subject-matter of the exception is described in general terms, parol evidence is admissible to give it effect as if it had been a grant. Applying the rule to the case at bar, the record and files of the court before which the litigation was pending, was doubtless the best evidence, but in its absence or incompleteness, parol evidence, under the rule, was admissible for the same purpose.

While it was, perhaps, unnecessary in this case, it was none the less competent, and as a matter of fact corroborated the evidence offered by the record and files.

There was, therefore, no error in admitting it.

Whether the exception in the deed would be inoperative for want of jurisdiction of the probate judge in the litigation mentioned, we need not determine, as he had jurisdiction both of the subject-matter and the persons. Nor do we see how the failure of both Hine and Smith to file their "statements," as claimants under the statute within the time limited, can affect the case. *Firstly*, it did not go to the jurisdiction of the court, but to the right of each to recover, and the record could not be questioned in this respect collaterally. *Secondly*, in our view, the litigation is referred to as matter of description, and the operation of the exception in no wise depended either on the regularity

or result of the litigation. It would have been equally operative if both claimants had failed in establishing a right to the land in litigation.

On the trial of this case below, and in argument here, counsel have proceeded on the assumption that the *onus* was on the plaintiff, and not on the defendant, to show the lands coming within the exception. We have so treated it, because if resolved otherwise it would not change the result, but we are not to be understood as impliedly passing on the question.

Judgment affirmed.

GENERAL TERMS OF DESCRIPTION IN CONVEYANCE may be explained by parol evidence: *Murray v. Hobson*, 10 Colo. 78.

EXCEPTION IN DEED IN GENERAL TERMS MAY BE MADE CERTAIN by evidence otherwise: *Loughlin v. Hawley*, 9 Colo. 174; *Loveland v. Clark*, 11 Colo. 271. See, also, *Pipe v. Smith*, 8 Colo. 154.

Goss v. BOARD OF COMMISSIONERS OF BOULDER COUNTY.

1. Upon a motion to quash a writ of attachment in aid, the court may look into the averments of both complaint and affidavit, for the purpose of determining the motion.
2. While the Code abolishes the *forms* of actions, it cannot obliterate the distinctions between the causes or nature of actions.
3. Where money comes rightfully into one's hands, he cannot, by reason of a subsequent misapplication of such money, be charged with fraudulently contracting a debt so as to authorize an attachment upon that ground.
4. The bond of the county treasurer (Gen. Laws, § 527) is the measure of his duties as treasurer, and is the contract covering his duties and all those in his employment performing the duties of the office.
5. Under our statutes neither a deputy treasurer nor clerk gives bond to the public for the faithful performance of his duties, and there is no such privity between the county or the public and the deputy treasurer or clerk, as to create an implied contract between them in the face of an express contract between the treasurer and the public.
6. Section 113 of the Code authorizes the court to dismiss an attachment on motion, when it appears from the face of the papers or the proceedings that the writ was improperly issued.
7. An affidavit in attachment stands as a pleading and is properly brought up by the record without being included in the statement required by the Code.
8. In causes pending at the time of the adoption of the Code, the assignment of errors might be filed *nunc pro tunc*, and considered the same as though incorporated in the statement, as contemplated by the Code.

Appeal from District Court of Boulder County.

THE case is stated in the opinion.

Messrs. J. B. BELFORD & CLINTON REED, for appellant.

Messrs. W. A. HARDENBROOK & L. C. ROCKWELL, for appellees.

STONE, J. The declaration avers that in 1871, Daniel A. Robinson was elected treasurer of the county of Boulder, and served out his full term, and having been re-elected, he served the second term ; that he duly qualified and gave his official bond for each of said terms ; that upon his first election he appointed the defendant his clerk, and upon re-election he re-appointed said defendant clerk, and afterward appointed him deputy treasurer ; that the defendant, in the course of his employment as such clerk and deputy, received large sums of money belonging to the county, and that of such money he failed to account for \$2,500 ; that he failed to pay over the same to the said Robinson, or to the county, or to Robinson's successor in office, but had the same in his hands at the time Robinson ceased to be treasurer, and fraudulently and unlawfully converted the same to his own use, "whereby the defendant has become and is indebted to said plaintiff in the sum of \$2,529.22, and fraudulently incurred said debt as above stated.'

Upon the same day of the issuance of summons, an affidavit for attachment was filed, which is as follows :

"William A. Hardenbrook, of lawful age, being first duly sworn according to law, says : he is the agent of the plaintiff in the above-entitled cause, and that the defendant, Percy D. Goss, is indebted to said plaintiff in the sum of \$2,529.22 over and above all legal set-offs and counter-claims upon an implied obligation for the payment of money, to wit: for money and property of said Boulder county, which said defendant took while employed in the office of the treasurer of said Boulder county, as the clerk

of Daniel A. Robinson, its treasurer, and deputy treasurer of said Boulder county under said Robinson, and fraudulently and wrongfully converted the same to his own use and benefit. That Percy D. Goss fraudulently contracted the debt and incurred the liability respecting which this suit is brought. That said writ of attachment is to be levied on personal property as well as real estate, and that the value of the personal property about to be attached is \$2,000."

A writ of attachment was issued and served, and at the term of court next ensuing, the defendant by his attorneys appeared specially and filed a motion to quash the writ for the reasons :

"1st. Because it appears from the papers filed in this cause that the writ of attachment was improperly issued.

2nd. Because an attachment does not lie except in actions upon contracts, express or implied, and it appears from the demand and papers herein that this is not such an action.

3rd. Because the declaration and affidavit show that there is no contract sued on, either express or implied, between the parties hereto; and that the defendant is not liable to the plaintiff for the money sued for in this cause, or any part thereof.

4th. Because the petition is not properly verified, and no writ of attachment can legally issue thereon.

5th. Because no sufficient bond was filed," etc.

The motion coming on to be heard was denied by the court, and to the denying said motion the defendant excepted and appealed to this court, and assigns for error:

"That the court erred in overruling the motion to quash the attachment sued out in said cause."

The action is brought under the Code and the declaration or complaint alleges the facts which constitute the cause of action. The affidavit for attachment alleges an indebtedness from defendant to plaintiff, and, as ground for the writ, avers, that the debt was fraudulently contracted.

Upon the motion to quash the writ the court below could properly look into the averments of both complaint and affidavit in order to determine the motion. From these averments we must conclude that the defendant is not liable in the action brought, and hence the writ did not lie. Section 91 of the Code provides that attachments may issue (upon the grounds enumerated in the next section) in "an action on contract, express or implied."

While the Code abolishes *forms* of actions, it cannot obliterate the distinctions between the causes or nature of actions; as for example, actions *ex delicto* and *ex contractu*. The only ground upon which the writ is based is, that the debt was fraudulently contracted. The money having, as the complaint shows, come rightfully into the hands of appellant, it cannot be said that by reason of subsequent misappropriation he fraudulently contracted a debt; there is in such case no contract except that which the law raises by implication.

The statute provides that the condition of the treasurer's bond shall be "that if the said ——— and his deputy, and all persons employed in his office, shall faithfully and promptly perform the duties of said office, and if the said ——— and his deputies shall pay according to law all moneys which shall come to his hands as treasurer, and will render a true and just account thereof whenever required by the Board of Commissioners or by any provision of law, and shall deliver over to his successor in office or to any other person authorized by law to receive the same, all moneys, books, papers and other things appertaining thereto or belonging to his office, the above obligation to be void," etc. R. S., p. 183. The same statute is re-enacted in the General Laws of the State, § 527. This bond is the measure of the duties of the treasurer. *Perley v. County*, 33 Mich. 141. Such bond, the complaint avers, was given by Robinson as treasurer, by and under whom the defendant was employed as clerk and deputy, and this bond was the contract covering the duties of the treasurer

and all those in his employ performing the duties of the office. Upon such bond the acts of the defendant, while so employed, created a liability on the part of the treasurer by express terms.

In the case of *Walker v. Brown*, 28 Ill. 378, it is held that an implied contract cannot exist when there is an existing express contract respecting the same subject. In that case the plaintiff sued the defendant upon an implied contract, when there existed an express contract under seal between plaintiff and a third party, embracing the identical subject-matter of the suit, and it therefore presents a parallel to this case. The court say: "As in physics, two solid bodies cannot occupy the same space at the same time, so in law and common sense, there cannot be an express and an implied contract for the same thing existing at the same time. This is an axiomatic truth. It is only where parties do not expressly agree that the law interposes and raises a promise."

This doctrine is supported by numerous authorities, English and American, cited and reviewed in the principal case.

Under our statute neither a deputy treasurer nor clerk gives a bond to the public for the faithful performance of the duties he undertakes. By the permissive authority of the statute, and under the guaranty of the treasurer's bond, the deputies and clerks are appointed by the treasurer, and by him employed and paid. With their compensation and terms of service the public has nothing to do. The relation of debtor and creditor between the county and the treasurer is unaffected by the circumstance that the duties of the latter are discharged by deputy or clerical agency. There is no such privity between the county or the public, and the deputy or clerk, as to create an implied contract between them in the face of an express contract between the treasurer and the public, embracing the duties of the office by whomsoever performed, and covering the acts here complained of.

Sections 113 and 114 of the Code authorize the court to discharge the attachment upon motion, whenever it satisfactorily appears, "that the writ was improperly issued for any reason appearing on the face of the papers and proceedings in the action." Looking to the affidavit and complaint, we must say that there is no express or implied contract between the appellant and appellee; and it follows that the attachment was improperly issued and should have been discharged under the motion.

Counsel for appellee raise a preliminary question whether the record is sufficient to bring before the court the errors relied upon; and it is insisted, first—that the bill of exceptions, or statement, does not contain the affidavit in attachment; and, second—that it does not contain a statement of the errors assigned.

As to the first point it may be said that the affidavit in attachment stands as a pleading, not alone in cases commenced originally by attachment, but where sued out in aid of an action the affidavit answers to the complaint *in that proceeding*, and hence is so far a pleading that it is properly brought up by the record without being included in the statement required by the Code.

As to the second point, we need only refer to the ruling made by this court in the case of *Willoughby v. Brown*, unreported, upon the authority of *Barrett v. Tewksbury*, 15 Cal. 357, that as to causes then pending (June 18, 1878), the assignment or specification of errors might be filed *nunc pro tunc*, and considered the same as though incorporated in the statement as contemplated by the Code, and this being one of the pending causes, is embraced in the rule.

The order denying the motion to quash the writ is reversed, and the cause remanded.

Reversed.

AFFIDAVIT IN ATTACHMENT STANDS AS PLEADING, and is properly brought up by the record without being included in the statement required by the code: *Buddie v. Spangler*, 13 Colo. 220.

BACON v. LAMB.

1. The filing of a notice of appeal and service on the same day must be presumed to have been cotemporaneous. The notice of appeal need not state the grounds of appeal.
2. Under the Code, on a trial to the court, a judgment reserved is deemed excepted to for the purpose of appeal.

Appeal from County Court of El Paso County.

Mr. Wm. HARRISON, for appellee, now moved to dismiss the appeal.

Mr. T. A. McMorris, *contra*.

Per Curiam. The grounds assigned for the dismissal of this appeal are not good. The filing of the notice of appeal and service were on the same day, and are presumed to have been cotemporaneous. It is not necessary that the notice of appeal should state the grounds of appeal. Under section 197 of the Code, where a case has been tried to the court, and the decision is not made immediately after the closing of the testimony, it is deemed excepted to for the purpose of review on appeal. *Motion denied.*

FILING AND SERVICE OF NOTICE OF APPEAL ON SAME DAY are presumed to have been cotemporaneous: *Daniels v. Daniels*, 9 Colo. 134.

BARNDOLLAR et al. v. PATTON.

Deficiencies in the record cannot be supplied by *ex parte* affidavits. An application to have a sheriff amend his return to a writ of summons must be addressed to the court below.

Error to County Court of Pueblo County.

Mr. T. T. PLAYER, for plaintiff in error, now moved to strike from the files of this cause an affidavit of defendant in error purporting to correct the sheriff's return to the summons in the court below.

Mr. JOHN W. HORNER, *contra*.

Per Curiam. The motion in this case must be allowed. Deficiencies in the record cannot be supplied by *ex parte* affidavits. If the defendant in error desires to have the sheriff amend his return, he must apply to the court below.

The affidavit might be considered in support of a motion for a stay of proceedings in this court until such application could be made, but there is no such motion interposed, and the affidavit must be stricken from the files.

The case of *De Armond et al. v. Adams et al.*, 25 Ind. 457, cited by the defendant in error, does not lay down any different practice as is claimed.

Motion allowed.

SWENSON v. GIRARD F. AND M. INS. Co.

1. The statute (Gen. Laws, p. 254) does not contemplate a bill of exceptions in the trial of a case in the district court upon appeal from the county court. Such trials are essentially new trials, and any objections to pleadings, and the like, made in the county court, and necessary to be reviewed, are limited to those which arise upon the record and files brought up on the appeal.
2. Under the Constitution (Sec. 23, Art. VI) appeals may be taken from the county courts to the district courts, and the manner is pointed out and provided for by statute (Gen. Laws, p. 254).
3. When the party appealing has entered into the appeal bond, and the same is accepted and approved by the county judge, the appeal is taken.
4. No time being fixed by the statute within which the transcript and papers on appeal are to be filed in the district court, it is the implied duty of the county judge or the clerk to make out and transmit such papers immediately upon approval and filing of the appeal bond. The failure to perform this ministerial duty should not affect the appellant.

Appeal from District Court of Arapahoe County.

This action was originally commenced in the county court of Arapahoe county by Swenson, for the use of Walker, against the Girard Fire and Marine Insurance Co., the

appellant. In that court the plaintiff obtained a verdict in the sum of \$853.28, and judgment was thereafter entered in that amount and costs, in favor of the plaintiff. The defendant prayed an appeal to the district court of Arapahoe county. The bond on appeal was filed in the county court and approved within the time fixed. At the January term, 1878, of the district court, the appellee filed his motion in the district court to dismiss the appeal; the principal grounds of this motion are stated in the opinion. At the same term and two days after the filing of the motion to dismiss, the appellant filed in the district court a transcript of the orders of court made in the cause in the county court, accompanied by certain files purporting to be the original files of the case in the county court, but not attached to the transcript, nor in any way identified as the said original files. On the 1st of March thereafter the appellant filed the affidavit of W. S. Decker, stating that on the 10th of January, 1878, he requested the acting clerk of the county court to send up the papers of the case and a transcript of the proceedings to the district court, and that he supposed it had been done. On the same day the appellee filed the affidavit of the said clerk of the county court, which in terms denies the statement of Mr. Decker, and affirms that since the day of the filing of the said appeal bond, the appellant had done nothing whatever toward perfecting his said appeal.

On the 26th of March following, at the special term of the said district court, the motion of the said appellee was sustained, the appeal dismissed and the cause stricken from the docket.

From the entry of this final order of the district court, the appellant has taken this appeal.

Messrs. SYMES & DECKER, for appellant.

Messrs. CHARLES & DILLON, for appellee.

STONE, J. This case is brought up on appeal from an order of the district court dismissing an appeal to that court from the county court. The grounds of the motion for dis-

missal in the court below are, that first, no bill of exceptions was filed by the appellant in the county court, and that the district court could not pass upon the appeal without such bill of exceptions; second, that the district court had no jurisdiction of said appeal for the reason that said court has not been sufficiently clothed by law with appellate jurisdiction to enable it to entertain and determine appeals from county courts; third, that appellant did not prosecute such appeal with due diligence. The record not showing otherwise, we must presume that the district court based its judgment on one or more of these grounds.

In an appeal from the county court to the district court is a bill of exceptions necessary?

Appeals from county to district courts are provided for by sections 575, 576, 577 of the General Laws, p. 254. So much of section 576 as is pertinent to this question is as follows: "In all appeals provided for in the foregoing sections the proceedings in the appellate court shall be in all respects *de novo*. Said appellate court shall consider and pass upon all objections to the pleadings and proceedings in said cause which may have been made in the county court, and make such orders and render such judgment or decree as shall be meet and proper—in the same manner as though such cause had been originally begun in said district court—and the defendant, where judgment has been rendered by default, shall have a right to plead any and all defenses which he might have pleaded had the cause been originally brought in the district court. All such causes shall be conducted in the same manner as if originally brought in the district court, etc."

This statute differs somewhat from our former statute relating to appeals from probate courts to district courts in that, *inter alia*, it contains the added words "said appellate court shall consider and pass upon all objections to the pleadings and proceedings in the said cause which may have been made in the county court," and it is insisted by counsel for appellee that to enable the district court to carry

out this provision a bill of exceptions is necessary. We cannot think this was contemplated by the statute. The precise meaning of this language is perhaps somewhat obscure, but taken in connection with the entire section is not, we think, beyond reasonable interpretation.

The prominent feature of such appeals is that the trial in the appellate court shall be *de novo*. To effect this no bill of exceptions can be necessary or contemplated. And while it cannot be supposed that such appellate court is to proceed as a court of review merely, yet the language in question seems fairly to imply that certain questions raised in the county court may be passed upon when necessary by the district court. Treating upon the subject of appeals, Mr. Hilliard, in his work on New Trials, page 701 (second edition), remarks that the term "appeal" is in the several States used in very different senses, and has to a great extent, in statutes and decisions, lost its distinctive meaning, having become the generic term for all forms of rehearing or else nearly or quite synonymous with error or new trial. The obvious intent of our statute is that the proceeding on appeal shall be a new trial upon the issues made in the county court, but that when an objection has been made in the county court to any of the pleadings, as for example by demurrer, the question raised by such objection may be passed upon by the district court on appeal and the issue settled or resettled in the case "as though such cause had been originally begun in the district court." Precisely what is meant by objections to "proceedings," aside from the pleadings in the cause, is more difficult to determine; but that it cannot be held to refer to objections to evidence and the like incidents of the trial, is evident from the requirements that the trial in the appellate court shall be *de novo*. We may fairly conceive that such "proceedings" might embrace rulings of the county court upon motions antecedent to the trial, involving jurisdictional questions as proper to be considered and determined by the appellate court as questions arising upon the pleadings. In this view

we cannot admit that the statute requires or contemplates a bill of exceptions in the trial of a case in the district court upon appeals from the county court. Such trials are essentially new trials, and any objections to pleadings and the like, made in the county court, and necessary to be reviewed, we think are limited to those which arise upon the record and files brought up on the appeal.

Under this view where the files in the cause do not show the objections taken to the pleadings and proceedings prior to the trial, they should be shown by the certified record entries, if the appellant desire to have them considered by the district court; and to this end he might properly by *præcipe* indicate what of the record entries he wishes to have certified.

Upon the point made that the district court is without jurisdiction to entertain appeals from the county court, it is urged by counsel for appellee that the act authorizing such appeals is inoperative and void for the reason that the county and district courts being courts of concurrent jurisdiction, an appeal will not lie from one to the other. Whatever weight this objection might have, if aimed at an act of the legislature alone, it certainly cannot avail against the provisions of the State Constitution expressly conferring such right.

Section 11 of article 6 of the Constitution provides that the district courts shall have "such appellate jurisdiction as may be conferred by law;" and section 23 of the article declares that "appeals may be taken from county to district courts, or to the supreme court in such cases and in such manner as may be prescribed by law." We accept as sound law the authority cited by counsel that "the Constitution cannot in respect of appeals execute its own provisions independent of legislative enactment," but, there being a full grant of authority in the Constitution, it only remains to examine whether the legislative assembly has "prescribed by law" a sufficient mode of carrying out the constitutional provisions.

By reference to the sections of the General Laws referred to above, sections 575, 576, 577 (General Laws, page 254), it will be found that the mode and manner of taking appeals "from all final judgments or decrees of said county courts to the district court of the same county," is pointed out and provided for. And while in some respects these provisions might well have been made more specific, and clearer in the language employed, yet upon the whole the statute seems to be as full and explicit as the law of 1872 in providing for like appeals from the probate to the district courts, and we can see no such defect in the statute or difficulty in its construction as will warrant us in holding it insufficient to carry out the provisions of the Constitution authorizing such appeals.

The point made that the appellant had not used diligence in prosecuting the appeal to the district court seems not to be sustained by the record and is insufficient to warrant the dismissal of the appeal. While it is true that in the interest of clients, as well as in the furtherance of the dispatch of business by the courts, it is to be expected that attorneys will be prompt and assiduous in seeing that causes are not delayed through their own neglect, and that in the matter of appeals they take prompt steps and give timely directions to the officers of the courts in the matter of perfecting the appeal, yet, so far as regards making a transcript of the record, and transmitting it with the necessary papers to the appellate court, this is a ministerial duty to be performed by the proper officers of the court appealed from, and any delay or default in the discharge of such duty ought not to work injury to the appellant, who has duly filed the requisite appeal bond and otherwise complied with the statute and the lawful orders of the court in the premises. With respect to an appeal from a justice of the peace to the circuit court, in a case where a similar question arose, the supreme court of Illinois says: "When the party appealing has entered into the appeal bond, and the same is accepted and approved by the justice, the appeal is

taken. He has done all that the law requires of him, and what remains to be done, to wit: the return of the papers to the clerk, is to be performed by the justice of the peace.

In the performance of this act, which is merely ministerial, the justice is the officer of the law, and not the agent of the party, and consequently the party cannot be held responsible for his neglect." *Little v. Smith*, 4 Scammon, 402.

In an appeal from the county court to the superior court of that State it was held that, in the approval and filing of such bond by the county judge, he acts as a justice in a similar case, and that "the neglect of the county judge, or of the clerk of the county court, to file the bond in the superior court within the time limited by the statute, does not defeat the appeal. This was a mere ministerial duty on the part of the officer, the failure to perform which should not injure the appellant." *Beardsly v. Hill*, 61 Ill. 356.

No time is fixed by our statute within which the transcript and papers on such appeal are to be filed in the district court, and the implied duty, therefore, of the judge or clerk of the county court, is to make out and transmit such papers immediately upon approval and filing of the appeal bond.

For these reasons we think the dismissal of the appeal by the district court was erroneous.

The judgment will be reversed and the cause remanded for further proceedings according to law. *Judgment reversed.*

ACT OF TAKING APPEAL IS APPEARANCE: *Cates v. Mack*, 14 Colo. 411.

APPEAL IS TAKEN WHEN BOND IS ENTERED INTO AND APPROVED: *Cates v. Mack*, 6 Colo. 405.

NO TIME BEING FIXED BY STATUTE within which appeal papers are to be filed, the judge or clerk should make out and transmit them immediately. But the appellate court may by rule fix the time for so doing: *Cates v. Mack*, 6 Colo. 405; *Kasson v. Foltlett*, 9 Colo. 349.

BREED v. FIRST NATIONAL BANK OF CENTRAL CITY.

1. A mining superintendent, by virtue of his employment merely, has no authority to borrow money on the credit of his principal.
2. The power of an agent to draw on a principal's funds is entirely different from the more comprehensive power to draw on his *credit*. The former does not include the latter. Neither by note nor overdraft, can a mining superintendent, as such, bind his principal.

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3. Where an agent, without original authority, borrows money on behalf of his principal and uses it in a manner advantageous to the principal, the ratification of the agent's act may be inferred from the silence of the principal after knowledge of the facts.
4. It is the duty of the principal to repudiate the unauthorized act if he does not acquiesce in it, and, if he fail to do so within a reasonable time, the jury may infer a ratification, but no estoppel is created if the unauthorized action is complete before knowledge of it reaches the alleged principal, and the status of the parties would not be changed by his failure to approve or disapprove within a reasonable time.

Appeal from District Court of Gilpin County.

ASSUMPSIT. Declaration on two notes to which the common counts were added. Pleas, general issue and *non est factum* verified. The notes described in the declaration were as follows:

"\$3,000.00.

CENTRAL CITY, COL., *Feb. 27, 1875.*

One month after date we promise to pay to the First National Bank of Central City, or order, the sum of three thousand dollars, for value received, negotiable and payable without defalcation or discount, at their office in Central City, Colorado, with interest at the rate of one and one-half per cent per month from date until paid.

CARIBOU TUNNEL Co.,

By J. M. DAWLEY, *Supt.*"

"\$317.96.

CENTRAL CITY, COL., *April 1, 1875.*

Fifteen days after date we promise to pay to the First National Bank of Central City, or order, the sum of three hundred and seventeen dollars and ninety-six cents, for value received, negotiable and payable without defalcation or discount, at their office in Central City, Colorado, with interest at the rate of one and one-half per cent per month from date until paid.

CARIBOU TUNNEL Co.,

By J. M. DAWLEY, *Supt.*"

There were two trials of this cause, the first resulting in a verdict for the plaintiff in \$4,143.46.

Upon the second trial the bank had a verdict for the sum of \$4,145, and judgment was rendered on the verdict. The defendant appealed.

The testimony of James M. Dawley, taken in the former trial, was read by agreement, as follows :

"I know Abel D. Breed ; knew him in August, 1872, and had business transactions with him at that time ; I commenced working the Caribou Tunnel August 16, 1872, and worked until April 16 or 17, 1875 ; it was in about 68 feet when I commenced ; in August, 1872, I made a contract with Breed to run the tunnel ; I run it under that contract until April, 1873 ; the tunnel was run to the Caribou mine, which Mr. Breed, I believe, owned at the time I commenced ; in the latter part of April, 1873, Breed and myself threw up that contract ; I was to keep on running the tunnel ; he was to sell the tunnel and I was to have an interest in the sale ; this was by mutual agreement between Breed and myself ; he was very particular for me to keep it to myself and say nothing about it to any one ; he told me the contract was in the little safe, and I could get it and destroy it ; I was to run the tunnel as I had been doing previously and he was to furnish the money ; I was getting a salary from the Mining Company Nederland, and he requested me to use what I could of that in the tunnel, and when he sold the mine he would remunerate me for what money I put in, and for my salary."

Defendant moved to strike out all of witness's testimony about the annulling of this contract. Overruled, and defendant then and there excepted.

"In April, 1874, I had a talk with Mr. Breed about the contract again ; I could not find it in the little safe and told him I thought it must have been sent to Cincinnati ; he told me when he went home he would look for it, and if found, he would cancel it or send it back to me ; I told him he need not send it back, he could tear it up ; I only wanted it destroyed ; he said all right it should be destroyed and

never brought up again ; I paid no more attention to the contract, supposing it destroyed.

After April, 1873, until April, 1875, I employed men and run the tunnel as I had been doing. Breed sent me money, or authorized Allen to draw money every month when my pay-rolls became due ; Allen was in the employ of the Mining Company Nederland, and was Breed's confidential agent. After Allen left I forwarded every month's pay-roll to Breed on the first of the month, and he sent me a draft for the amount, which he continued to do until the last one, which I think was sent in June, 1873 ; at that time I had been working several months on some veins struck in the tunnel, and had taken out ore enough to pay expenses ; the tunnel was completed to the mine some time in May, I believe. When Mr. Breed was out in the fall of 1874, he requested me to put some men in the tunnel beyond the Caribou mine which I did, also to work on the lodes ; the lodes did not pay ; Mr. Breed went away, and in December, 1874, I had no money to meet my November pay-roll ; I wrote to Breed and sent amount of indebtedness of tunnel, and received no answer ; I overdrew my account at the bank several hundred dollars to pay the men and wrote Breed respecting it, also telegraphed him, but received no reply. He had authorized me to keep the tunnel running ; I talked to the men about it and they said they were not at all afraid to work for Breed ; I kept the tunnel going until April 17, 1875, when Mr. Breed telegraphed me to stop work ; Mr. Breed requested me to work the lodes, and I worked them under his direction ; with the proceeds of the ore I paid the debts of the company ; I sent Mr. Breed the pay-rolls or a monthly statement of the expenses ; my first overdraft at the bank was in December, and amounted to \$2,500.00 ; it was increased to \$3,000.00, and April 27, 1875, when I received the telegram to stop work, \$373 more to balance the account. Mr. Thatcher said the law did not allow him to have overdrafts, so I gave these notes in this form ; I was not going to be responsible for Mr. Breed's

debts ; the account had been kept in the name of the Caribou Tunnel, so I made out these notes in that name and signed my own name by which I became responsible also. I paid the indebtedness of the Caribou Tunnel with money received from overdrafts ; I notified Mr. Breed of the overdraft but received no reply. During the time I worked the tunnel I received drafts from Mr. Breed, which were cashed at the First National Bank. In the fall of 1874 the account was ahead about \$2,000.00 from the proceeds of working these mines. These lodes were all recorded in Mr. Breed's name ; he claimed them ; they were the Sherman and Poorman. The lode and tunnel accounts were kept together as one account."

The witness here identified the letters referred to in his testimony.

"About April 24, 1874, I received a draft from Mr. Breed, No. 329, for \$700, on A. L. Scoville & Co., New York. I also received a draft previous to that for \$1,200 ; the letters contained the drafts as stated, which were deposited with plaintiff, and the proceeds used for working the Caribou Tunnel ; none of the drafts or money were received by me as contractor ; they were paid to me in the capacity of superintendent of the tunnel."

Cross-examination : "The contract I spoke of was in writing signed by Breed ; (paper marked X handed to witness ;) I commenced work on the tunnel under this contract, and continued until the last of April, 1873 ; I then told Mr. Breed I could not run the tunnel under that contract after the Caribou mine was sold. He said : 'All right, we will cancel the contract, but I am going away and I want you to keep on running the tunnel ; I have entered into an arrangement with the Mining Company Nederland to run that tunnel to the Caribou mine, in consideration of the sale ; I will furnish you the money necessary to complete the tunnel.' I was in probably 350 to 400 feet ; up to this time I had only worked one

vein and that did not pay. On that day the contract was annulled, and after that I was running the tunnel as Mr. Breed's superintendent ; I kept a bank account both before and after this time, always in my own name ; so kept at Mr. Breed's request ; I kept the accounts at the tunnel and the pay-rolls in the name of Caribou Tunnel ; I signed my own name, J. M. Dawley, to the checks ; the tunnel cut this vein thatp aid in August, 1873 ; I took out ten or twelve thousand dollars ; I put the proceeds in the First National Bank to my credit ; my salary after the time the contract was given up was to be made all right when he sold the mine ; he was to give me an interest in the sale of the tunnel ; he told me not to charge up any thing for salary, he would give me an interest in the sale ; I took some money for my own expenses and charged it to myself on the books ; cannot tell how much ; I had nothing to do with the Mining Company Nederland so far as running the tunnel was concerned ; I did not see the contract at that time and did not know its contents ; all I knew was Mr. Breed made some kind of an arrangement for the company, to run out and meet me ; I think, at Mr. Breed's request, I helped measure the work they did ; I commenced sending Mr. Breed memorandum of indebtedness every month, in the fall of 1873 or spring of 1874 ; the checks which Mr. Allen drew were drawn on Mr. Breed's account at the First National Bank, and I deposited them in my name, and drew checks to pay the men and necessary expenses ; I commenced in this way, and when the contract was annulled he requested me to continue to do so, and I did ; after Mr. Allen went away in 1874 I had access to the safe ; I worked the lodes up to the time I quit and rendered him a statement of what I took out ; I claimed no interest in them ; when I was \$2,000 ahead Mr. Breed applied to me for the money ; I employed the men in the name of the Caribou Tunnel ; in December, 1874, I notified Mr. Breed by mail and telegraph of the overdraft, and to send a draft or authorize me to draw ; it was hew ho was overdrawn, but in my name ; I was then running the

tunnel beyond the Caribou and working on two lodes; there was no arrangement for running the tunnel beyond the Caribou vein, only Mr. Breed went in there and told me to run it on beyond the Caribou, and I ran it about 84 feet; I quit all work when I received the telegram from him; the \$2,500 note was taken up by giving another; I indorsed this note for forty days, and I made the other indorsements; I presume I was liable on the notes, I had no authority to sign Mr. Breed's name.

Question. He never gave you authority to borrow money, did he?

Answer. I do not know what you call it; I think I was authorized; I had to get money from some place; he authorized me to run the tunnel, and never authorized me to stop until he telegraphed.

I notified Mr. Breed I had executed these notes in name of Caribou Tunnel, in December, by letter, just as soon as I did it; I think it was June or July, 1874, that Mr. Breed sent me last draft; for three or four months after that I did not have to draw; made money enough out of the mine; Mr. Breed did not answer the letter; did not hear from him from that time to this, and did not see him until yesterday.

At the time I commenced this account on which suit is brought, at the bank, I explained to them my relation to Mr. Breed; they understood this money was used on Mr. Breed's account as well as I did; Mr. Breed knew I kept the account in my own name, and knew this when the account was \$2,000 ahead; he wanted me to draw him a check for it; he claimed it as his; I told him the tunnel was not working well and it would be best to leave it as I might have to draw on him for it back next month.

I think I gave the bank a note in July, 1874, for \$400 for an overdraft, which was paid by check on my account; that note was signed individually, J. M. Dawley; that was the only note I ever gave them except these; the one signed Caribou Tunnel Company—I should have left the *company* off."

Witness recalled for plaintiff in rebuttal :

“ I heard Mr. Breed's testimony in reference to the Nederland contract ; I knew such a contract was in existence from the time it was made ; Mr. Breed told me he had a contract with the company to meet me ; I did not have any interest in the contract that I know of ; did not know my name was mentioned in it ; Mr. Breed never had any settlement with me about that contract ; did not consult me about making it ; he did not make a verbal arrangement with me to run the tunnel beyond the Caribou ; I never had such a conversation with him about it ; there was no agreement by which I was to run the tunnel beyond the Caribou at so much per foot ; I run it as superintendent for him at his expense.”

Cross-examination :

Question. You say you never saw the contract with the Nederland Company ?

Answer. I never saw it ; never knew my name was connected with it.

Question. Never knew about the amount paid ?

Answer. I might have known it.

Question. Had nothing to do with paying the amount ! Whose handwriting is that ? (Paper marked Z handed witness.)

Answer. That is mine.

Question. Read it and see what it is, it is all in your handwriting ?

Answer. Yes, sir ; this letter is in my handwriting, and this statement, which was inclosed ; all done at Mr. Breed's request ; I got the entries on this sheet from the book in the safe ; I made the entries at the time they are dated, I presume ; they were probably handed me on a slip by Mr. Breed ; on the 13th day of October, 1874, I wrote to Scoville & Co. : ‘ Gents. : Inclosed find statement of the journal and cash-book entries made since last statement sent you by Mr. Breed ;’ that refers to this sheet, and was at

Mr. Breed's request; I entered on the journal at the date of it, 'The Caribou Tunnel to J. M. Dawley, for running tunnel, March and April, since last measurement, 16 feet at \$18 per foot, \$228; also, running 2d, 94 feet at \$20; the above completes contract to the Caribou tunnel.' Mr. Breed requested me to keep the tunnel running as I had done; so far as I was concerned the contract was annulled; I made the entry 'James M. Dawley to Mining Co., Nederland, for running tunnel from Caribou mine to intersection with Dawley, 80 ft. 5 in. at \$28 per foot;,' I made it out that way by Mr. Breed's instructions, and sent Scoville & Co. a copy; I was keeping the books, and did it just as he instructed me."

J. A. Thatcher testified: "I am president of the First National Bank of Central City, and have been since it was organized; had business transactions with Dawley in 1873, and for a long time previous; in the fall of 1874 he was running the Caribou tunnel; his business was active; drawing and receiving remittances from Breed; depositing them and conducting mining business as is usually done by agents; the last draft, I think, came from Breed in June, 1874, for about \$1,400; after that time up to December 22, Dawley was working the mines crossing the tunnel, and met his current expenses; our first advance to Dawley in December was \$2,500; we authorized him to check for it; I told him we could not allow an overdraft, and he executed a note at my request; we let him have \$500 more later in that winter; after that some more; the total was \$3,316; it was paid out in small checks to the workmen; no check larger than \$100 unless it was to some merchant; sometime about November 1, 1874, I had a conversation with Breed about our transactions with Dawley; Dawley's account was then good; I took Mr. Breed into the back room; he asked me to show him Dawley's account, and how it was kept, and its condition as to debits and credits, and how he stood at that time; I showed it to him and he expressed his gratification to me, and asked me as to Mr.

Dawley's habits, and whether he was conducting his business right in my judgment ; I told him we kept the account in Dawley's name, as Dawley said he had requested that it should be kept in that way ; I cannot say what Mr. Breed's answer was to that ; in the early part of that year Dawley told us that the contract between them had been thrown up ; said Breed requested him to keep the account in his own name ; we transacted a great deal of business with Breed personally ; he had his personal account there ; he knew we kept that account as we did ; I showed him the account and the amount Dawley's account was good for at that time ; he seemed gratified and mentioned the amount, about \$1,900 ; he examined the account and spoke of it as his own ; the checks paid were placed to his, Dawley's, debit, and Breed's drafts were placed to his credit."

Cross-examination : " He commenced business with us as Thatcher, Standley & Co., in 1872, simply as J. M. Dawley ; I think he overdraw \$300 or \$400 in 1872, which I think was paid by Mr. Breed's check or draft ; we made him the loan of \$2,500 ; that is, we agreed upon that amount he could use ; it was paid out on checks to workmen and merchants, none to Dawley himself ; we paid the checks as made and did not inquire who they went to ; the first note was made by Mr. Dawley, December 22, 1874, and credited to his account that day ; I asked Dawley very particularly for what purpose he wanted the money ; the note was for \$2,500, due in forty days, and it was expected and represented by Dawley that Breed would return by that time and make it good ; this note was renewed for thirty days, and we let him have \$500 more ; at the end of the thirty days we took his note for \$3,000 ; he said it was Breed's affair all the time, therefore I did not look to anybody but Breed for payment ; he did not have authority to sign Breed's name to the note ; every thing was done in the name of Dawley."

Re-direct examination : " After the debt was contracted

I wrote Mr. Breed about it, but got no answer; the first letter was written at my house and I have no copy of it; to the best of my knowledge it was deposited in the mail; we had great trouble in finding Mr. Breed; he was supposed to be in Cincinnati, or a letter would be forwarded to him from there, and we only wrote to him there; I used a return envelope, and the letter never came back; I wrote a telegram for Mr. Dawley, and think I signed it with him; we tried to find Mr. Breed; he was in the interior of California, and could not be reached; the telegram was sent to San Francisco, but he was then in the Pleasant Valley mining region; it was sent within two or three days after Dawley got the money, and stated exactly what he had done; that he got this money from me to pay this pay-roll, stating the amount; we received no reply; after several days the message was repeated; the second letter was written October 12, 1875." Copy read as follows:

"CENTRAL CITY, *October 12, 1875.*

MR. A. D. BREED, Cincinnati, Ohio:

Dear Sir—We had expected to see you here long before this, and now learn that you are east. I wrote you to request you to settle up our debt against the Caribon Tunnel Company, created by Mr. Dawley. It is a fair, honorable and just debt, and I trust you will not compel us to wait longer on this matter. The debt was created in the name of the 'C. T. Co.' by Mr. Dawley, sup't, and whatever the differences between yourself and Mr. D., it should not work an injury to us in delaying the matter. Please reply at once to this.

Yours, very truly,

J. A. THATCHER, *President.*"

"These are the notes (notes sued on shown to witness).

I do not know where Dawley is now; at the time of the loan he was not worth any thing, and that was the reason I loaned the money to Breed."

Richard Crow sworn, and testified : "I reside in Nederland; have known Mr. Breed since 1871; I was in his employ from 1871 until he quit working the Caribou tunnel in the spring of 1875; I was hauling quartz and wood; hauled from the Sherman and Poorman; I knew James M. Dawley; he was working the mines and driving the tunnel; he commenced running the tunnel south of the Caribou lode sometime in the fall of 1874; Mr. Breed was out here two or three times, and always spoke to me as if he was interested in running the tunnel; I heard him say regarding the lodes that he had three-fourths of the net proceeds; the Sherman and Poorman lodes were owned in New York, I believe; Mr. Breed worked them right along as if he had a right to.

Mr. Breed claimed 250 feet on each side of the tunnel on the lodes crossed by it; the Sherman is an old discovery, and the Poorman was discovered before the Caribou; Dawley was working on these lodes about 200 feet below the surface, and there was no connection with the surface, but it was afterward proven to be on these lodes; I was paid for my work at the tunnel by check on the First National Bank, signed by James M. Dawley."

Clarence A. Sherwood sworn, and testified : "I reside at Caribou, and am engaged in mining; have been acquainted with Mr. Breed since 1871; I worked for him over three years, at the Nederland mill twenty-two months, and then at the Caribou tunnel and lodes struck in tunnel; I understood I was working in the tunnel for Mr. Breed. Mr. Dawley paid me by check on the First National Bank. Mr. Dawley employed me to do that work; I commenced in April or May, 1873, and worked both north and south of the Caribou."

J. A. Thatcher, recalled : "This claim with interest at ten per cent per annum amounts to-day to \$4,145."

Plaintiff rested.

Defendant read in evidence the deposition of Abel D. Breed, as follows :

"My name is Abel D. Breed ; sixty-six years of age ; a manufacturer by occupation ; I know the plaintiff ; I am defendant ; I have known James M. Dawley, since 1872 ; he has been in my employ ; my first business transaction with said Dawley was in form of a contract on the 3d day of August, 1872, a copy of which is hereto attached (same as offered in evidence and marked X). On or about September 1st, 1872, I employed him as foreman of my mill at Middle Boulder ; the said Dawley was never employed by me as my agent ; he was employed by me both in the capacity of hired laborer and contractor, but never as an agent. He contracted to drive the Caribou tunnel for me according to the provisions of the contract referred to above (marked X) ; the original contract is in the hands of my attorneys, H. M. & W. Teller of Central City, Colorado ; I knew the Mining Company Nederland in 1873 ; I made a contract in writing with said company in 1873, a copy of which is hereto attached (same as offered in evidence and marked Y), the original of which is now in the hands of my attorneys H. M. & W. Teller, Central City, Colorado ; I made but one contract with this company ; this contract provided for the running of a tunnel from the Caribou mine to meet the tunnel being run by Dawley ; Mr. Dawley knew of the making of the contract with the Mining Company Nederland and he assented thereto, and was very anxious to have the contract made, as he believed the tunnel, if driven by said company, would intersect rich veins in the course of its progress by which he would be much benefited financially, as provided for in the contract (marked X).

Said contract (X) with James M. Dawley has never been canceled or annulled ; I never at any time or in any place agreed to destroy this contract, nor told Dawley it should be destroyed, nor that the contract was at an end, discharged or canceled ; Dawley completed the tunnel as per contract (X) I believe, in the latter part of 1874, and I paid Dawley

in full according to the terms of the contract on or before the completion of the same; Dawley contracted and agreed with me to extend the Caribou tunnel one hundred feet south of the Caribou mine; the price per foot to be paid said Dawley for the driving of said tunnel was not to exceed thirty dollars; this agreement was entered into in the latter part of 1873 or the early part of 1874; Dawley was never authorized or empowered by me in any manner or form whatever to employ men for me to work on the Caribou tunnel either north or south of the Caribou lode, and in no instance did I ever authorize him to incur any indebtedness for such work, or for any work on such lodes connected with the Caribou tunnel or the Caribou lode; I have paid Dawley in full and the entire amount due him for the work done on the said Caribou tunnel south of the Caribou lode; I paid this money in installments at different intervals of the work in checks and drafts; I never did business under the name of the Caribou Tunnel or the Caribou Tunnel Company, and never knew of any business being transacted under either of these names; I never authorized or empowered James M. Dawley to do business for me under such name or names; I first learned that Dawley assumed or claimed that he could bind me under such name or names in the latter part of 1875; I had a conversation with Frank C. Young, cashier of plaintiff, in New York in 1875, in respect to the notes sued on in this case. In my conversation with Mr. Young I emphatically informed him that Dawley had no authority whatever to give the notes now sued on, and that I was not legally or morally responsible for the same. Mr. Young informed me the bank would sue for the payment of the notes; I never requested James M. Dawley to keep the account of the work done on the Caribou tunnel or lodes connected therewith in the name of the Caribou Tunnel or the Caribou Tunnel Company, and I never made any suggestions whatever as to how he should keep his accounts; I heard James M. Dawley testify in the Boulder county

district court in July, 1876; I requested Dawley to send accounts monthly to A. L. Scovill & Co., showing all money he had received from me or from said A. L. Scovill & Co.; I never promised to pay the notes sued on in this case or the amount thereof, or any amount whatever included in these notes; I knew David B. Miller; he was in Colorado in July, 1875, to render assistance to my attorneys; he had no authority from me whatever to incur any indebtedness due or claimed to be due from me; I heard my letter read in the Boulder county district court relative to recording lodes struck in the tunnel, whether known or not; I gave these instructions to Mr. Dawley in accordance with the law of Colorado governing the ownership of lodes struck in driving tunnels. I have banked with the plaintiff in this suit, and with the plaintiff's predecessors, Thatcher, Standley & Co., having had money deposited with them over three years; I had money on deposit with plaintiff to my credit during the fall of 1875; my balance during that period being about five hundred dollars; this money was drawn out by D. B. Miller about the 22d day of July, 1876, on an order from me; I think I first learned that plaintiff was claiming an indebtedness against me in the latter part of 1875; cannot state from whom I learned it; I was not in anywise indebted to James M. Dawley in December, 1874, or at the time of the date of the notes sued on for work done on the Caribou tunnel, or on any lodes worked by Dawley, in connection with said tunnel, nor was I indebted to him on any matter whatever; the payment of the \$1,700 by me to the said James M. Dawley, in May, 1875, was subject to my contract with Dawley, and any other money which I may have paid him about that time was likewise paid on account of the contract; I did not know at that time that Dawley claimed to be my agent; I had no knowledge of the execution of the note sued in this case, and I had no knowledge whatever of any claim of the plaintiff upon me for any money advanced by it to James M. Dawley; Dawley did work on the lode cut by the tunnel, after said tunnel had reached the Caribou lode;

Dawley claimed his proportion of the net profits of work ing said lodes during the time he was working on the tunnel south of the Caribou lode; the same as he had before the tunnel had reached the Caribou lode; Dawley claimed the right to such net profits under the contract hereto annexed (marked X); James M. Dawley was never at any time authorized or empowered by me in any manner or for any purpose to contract any indebtedness, or to employ any men to work for me, or to make any settlement or statement of account with any one for me; he was not authorized to keep any account of mine with any bank or bankers, or to give any instrument in writing that could bind me in my name, or in any other name; I was first informed of Dawley claiming so to do in the latter part of the year 1875; I did repudiate such claims and wrote Dawley to that effect at once; I am acquainted with Joseph A. Thatcher; I have no recollection of having any conversation with Mr. Thatcher in reference to this claim; in the year 1873, in a conversation with Mr. Thatcher, he inquired of me very particularly regarding the financial responsibility of James M. Dawley, remarking at the same time that Dawley was indebted to his bank in the sum of \$2,000, or more; in answer to his questions regarding the financial standing of Dawley, I replied that I could not inform him as to Dawley's responsibility financially."

Cross-examination: "Dawley was to run the Caribou tunnel under the first contract until it cut the Caribou lode; I paid Dawley at different intervals during the progress of the work, in drafts, currency and checks, upwards of twenty-six thousand (\$26,000) dollars; I employed Dawley to run the tunnel south of the Caribou lode, in the autumn of 1874; he run this tunnel about 80 feet; at the time of the completion of the first contract, to run the Caribou tunnel, Dawley was personally indebted to me for several thousand dollars, which I had advanced him over and above the money actually due him; by the provisions of the contract a portion of this money owed me by Dawley was applied

as payments on the second contract; in addition to this I made payments of money to Dawley in the spring of 1875 at the time Dawley had driven the tunnel 80 feet south of the Caribou lode; he was indebted to me in the sum of over \$10,000 for over-payments in the contracts in drafts and checks; I knew of the work done by Dawley on the Caribou tunnel, and lodes cut by said tunnel at the time it was progressing; this work was to be paid for according to the terms of the contract; do not recollect of ever having received a letter from Joseph A. Thatcher on the subject of the claim of plaintiff, and do not recollect writing him on that subject; I admitted during the trial of the case of Clarence A. Sherwood against me in the U. S. district court, at Denver, on or about 2d day of August, 1877, that Dawley and myself were to share the profits of working the lodes cut by said tunnel, I to have three-fourths and Dawley to have one-fourth interest, and if there were losses, we would share it in like proportion; not that I was under any legal obligation to Dawley to share in the losses, but taking into consideration his indebtedness to me, I was willing to deal leniently with him in his losses.

(Signed,)

ABEL D. BREED."

Defendant offered in evidence the contract above referred to between Abel D. Breed and James M. Dawley marked X, as follows:

"This agreement made and entered into this third (3d) day of August, A. D. 1872, between James M. Dawley, party of the first part, and Abel D. Breed, party of the second part, witnesseth: That for and in consideration of the payments, agreements and stipulations hereinafter to be specified, the said party of the first part agrees and covenants with the said party of the second part to drive the Caribou tunnel (so called), owned by said Breed, from its present face (about seventy-five feet from its entrance) until it cuts the Caribou lode, whatever the distance may be; to construct said tunnel of the following dimensions, viz.: To

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be seven (7) feet high in the center, to be six (6) feet high on each wall from the bottom to the turn of the arch, the said arch to be sprung for a tunnel eight (8) feet wide, and the width of said tunnel to be five (5) feet in the clear.

The said party of the first part further agrees to devote his time and energies to the prosecution of the work so as to complete said tunnel to the Caribou lode at the earliest practical period of time. He also agrees not to claim any lodes discovered or struck in said tunnel, but to notify said Breed or his agent of the striking of such lodes as may be found, at his first opportunity, that they may be recorded.

He also agrees not to claim or remove any ore from the Caribou lode, by virtue of this agreement.

In consideration of the above covenant and agreements the said party of the second part agrees to and with the said party of the first part to pay him for running the aforesaid tunnel to the Caribou lode, the following prices per ft., viz.: For the first one hundred (100) ft. from the present face of the tunnel, five (\$5.00) dollars per foot. For the second one hundred (100) feet, seven (\$7.00) dollars per foot. For the third (3d) one hundred (100) feet, nine (\$9.00) per foot. For the fourth (4th) one hundred (100) feet, eleven (\$11.00) per foot. For the fifth (5th) one hundred (100) feet, fourteen (\$14.00) per foot. For the sixth (6th) one hundred (100) feet, eighteen (\$18.00) per foot. For the seventh (7th) one hundred (100) feet, or for so many feet as may be found to remain between a point six hundred (600) feet from the present face of the tunnel and the Caribou lode, twenty dollars (\$20.00) per foot. The said party of the second part further agrees to furnish lumber for a track, a car for removing the ore and waste rock, and also such appliances and power as may be found requisite to drive air into the tunnel, whenever artificial ventilation becomes necessary. The said party of the second part further agrees that the said Dawley shall have one-fourth ($\frac{1}{4}$) of the net profits on all ore he may extract from each and all of the veins or lodes he may strike in the prosecution of the work for a

period of twelve months from the date of striking such lodes. It is further mutually agreed and understood that during the joint occupation and use of said tunnel and track for the removal of ore, that neither party shall have the preference, but that the arrangements shall be equitable and fair.

"In testimony whereof we have set our names and affixed our seals, on the day and the year first above written.

J. M. DAWLEY, [L. S.]

A. D. BREED, [L. S.]"

Witness:

SAM'L CUSHMAN.

[Int. Rev. 6c.]

Plaintiff objected to the admission of the same, "because it is irrelevant; applies to work done north of the Caribou lode, and before the incurring of the indebtedness, and had nothing to do with any work south of the Caribou lode, and can have nothing to do with this case."

The court sustained the objection, and defendant excepted.

Defendant offered in evidence the article of agreement between Abel D. Breed and the Mining Company Nederland, (marked Y), as follows:

"This article of agreement made by and between Abel D. Breed, of the city of Cincinnati, of the first part, and the Mining Company Nederland of the second part, witnesseth: That the said party of the first part being desirous to insure the completion of the Caribou tunnel, located in Boulder county, Colorado, at the earliest possible moment, hereby agrees and binds himself to pay to the said Mining Company Nederland, the actual cost of finishing said tunnel from the point in the Caribou mine that it may be on the 1st day of January, 1874, until it intersects the tunnel now being driven by Mr. Dawley from the valley. In consideration of said payment, the said party of the second part does hereby agree to procure the said work to be done at the lowest possible price, and will furnish such supplies as

they may have and as may be required for said work at cost. They further agree to give the use of their engine and hoisting machinery, when the same can be used for said work, and hoist all stuff taken from the tunnel free of cost; and that their chief agent or such person as he may designate will superintend the construction of the said tunnel free of any charge to said party of the first part, and as it is agreed by the party of the second part to commence the work on said tunnel from the mine to its face, and if in such case on account of improper location the tunnel should not connect with the portion now constructed, then the said connection between the two parts is to be made at the sole expense of the party of the second part. Whereas, the said party of the first part has already made a contract with J. M. Dawley to complete said tunnel, and whereas he does not desire in any manner to interfere with him in the execution of the same, he hereby agrees with the party of the second part that they can make any agreement with said Dawley that they mutually agree upon, and in the event of such contract being made, the party of the first part binds himself to pay to said party of the second part, whatever price the said Dawley may agree to pay to the said party of the second part for the completion of the tunnel which, however, is in no event to exceed more than it actually cost the party of the second part to complete the said work; but in the event that the price agreed on between the said Dawley and said party of the second part should not be sufficient to repay the party of the second part, to complete the said tunnel in the manner heretofore described, the party of the first part hereby agrees also to pay such sum as may be the difference between the amounts agreed upon by said Dawley and the actual cost of the work. For the purpose of avoiding disputes as to the actual amount of the cost of said work, it is hereby agreed by and between both parties to this agreement, that the statement of cost made in writing and certified to as being correct by P. H. Van Diest, Esq., the chief agent of the Mining Company Nederland, shall be

conclusive as to the cost, and the said party of the first part agrees to pay the same on demand of the second party to this agreement. In the event that the agreement made between said Dawley and the party of the second part should allow them more than the actual cost to run the said tunnel, then the said parties of the second part agree to repay to said Dawley the amount of said excess.

In witness whereof our hands and signatures, this the 19th day of December, 1873.

A. D. BREED. [L. s.]

For Mining Company Nederland.

Witness : P. H. VAN DIEST, [L. s.]

W. M. F. ALLEN. *Agent."*

Plaintiff objected thereto for the following reasons :

"It is irrelevant ; applies to work north of the Caribou lode, and before the incurring of the indebtedness, and has nothing to do with any work south of the Caribou lode, and can have nothing to do with this case. This article of agreement is between A. D. Breed and the Mining Company Nederland, and refers to work done north of the Caribou lode, and before the tunnel cut the lode."

Objection sustained by the court, and the defendant excepted.

Defendant offered in evidence the letter referred to by witness Dawley, and statement inclosed therewith, from J. M. Dawley to A. L. Scoville & Co., (marked Z) as follows :

CARIBOU, *Oct. 13th*, A. D. 1874.

A. L. SCOVILLE & Co., Gents :

Inclosed find statement of journal and cash book entries made here since last statement sent you by Mr. Breed ; also map of Caribou tunnel which Mr. Breed forgot to take. Please hand it to him on his arrival. The tunnel is looking splendid. Please acknowledge the receipt of papers and oblige,

Yours respectfully,

J. M. DAWLEY."

Journal entries since last statement made March 5, 1874.
 "Oct. 12.

Caribou Tunnel,	\$2,168 00	
To J. M. Dawley,		\$2,168 00
For running tunnel March and April and since last measurement, 16 ft. @ \$18.00 per foot,		288 00
Also running tunnel 94 ft. @ \$20.00 per foot,		1,880 00
The above completes the contract to the Caribou Tunnel.		
Oct. 13. J. M. Dawley,	\$2,251 66	
To Mining Co. Nederland,		\$2,251 66

For running tunnel from Caribou mine to intersection
 with Dawley, 80 ft. 5 in. @ \$28.00 per foot."

Defendant rested.

Plaintiff, in rebuttal. J. A. Thatcher recalled and testified
 as follows :

"I heard the deposition of A. D. Breed read; I do not
 recollect of having any conversation with him about Daw-
 ley's financial condition in 1874; I never stated to him that
 Dawley was indebted to the bank in the sum of \$2,000;
 Dawley was never indebted to the bank in the sum of
 \$2,000; at one time he owed the personal debt as I testified
 to; \$400 or \$500 I think; that was a year before this debt;
 he gave his own personal note and paid it."

Which was all the evidence introduced on the trial of
 said cause.

The instruction numbered thirteen and referred to in the
 opinion was as follows: "The court instructs the jury that
 the employment of a person as agent to do work in a tun-
 nel or mine does not authorize such person to borrow
 money for the purpose of carrying on the work or to pay
 for work already done by him, and unless plaintiff has
 shown authority other than that of Dawley's employment,
 to borrow the money for which suit is brought, then plain-
 tiff cannot recover in this action."

Messrs. H. M. & W. TELLER, for appellant.

Messrs. BELFORD & REED, for appellee.

THATCHER, C. J. Evidence was introduced by plaintiff tending to show that Dawley during and after the spring of 1873 acted as agent or superintendent of Breed; that he continued so to act until and at the time he borrowed money from the bank, for the recovery of which this suit was brought. The contract between Dawley and Breed, if introduced in evidence, would have tended to show that at the time it was entered into, and so long as it remained in force, Dawley was a contractor, and not a superintendent or agent. If the terms of the contract were by verbal agreement, as Breed testifies, made also to apply to the construction of the tunnel *south* of the Caribou lode, except so far as related to the price per foot to be paid by Breed, the agreement itself furnishes the best evidence of the relation that existed between him and Dawley, and tends to show that the southern extension of the tunnel was constructed by Dawley as a contractor. There is also evidence that in the spring of 1873, the written contract between Dawley and Breed was, by mutual consent, rescinded, and that thereafter Dawley acted as superintendent. These controverted questions of fact touching the nature of the agreement between Breed and Dawley, during and after the spring of 1873, until the autumn of 1874, and the nature of the agreement thereafter under which the tunnel was extended south, were properly questions for the jury, in the resolution of which they might be aided by reference to the original contract which should have been admitted in evidence. The course of Dawley's dealing with Breed from which Dawley's agency might be inferred, was before the jury. As tending to repel such an inference, at least, so far as relates to the tunnel north of the lode, the August contract was admissible. Nor is it entirely clear from the evidence whether the amount of the overdraft was paid out on account of work in the tunnel north or south of the lode.

If paid out on work north of the lode, and under the August contract, the question as to whether it inured to the ultimate benefit and use of Breed would not ordinarily be material; for in such case Breed, if he had learned of the loan and expenditure, could not, by silence, be construed to have ratified Dawley's act in securing it. His only duty would have been to respond to Dawley for work on the tunnel at so much per foot according to the contract. It could not properly be said in such case that the money was expended for Breed's use, but for the use of Dawley. There is some evidence tending to show that the contract between Mining Company Nederland and Breed was entered into with the knowledge and consent of Dawley, and that he (Dawley) did work in pursuance of its provisions.

This contract tended, in connection with other evidence, to impeach Dawley's testimony concerning the annulment of the former agreement. The court, we think, erroneously excluded it. With a view to determine Dawley's status, both written contracts should have been considered in the light of all the evidence.

If Dawley was by Breed appointed mining superintendent, to oversee and direct the construction of the Caribou tunnel, either north or south of the lode, with authority to employ men to work in the tunnel and operate the mines that might be found therein; if further, from time to time Breed furnished money to Dawley to pay the employees, and Dawley placed such money to his individual credit at the bank, checking out the same as it was needed to pay the laborers, was he, by virtue of his employment as such mining superintendent, in the absence of any special authority in that behalf, authorized to borrow money to enable him to prosecute the work in the tunnel, or to pay for work already done therein, and bind his principal to its payment?

If it be conceded that although the bank account stood in the name of Dawley it was in fact Breed's account, kept in Dawley's name, by agreement of parties, and that Daw-

ley had authority to draw thereon, it does not follow that he was authorized to *borrow* money from the bank on account of his principal. Even if he had been acting under a general power of attorney to draw checks or drafts in the name of his principal, he would have no authority, under such power, to make an overdraft, which is one form of borrowing money from the bank. *The Union Bank v. Mott*, 39 Barb. 180.

The giving of the following instruction is assigned for error:

"The court instructs the jury that if they believe, from the evidence, that Dawley was the agent of Breed, in the work of employing and superintending men at work upon the lodes and the tunnel, and that Dawley was not running the tunnel south of the Caribou lode at so much per foot, but that he was employing the men and incurring the expense incident thereto, with Breed's knowledge and consent, and that the men were at work for Breed, and that Breed requested Dawley to keep the bank account in Dawley's name instead of Breed's, and that that was the reason that Dawley kept the account in his own name, that really belonged to Breed, then you may, under the law, find that Dawley had implied power to *overdraw*, to pay those men and other necessary expenses."

That a mining superintendent, by virtue of his employment as such, has the power to borrow money in the name of his principal, in the absence of express authority or authority which must necessarily be inferred to exist from the course of dealing between himself and his principal, is a doctrine which we cannot sanction.

All the hypotheses enumerated in the instruction may co-exist, and still the principal not be liable. The power of an agent to draw on a principal's funds is entirely different from the more comprehensive power to draw on his credit. The former does not include the latter. The superintendent may have the authority to employ men to prosecute the work; if so, and funds be not furnished, the

principal, and not the superintendent, is liable to the workmen. The superintendent is not authorized to exercise a power not conferred, by entering into a contract with third persons for the loan of money with which to discharge even the lawful debts of his principal. Had there been previous overdrafts to the knowledge of his principal which he had subsequently paid, a just deduction might be drawn as to Dawley's authority to borrow by way of overdraft. But this view of the case is not presented by the instruction, nor do we think the evidence would justify it. Neither by note nor overdraft on a bank, can a mining superintendent, as such, bind his principal.

In the case of *New York Iron Mine v. First National Bank of Negaunnes*, Albany Law Journal of 1878, p. 489 (not yet reported in the published opinions), the supreme court of Michigan very fully considered the question as to whether a general mining agent, without being specially empowered so to do, has authority to make a promissory note in the name of his principal. The court denied the authority, holding that the owner of the note could not rest its case on the implied power of the general agent; that the issuing of promissory notes is not a power necessarily incident to the conduct of the business of mining, and that it is so susceptible of abuse to the injury, and indeed to the utter destruction of the principal, that it is wisely left by the law to be conferred or not as the prudence of the principal may determine.

In *McCullough v. Moss*, 5 Denio, 567, it was held that the president and secretary of a mining corporation could not bind the corporation by a note made in its name, without proof of their authority to execute it.

In *Union Gold Mining Co. v. Rocky Mountain National Bank*, 2 Col. 248 and 565, the court held that the superintendent of a mining company has no authority, by virtue of his office merely, to borrow money on the credit of the corporation by note, overdraft or otherwise. We discover no sufficient reason for departing from what may be consid-

ered as the settled doctrine in this State on this subject. We must conclude that the instruction under consideration, as it is not in harmony with the views here expressed, was liable to mislead the jury as to the law of the case, and, therefore, was erroneously given. This instruction is inconsistent with instruction numbered thirteen.

Whether Breed, by his course of dealing with Dawley, held him out to the world as an agent, authorized to borrow money to carry on mining operations, is a question which, upon all the facts, is for the jury, and upon which we now express no opinion.

If Dawley was without original authority to borrow money on behalf of his principal, but did in fact so borrow, and used it in a manner advantageous to the party to be charged, the ratification of his unauthorized act may be inferred from the silence of the principal after knowledge of the facts. It is his duty, if he does not acquiesce in the unauthorized act, to repudiate it. If he fail to do so within a reasonable time after notice, the jury may draw an inference of ratification, but no estoppel is created if the unauthorized transaction is complete before knowledge of it reaches the alleged principal, and the status of the parties would not be changed by his failure to approve or disapprove within a reasonable time. *Union Gold Mining Co. v. Rocky Mountain National Bank*, 2 Col. 248. Judgment

Reversed.

THE CORNING TUNNEL, etc., Co. v. PELL et al.

- 1 The right of possession of veins or lodes granted by section four of the act of Congress of May 10, 1872, to tunnel owners, is dependent, among other things, upon *discovery* of the vein or lode in the tunnel. The effect of section two of the act is to give a party running a tunnel for any purpose, whether for prospecting or development, the right to pre-empt and locate any and all lodes not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface.

2. Under the act, the "line of the tunnel" does not mean the entire width and length of the surveyed tunnel site, nor does the act provide for or authorize a tunnel site survey and location fifteen hundred feet in width. The policy of the government has been to prevent monopoly of its mineral lands, or its ownership in large tracts.
3. The "line" of the tunnel, having reference to the subject it was intended to describe, designates a width marked by the exterior lines or sides of the tunnel.

Appeal from District Court of Arapahoe County.

THE facts are sufficiently stated in the opinion.

Messrs. BELFORD & REED, for appellant.

Messrs. H. M. & W. TELLER & G. B. REED, for appellees.

ELBERT, J. In November, 1875, the appellees made application under the law for a patent to the "Slide lode." The appellant filed an adverse claim and brought ejectment in the district court for the county of Boulder to determine the title. A change of venue was taken to the district court for the county of Arapahoe, where a trial was had to the court, and on motion of appellees a judgment of nonsuit was entered. The appellant claims by virtue of its tunnel site location, made Sept. 18, 1872, under the act of Congress of May 10, 1872, and by virtue of the work done in and upon its tunnel.

This tunnel site as claimed may be described generally as extending along a center-line running from the face of the tunnel 3,000 feet, with side lines parallel with the center line, and each 750 feet from it, making a parallelogram 1,500x3,000 feet.

The tunnel appears to have been worked with reasonable diligence, and never to have been abandoned.

The appellees claim under the same act, by virtue of discovery, development and location. The location was made in August, 1875, and the appellees have been in continuous possession ever since, claiming title thereto.

The Slide lode is 1,500 feet in length and crosses the center line of the tunnel site nearly at right angles. The discovery shaft is near, but not on the center line, being about 55 feet therefrom.

The evidence does not show, nor was there any attempt to show that the Slide lode had been reached or cut by the tunnel; nor is there any claim that the appellant ever located or pre-empted it, or ever had actual possession of it. Its claim is based entirely upon the right of tunnel owners under section 4 of the act of Congress mentioned. The section is as follows:

"That when any tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof not previously known to exist, *discovered in such tunnel* to the same extent as if *discovered* from the surface; and locations on the line of such tunnel, of veins or lodes not appearing on the surface, made by other parties, after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of said tunnel."

The right of possession of veins or lodes here granted to the tunnel owner is dependent, among other things, upon *discovery* of the vein or lode in the tunnel. Such is the force and effect of the language of the section. "The owners of such tunnel shall have the right of possession of all veins or lodes * * * *discovered in such tunnel*" and "to the same extent as if *discovered* upon the surface." The purpose of the section, as of the entire act, was to fix the rights and reward the labors of the *discoverer*. The same purpose is manifest and the same rule prescribed with regard to surface claims in section 2 of the act, in the provision that "no location of a mining claim shall be

made until the *discovery* of the vein or lode within the limits of the claim located." The effect of the section is to give a party running a tunnel for any purpose, whether for development or for prospecting, the right to pre-empt and locate any and all lodes not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface.

The right of possession being dependent upon discovery in the tunnel, it follows that it could not attach prior to discovery, and that the appellant, therefore, had no right of action, unless by reason of the location of the Slide lode upon the line of its tunnel, if such was the fact. The right of the tunnel owner to the possession of the "line of his tunnel," as well as the extent of this right, are independent questions.

It is claimed that the location of the Slide lode is on the line of the appellant's tunnel, and that for the line of its tunnel, as well as for all blind lodes therein not previously known to exist, ejectment lies at any time after commencement of work on the tunnel.

The argument is founded upon the provision that "locations on the line of such tunnel of veins or lodes not appearing on the surface made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid."

The "line of the tunnel" it is insisted, as here used, means the entire width and length of the surveyed tunnel site—in this case 1,500 x 3,000 feet; that within these limits, after the commencement of the tunnel, and while it is prosecuted with reasonable diligence, no valid location can be made of a vein or lode not appearing upon the surface. In the first place this section does not provide for or authorize, nor do we know of any law that provides for or authorizes a tunnel site survey and location 1,500 feet in width.

In the second place, the results of such a construction as is contended for by appellants forbid its adoption, unless the language clearly indicates such to have been the legis-

lative will. In this case, the tunnel site location would withdraw from the explorations of prospectors over one hundred acres of mineral lands. A very limited number of such locations would cover and monopolize, in most cases, an entire mining district—giving to a few tunnel owners, all its mines, not upon the condition of discovery and development, but upon the easy condition of a *commencement* of work on the tunnel, and its prosecution with reasonable diligence.

The policy of the general government has been to prevent monopoly of its mineral lands, or its ownership in large tracts. But for the existence of this policy, there was but little or no reason for an abandonment of its system of surveys and pre-emptions applicable to agricultural lands, and the adoption as to its mineral lands of a system, that as to surface claims at least, limits mining locations to an inconsiderable acreage, appendant to a discovered lode. The construction claimed is in contravention of this policy; nor can it be justified by the language of the section.

Line, as a term of surveying, is that which has length without breadth, but, as used in this section, having reference to the subject it was intended to describe, we think it designates a width marked by the exterior lines or sides of the tunnel. A greater width than this it cannot be fairly said to imply. The line of the tunnel being the width of the tunnel, the location (in the sense that it is here used, of initial point of location or discovery shaft) of the Slide lode, was not on the line of the appellant's tunnel.

What the appellant's rights would have been had this fact been otherwise, it is not necessary to determine. The location not being on the line of the tunnel, it is immaterial whether the lode appeared upon the surface or not, as in either case the evidence did not show any right upon the part of the appellant.

The judgment of the court below is affirmed with costs.

Affirmed.

HART AND SCHLESSENGER CORPORATION v. MULLEN et al.,
impleaded, etc.

1. Under the statute (Laws 1872, p. 147), one who contracts directly with the owner for the delivery of materials in the construction of a building, is required to file his lien claim within forty days after the completion of the building. He may file it an earlier day if he so elects; and within six months thereafter, whether the lien be filed prior or subsequent to the completion of the building, he must commence suit to enforce it. Purchasers, after notice of lien claim filed, may be properly made parties defendant in such action.
2. In an action to enforce a lien under the statute, a judgment for the payment of money is not warranted.

Error to District Court of Gilpin County.

THIS was a suit to enforce a lien under the statute by the plaintiff in error, for materials furnished Neaman (impleaded with Mullen and Sartori), and used by Neaman in the construction of a building owned by him. Upon demurrer, the petition was dismissed as to Mullen and Sartori. Default was taken against Neaman. From the evidence taken before the master, it appears that Neaman was the owner of the building at the time the materials were furnished; that Mullen and Sartori purchased the property on the 10th day of June, 1876; that when Neaman sold to Mullen and Sartori, the building was unfinished.

The following, among other matters, appears by the report:

Notice of Mullen and Sartori filed in recorder's office of Gilpin county, July 9, 1875, of their intention to claim a lien.

Petition filed by Mullen and Sartori to enforce the same, December 16, 1875.

Notice of the Hart and Schlessinger corporation of their intention to claim lien, filed in the recorder's office May 2, 1876.

Henry Hale testified in substance as follows: "Was book-keeper and salesman for plaintiff in April, 1875.

Henry Neaman got lumber from plaintiff to the amount of \$179.19; know it was used in the construction of building described in plaintiff's petition; I presented the bill to Neaman in May or June, 1875; he said it was correct; the building is now unfinished, and has never been occupied; I filed the notice on behalf of the corporation of its intention to claim a lien."

The master certified that there was due from Neaman to complainant the sum of \$218.70.

Afterward, on the filing of the master's report, the complainant filed a "motion for judgment against Henry Neaman, one of said defendants, for \$218.70 And further, that petitioners may be decreed to have a lien upon the premises in the petition described, for said sum, and that the same may be sold to satisfy the same, according to the rules and practice of the court and in pursuance of the statute."

Judgment was rendered against Neaman for \$218.70 and costs, and a decree for a lien on the premises denied.

The complainant prosecutes this writ of error and assigns for error:

"1. The court erred in sustaining the demurrer of defendants to petition, and dismissing the same as to defendants Mullen and Sartori.

"2. The court erred in denying to petitioners, plaintiff in error, a lien upon the premises described in petition.

"3. The court erred in rendering judgment for costs against plaintiff in error."

Mr. ALVIN MARSH, for plaintiff in error.

MESSRS. H. M. & W. TELLER, for defendants in error.

THATCHER, C. J. By the petition of the plaintiff in error, complainant below, it appears that it claims a lien for lumber furnished by it to and used by Neaman in the construction of a building situated on a certain lot owned by Neaman, in Central City; that the lumber, in accordance with a contract between the plaintiff in error and Nea-

man, was delivered to him in the month of April, A. D. 1875; that thereafter, and on the 2d day of May, A. D. 1876, before the building was finished, it filed its notice of intention to claim a lien upon the building and premises upon which it was situated, in pursuance of section two of the Mechanics' Lien Act of February 9, 1872, Session Laws 1872, p. 147; that Mullen and Sartori claim to have some interest in the premises for work and labor performed on said building, and they are therefore made parties defendant.

A joint and several demurrer was interposed to the petition, which, as to Mullen and Sartori, was sustained by the court. The only point relied on by defendants in error, in their argument, is that the statement of the lien claimed was not filed within the statutory period. Section one of the act provides that all artisans, mechanics, and others, who shall perform work or labor, or furnish materials * * * for the construction or repairing of any building, shall have and may claim a lien upon such building for the amount and value of the work and labor so performed or materials furnished. Section two provides that persons claiming a lien, as provided in section one, shall file in the clerk and recorder's office, within forty days after such building or superstructure, work of construction, or any repairs shall have been completed, a statement of such lien. Defendants in error contend that the statement must be filed, under this section, within forty days after the last materials were furnished by lien claimant. To determine the time within which a sub-contractor must file his lien, reference must doubtless be had to the time when the last labor was performed or the last materials furnished by him. Such is the plain requirement of the last provision of section two. But a different rule, as will be seen from the portion of section two above quoted, applies to him who contracts for the delivery of materials directly with the owner of the building. In such case the contractor is only bound to file his lien claim within forty days after the completion of the

building. Until that time has elapsed he cannot be said to be in default. Phillips on Mechanics' Liens, § 330, p. 465. He may file it at an earlier day if he so elects, and within six months thereafter in either event, whether the lien be filed prior or subsequent to the completion of the building, he must commence suit to enforce it. § 8.

As the lien claim was filed within the prescribed time under the statute, as we construe it, the decree dismissing the bill as to Mullen and Sartori was erroneous. The decree against Neaman for the payment of money in the absence of a lien, is not warranted by the Lien Act. *Barnard, Adm'r, v. McKenzie* (ante, p. 251).

Decree reversed.

IN ACTION FOR ENFORCEMENT OF MECHANIC'S LIEN a judgment for money was not warranted prior to the statute of 1893, which changed the law: *Cannon v. Williams*, 14 Colo. 28. But see contra the dissenting opinion, page 28.

BYERS v. HUSSEY.

Where a surety seeks to be discharged on the ground of extension of time the controlling question is was the extension of such a character as to bind the creditor, and thereby preclude him from pursuing his remedy against the principal.

Appeal from District Court of Arapahoe County.

In November, 1874, William N. Byers gave his promissory note for \$2,860 for money borrowed, payable in ten years, to the Denver Co-operative Loan, Building and Homestead Association or order, with interest at ten per cent per annum. The interest was payable, one-twelfth part monthly; the principal was payable 1-120 part monthly, without grace. In January, 1875, Mr. Byers gave another note for \$2,920 for money borrowed, payable in the same manner. The complainant, as it was contended, signed these notes as surety, and made conveyance to Hussey, the appellee, of the real estate in controversy, to be held in trust to secure the payment of the notes. Mr. Byers, the principal debtor, continued to pay the installments on these

notes, both the interest and principal, as required by the terms of the notes, until the month of April, 1876. In May, 1876, the association, it was contended, adopted an amendment to its constitution, releasing all who chose to avail themselves of the privilege, from the monthly repayment of the 1-120 part of the principal of the notes given by them to the association, and further providing for the non-payment of the principal until the expiration of ten years from the date of the notes. Mr. Byers, it was contended, entered into this new agreement, availed himself of the privilege, and continued to pay interest only, until November, 1876, when he ceased the payment of interest, not having paid any part of the principal of his two notes after April, 1876. The association accepted and receipted for the interest by its treasurer, Rubidge, regularly, for some six months, that is from April to November. This change was made and entered into without the knowledge or consent of the complainant.

The bill alleged among other matters that the association was a "voluntary association, composed of numerous individuals for private purposes, and of whose particular interests, if any they have in said deeds of trust mentioned in said bill, said plaintiff is not informed; and that said association, so composed as aforesaid, as said plaintiff is informed and believes, is not authorized by law to take, hold, or purchase, or to grant, bargain, sell, and convey real estate in any manner whatsoever."

The constitution of the association provides among other things that:

"The board of directors shall from time to time select two men, not members of this association, to act as trustees for the association, to whom shall be conveyed all property belonging to this association or held by it as security. These trustees shall perform the duties and trusts imposed upon them, and shall receive a compensation to be fixed by the board, not exceeding that allowed by the courts of this Territory for similar services."

Messrs. FRANCE & ROGERS, for appellant.

Mr. A. C. PHELPS, for appellee.

ELBERT, J. This was a bill for an injunction and other relief. The complainant, Elizabeth M. Byers, alleges in her bill :

“That on or about November 7, 1874, William N. Byers made, executed and delivered to the Denver Co-operative Loan, Building, and Homestead Association, his promissory note for \$2,860, with annual interest at ten per cent; said note payable to said association, or to its order, ten years after date, as follows: ‘The one hundred and twentieth part of said principal sum, and the one-twelfth part of the annual interest thereon, at the rate of ten per cent per annum, monthly, on the first Thursday of each month, without grace after the date of the said note, until said note was fully paid.’ That complainant signed said note, as surety merely, for the said William N. Byers, and not otherwise, of which the said association had notice; that for the purpose of securing the payments of the said note, and of indemnifying the said association on account of indorsement, etc., the complainant executed and delivered to the respondent, Hussey, a deed of trust of certain lands in the city of Denver, for the use, etc., of the said association, with power of sale, etc., in case of default in the payments of said note.

“That said deed was duly recorded, etc., and reference prayed thereto for greater certainty; that on or about January 8, 1875, William N. Byers made, executed and delivered to said association, a certain other note, for the sum of \$2,920 (payable in like manner as the first; that complainant signed the said (last mentioned) note, as surety merely, and made, executed, and delivered as surety, to Hussey, the respondent, for the same purposes, a second trust deed, upon the same real estate, which was duly recorded, etc.

That before the said notes, or either of them, became due and payable, that is, about the month of April, 1876, the said association, together with the said William N. Byers,

and the said Hussey he, the said William N. Byers, being the principal debtor and maker of the said notes, and the said association then and still being the owner and holder of said notes, without the privity, knowledge, procurement, or consent of complainant, changed and extended the times of the payments of said notes, and then and there entered into and effected a new and different contract from the said promissory notes so made, executed and delivered, by the said complainant, as aforesaid, and other and different contract than the said promissory notes, for the payment of which, according to the tenor thereof, the complainant had made, executed, and delivered the said deeds of conveyance in trust as aforesaid.

That respondent pretends that complainant is still holden as surety for the payment of said notes, and that the said lands are still liable for the payment of said notes; that the conditions of the deeds of trust have been broken; that the lands have thereby become liable to be sold, according to the covenants, etc., in said deeds mentioned, for the purpose of paying said notes; that he, as trustee, has authority and power to dispose of and sell said lands, etc., and to make, execute and deliver deeds of conveyance of the same, to the purchaser or purchasers, and to deprive complainant of all her right, title, and interest in and to said property. Whereas, the complainant charges that the association has released complainant from her liability as surety upon the notes, has discharged the property described, from all liability as security for the payment of said sums of money, and each and every of them. That the complainant is seized in fee, and is in the actual occupation and possession of the same, and that the said deeds of trust are a cloud upon the title of complainant.

That Hussey, pretending as aforesaid, and at the request of the association, and assuming to act as trustee, under and by virtue of the deeds of trust, threatens that he will, on the 22d day of June, 1877, sell the lands, etc., for the purpose of paying the said sums alleged to be due upon

the said notes, together with alleged interest due thereon, etc., and to make deeds of conveyance to the purchasers, etc., and thereby create a further cloud upon the title of complainant.

The complainant has requested him to refrain, etc.”

Upon this statement the complainant prays for surrender and cancellation of the deed of trust, and decree of discharge as surety from the said notes, etc.

The answer denies that the complainant sustained the relation of surety, and also denies the alleged change in the terms of the contract.

Proofs were taken and upon a final hearing the bill was dismissed. The complainant appeals to this court.

If the relation of surety be admitted, the proofs by which complainant supported her bill did not warrant a decree in her favor.

The Denver Co-operative, Loan, Building and Homestead Association was a voluntary association composed of numerous members, and governed by a constitution and by-laws. Article XIII of the constitution under which the association was organized, provided as follows :

“Article XIII. The Loan Department. Section 1. Whenever the funds of the association warrant it, one or more awards or loans shall be made at an advance of not less than thirty per cent premium, which loan or loans, with the interest thereon, shall be repaid at the rate of the one hundred and twentieth part of said loan or loans, and premium, and the one-twelfth of the annual interest monthly.”

The notes given by William N. Byers and the complainant were made payable in conformity with the requirements of this article, and are as follows :

“\$2,860.

DENVER, COL., *November 7, 1874.*

On or before ten years after date, for value received, I promise to pay the Denver Co-operative Loan, Building and Homestead Association, or order, the sum of two thousand eight hundred and sixty dollars, with annual interest at the

rate of ten per cent per annum, in manner following, to wit : the one hundred and twentieth (1-120) part of the said sum, and the one-twelfth (1-12) part of the annual interest thereon at the rate of ten per cent per annum, monthly, on the first Thursday of each month, without grace, after this date, until this note is fully paid.

WM. N. BYERS.

E. M. BYERS."

"\$2,920.

DENVER, COL., *January 8, 1875.*

On or before ten years after date, for value received, I promise to pay the Denver Co-operative Loan, Building and Homestead Association, or order, the sum of two thousand nine hundred and twenty dollars, with annual interest at the rate of ten per cent per annum, in manner following, to wit : the one hundred and twentieth (1-120) part of said sum, and the one-twelfth (1-12) part of the annual interest thereon at the rate of ten per cent per annum, monthly, on the first Thursday of each month, without grace, after this date, until this note is fully paid.

WM. N. BYERS.

E. M. BYERS."

The records of the meetings of the stockholders of the association kept by the secretary show, that at a meeting held April 6, 1876 :

"On motion, Mr. Pierce was given time to draw up an amendment to the constitution, to be presented and acted upon at the next meeting, as follows : To Section 1, Article XIII. 'It will be permitted at the option of any borrower, he giving the treasurer thirty days' notice of such wish, to omit the repayment of any portion of the principal of his loan, until such time as his note shall become due, or the affairs of the association shall be closed.'"

This was a *proposed* change of the constitution of the association which, if adopted by the association, and acted upon by them and the principal debtor, would materially change the terms of the contracts. It was a proposed ex-

tension of time upon all the monthly payments of principal stipulated for in the notes.

In *Winne et al. v. Colorado Springs Co.*, 3 Col. 161, the well-settled rule is laid down, that where sureties seek to be discharged on the ground of extension of time, the controlling question is, was the extension of such a character as to bind the creditor, and thereby preclude him from pursuing his remedy against the principal? If yea, even if the extension be but for a day, the sureties are exonerated, otherwise they are held.

Was the amendment to the constitution of the association ever adopted, and was it afterward acted upon by the association and Mr. Byers, in such a manner as to bind the association, and preclude it from pursuing its remedy against Byers on the notes? It does not appear from the secretary's record that this amendment ever passed. The record of the meeting held May 4, 1876, specifies the amendments that passed at that meeting but makes no mention of this.

The record is as follows:

“DENVER, COLORADO, *May 4*, 1876.

The regular monthly meeting of the Denver Co-operative Loan, Building and Homestead Association met at the usual place. A quorum present. Peter Winne, president, in the chair. Minutes of the last regular meeting read. Approved. Money was then offered and none sold. The meeting then proceeded to take action on the amendments to the constitution, and the first one, viz.: To section 1 of article 13, ‘That the per cent of premium be reduced from thirty (30) to ten (10) per cent,’ was, upon motion of Mr. Fay, adopted. The second amendment was also carried with only one dissenting vote, viz.: To an amendment passed January 4, 1874, to section 8, of article 13, ‘That the penalty for paying loans be reduced from 5 per cent to one per cent,

after May 1, 1876. Money was again offered for sale with the following results :

* * * * *

On motion, meeting adjourned.

Attest, PETER WINNE, *President.*
W. H. PIERCE, *Secretary.*"

Mr. Winne, however, testifies that he was president of the association at that time, and that the amendment passed at the meeting of May 4th, but that there was no record of it. If it be admitted that such an amendment did pass as testified to by Mr. Winne, we are confronted with an objection that, as between the association and Byers, is fatal to the validity of the amendment.

Article XX of the constitution of the association provides that "the constitution shall not be altered or amended, except at an annual, semi-annual or special meeting of stockholders, with the consent of three-fourths of the stockholders present, and upon at least thirty days' previous notice."

There is no claim that the amendment was passed at either an annual, semi-annual or special meeting. On the other hand, it is clear that it was not. The semi-annual meetings were fixed on the first Thursday of February and August of each year. A special meeting had to be called by published notice. No annual meeting is provided for, except inferentially, by the provision fixing the election of officers at the semi-annual meeting on the first Thursday of February of each year.

Doubtless it was competent for the association to pass a valid amendment to their constitution at a time other than that fixed by the constitution, the stockholders all being present and assenting thereto, but in the absence of such assent, the amendment would be of no validity as between the members of the association. This irregularity would not have availed against a debtor who was not a member of the association, and had dealt with its officers and agents in good faith, upon the strength of the amendment. But it must be borne in mind that Mr. Byers was a member of

the association, with full knowledge of its constitution and by-laws, and was bound to take notice that this amendment was of no validity.

If the treasurer, who was the financial agent of the association, acted upon this amendment, Byers was bound to take notice, as a member of the association, that he acted without authority. It is claimed by counsel that this action was ratified by the association, but they fail to state how. Certainly not by any formal ratification, as by a vote at any meeting at which all the stockholders were present. The acts of the treasurer, as we have said, would not avail as a ratification by the association, for Byers was bound to take notice of his want of authority.

Long continued and habitual disregard of partnership articles may be regarded as a waiver. A waiver may also be implied from silence or neglect long continued and fairly open to no other explanation than that the parties understood the provision disregarded to have no force ; so if the silence or non-observance be brief, but strengthened by acts of the partners, opposite in their nature and effect to such provisions, the same inference may be made. Parsons on Part. 238.* But the disregard of this constitutional provision of the association by a limited number of the members upon a single occasion cannot be regarded as an abandonment of the provision by the association. Nor is a waiver fairly inferable from silence, where there was no record made of the irregular proceeding, nor proof that it was known to the members.

It cannot, therefore, be said that there was any valid agreement between Byers and the association for an extension that would have precluded the association from pursuing its remedy on the notes executed. This being the case, the surety cannot be discharged under the rule laid down. The complainant was not deprived of or delayed in the assertion of her equitable claim to pay the debt and become subrogated to the rights and remedies of the creditor against the principal debtor. Even if this point was not

fatal, we doubt if we could say that Byers ever, in fact, accepted or acted on the terms of the amendment. Upon this point the testimony of Byers, and Rubridge, the treasurer, is in direct conflict. There is no pretense that Byers ever gave the thirty days' notice required by the amendment. It was not waived in terms, but may have been by the acts of the parties. The pass-book in which it was customary to make the entry of his monthly payments of both principal and interest in separate columns, in part corroborates Byers, but in so far as it shows no payment of principal for the month of May, it corroborates Rubridge, as the payment of principal for that month did not come within the terms of the proposed extension.

Again, Hussey was but a naked trustee, and the beneficiaries under the deed of trust should have been made parties defendant. The fact that the association was a voluntary association, composed of numerous members, might avail as a reason for not making them all defendants, but some portion of the members or officers should have been made defendants as representatives of the interests of all. Story's Eq. Pl., §§ 97, 107, 116; 2 Perry on Trusts, §§ 873, 875.

The decree of the court below is

Affirmed

KANSAS PACIFIC RY. CO. v. CRANMER.

It is now well settled that a plaintiff may recover in an action against a railroad company for injury sustained, notwithstanding his own negligence exposed him to the injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid doing the injury.

Appeal from District Court of Arapahoe County.

ACTION on the case. The facts are sufficiently stated in the opinion.

Messrs. SAYRE, WRIGHT & BUTLER, for appellant.

Messrs. HUGHES & WELBORN, for appellee.

THATCHER, C. J. This is a suit brought by the appellee for the purpose of recovering damages from the appellant by reason of his wagon being demolished and his horses killed by being run over by an engine of the appellant, the appellee being at the time in what is called the yard of the company for the purpose of unloading coal from certain cars. There is evidence tending to show that appellee was at the time of the accident in the yard of the railway company, between the tracks at a place not designated for the purpose of standing room, or driving way for the teams, sufficient facilities being afforded for the convenience and safety of the teamsters upon the opposite side of the coal cars; but the space occupied by appellee with his team had before been used, both by himself and other persons, without any notice from the company not to use it, or that it was intended for a different purpose. The horses becoming frightened, backed the wagon upon the track before the train had reached them. The engine struck and destroyed the wagon and killed the horses. The verdict of the jury was for the plaintiff. The only alleged errors which appellant notices, and upon which he relies in argument, and the only ones we will therefore consider are based upon the giving of one instruction, and the refusal to give another. The instruction given alleged to be erroneous is as follows:

“If the jury believe, from the evidence, that the plaintiff had no right to be between the railway tracks of the defendant at the place where the alleged accident occurred, and that the accident occurred in consequence of the imprudence and negligence of the plaintiff, he cannot recover, *unless you also believe, from the evidence, that the defendant's engineer failed to exercise ordinary care after becoming aware of the plaintiff's danger.*”

The portion of the instruction in italics is objected to on the ground that no recovery should be allowed where there is contributory negligence on part of the plaintiff. It will be observed that under this instruction the plaintiff, even though a trespasser on the track, may recover if the defend-

ant, with knowledge of his danger, failed to exercise ordinary care to prevent it. The instruction refused announced a directly different doctrine, excusing the defendant from ordinary care; if plaintiff was wrongfully on or near the track, and thereby contributed in any degree to his own loss. If the one instruction was properly given, the other was properly refused. We think the instruction given announces the law correctly. If an engineer sees a person or animal on the track it is his duty to use at least ordinary care to avoid running over such person or animal. If he do not, and an accident follows, it may be said to be the result of gross negligence and wantonness. Shearman & Redfield in their book on Negligence, § 36, say: "It is now well settled that the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him." See, also, numerous cases there cited in support of the text. This rule is in substantial accord with the doctrine laid down in *The Denver & Rio Grande Railway Co. v. Olsen* (*ante*, p. 239).

The judgment will be

Affirmed.

NEGLIGENCE OF PLAINTIFF WILL NOT BAR RECOVERY if the defendant, on becoming aware of plaintiff's danger, failed to use ordinary care to avoid the injury: *Kennedy v. Denver & S. P. & P. E. R. Co.* 10 Colo. 495, 501.

MORGAN v. HEDGES.

1. Where tenants in common of chattels agree that one shall have exclusive possession of the chattels, the tenant so entitled may maintain replevin against his co-tenant.
2. That the jury might, upon the evidence, have found a different verdict, will not justify the reversal of a judgment.

Appeal from District Court of Pueblo County.

MORGAN, the appellant, brought an action of replevin against Hedges, for the recovery of a quantity of farm produce and certain farming tools. The declaration was in the *cepit* and *detinet*; pleas: not guilty and property in the defendant. The jury returned a verdict in favor of the de-

fendant ; a motion for a new trial was interposed and overruled, and judgment rendered on the verdict. The record discloses substantially the following matters in evidence :

Morgan, plaintiff, testified : " I rented a farm from Charles Goodnight, in fore part of 1875 ; I moved my family on it and took possession of it ; I afterward employed defendant to do the work on the farm ; I agreed to furnish what money might be needed to buy seed, farming implements and groceries for Mr. Hedges and his family ; I was to retain control of the place and sell the crops as soon as they should be matured ; I was first to take out of the proceeds of the sales, all the money I had advanced for seed, implements and groceries, and after that, was to give Mr. Hedges for his labor one-half of what should be left of the proceeds of the sales."

Here paper is shown to witness, which he identified as the agreement between himself and the defendant in regard to the property in controversy in this suit, which reads as follows :

" Agreement made this first day of Feb., A. D. 1875, between E. S. Morgan and L. A. Hedges, witnesseth as follows, to wit : E. S. Morgan furnishes means to pay current expenses necessary to farm the Chatham ranch, under rent to him for the present year, and agrees to devote his time to the general financial and outside management of the affairs of the ranch, sell the products of the place and keep a full account of all receipts and disbursements, and otherwise assist in the conduct of the business, so far as he can. He will also furnish what cows may be mutually agreed upon for the purpose of a dairy. The milk and butter to be used by both families, and the surplus to be sold for mutual benefit. The stock being so furnished to the company for milking, and to belong to the purchaser, at the expiration of this agreement.

E. S. Morgan will also furnish means to Mr. Hedges to defray his necessary expenses for groceries and provisions until the products of the farm can be realized from, and

assist him generally as he may be able to do and the exigencies require.

Mr. Hedges, on his part, agrees to furnish his team, and with the assistance of his family, take charge of the farming and dairy. Mr. Hedges will do the farming, and have charge of that branch of the business, putting in such crops as may be mutually agreed upon, and conduct the business generally to the best of his ability for the mutual good. The profits of the business shall be divided equally between E. S. Morgan and Mr. Hedges, share and share alike, after all advances made by E. S. Morgan are paid, the net proceeds or profits shall be so divided.

All advances made by E. S. Morgan, for the joint account, or to Mr. Hedges for his own uses, shall be paid back out of the first money realized from the products of the ranch. E. S. Morgan further agrees to divide with Mr. Hedges any money (or the product) of the place rented by him to Mr. Cox. Whatever he gets from Mr. Cox shall be divided equally. This is done by E. S. Morgan, the better to insure success to Mr. Hedges (and not as an original agreement). At the end of the current year the affairs shall be settled and closed up according to the tenor of this agreement and the association of the parties will end unless renewed by mutual agreement.

E. S. MORGAN, [SEAL.]
L. A. HEDGES, [SEAL.]”

Witness, C. PLATT.

The witness continued : “The farm I rented of Goodnight is the Chatham ranch, mentioned in the agreement ; under this agreement defendant moved on the place and went to work, and put in crops ; under this agreement I furnished the seed, implements, groceries and every thing that I had agreed to furnish ; things thus furnished by me cost \$675 : during the season the grasshoppers destroyed nearly all we had at that time ; the prospect was gloomy ; there was some hay, corn and onions left ; I then told defendant I would go to Rosita, and that he should do what he could with

what hay and corn was left, so that I should get out of them what money I had advanced ; he said that he would do the best that he could, and that I should have the money back that I had advanced out of what should be left ; that he had now a house to live in and would have no rent to pay, and that he could haul wood to town to support himself through winter ; I then went to Rosita ; when the corn and hay were ready for market, I sent Mr. Platt as my agent to go and sell the crops, as I considered this a part of my duty under the contract ; Mr. Platt sent four loads of corn, with defendant's consent, to Rosita, to me, which weighed altogether 7,750 pounds, in the ear, and was worth two cents per pound ; defendant brought up two of those loads himself ; after that defendant refused to allow Platt to take any more of the crops or any thing else from the place."

The property described in the writ in this suit was then read to the witness, and he testified that all the property described in the writ was property which he was entitled to the possession of under his agreement with the defendant, and that all the property described in the writ, together with what he had before received, would not near amount to as much, at fair market prices, as the money which he had advanced under the agreement.

[Cross-examination — see the opinion.]

* * * * *

On further examination by counsel for the plaintiff, the witness testified : "I did not stipulate to stay on the farm more than I wished to ; the written agreement in evidence was in no way changed or modified when I went to Rosita."

The witness, Platt, testified : "I lived with Mr. Morgan, the plaintiff, during the summer and spring of 1875, upon the Chatham ranch ; when the crop was ripe he gave me authority as his agent to take control of the property described in the writ in this suit, and sell the same ; acting under his authority I took control of the property and the defendant made no objection at that time ; I sent four loads of corn to Rosita to the plaintiff, with defendant's consent,

and defendant took two of them up himself; after that the defendant forbid me from taking any thing more from the place; I then, as agent for the plaintiff, demanded of the defendant the property described in the writ in this suit, for the purpose of selling the same; he refused to permit me to take possession of the same, or to sell any more; defendant told me that he had hauled away four loads of hay off the place, but I inquired and found out that he had hauled away eight loads; the loads weighed about one ton each, and was worth \$13 or \$14 per ton; the hay grown on the place during the season was greatly damaged through defendant's neglect to harvest it properly; it was not worth more than half what it would have been worth if it had been properly cared for; I was with the sheriff when the writ in this cause was levied on the property described in the same; one load of corn was taken from defendant while on the road to Pueblo to sell the same."

On cross-examination the witness testified: "The greater part of the corn described in the writ was standing in the field and uncut when it was levied upon; the hay was in the stack in the corral; the property was all found on the place, except the load of corn which the sheriff took possession of on the road."

Abe R. Ellis testified: "I am the sheriff of this county; I served the writ in this suit; the property described in this writ I found in the possession of the defendant; I turned it over to Mr. Platt as agent of the plaintiff."

The appellant assigned for error in this court:

First. The jury erred in rendering a verdict in favor of the appellee contrary to the law and the evidence of the case.

Second. The court erred in denying the motion for a new trial.

Third. The court erred in rendering judgment in favor of the appellee and against the appellant.

Mr. E. P. HARMON, for appellant.

Mr. H. P. H. BROMWELL, for appellee.

ELBERT, J. The stipulations in the articles of agreement that appellant, Morgan, should sell the products of the ranch and keep a full account of all receipts and disbursements, involved an agreement for their possession to that end.

Where tenants in common of chattels agree that one shall have exclusive possession of the chattels, the tenant so entitled may maintain replevin against his co-tenant. *Newton v. Gardner*, 24 Wis. 232.

While the right of the appellant, Morgan, to the possession of the products of the ranch for the purpose of selling them, is fairly inferable from the terms of the agreement, the jury were warranted in finding, from the evidence of the appellant, that the agreement, in this respect, was subsequently modified.

He testified: "During the season the grasshoppers destroyed nearly all we had at that time. The prospect was gloomy. There was some hay, corn and onions left. I then told defendant I would go to Rosita, and that he should do what he could with what hay and corn was left, so that I should get out of them what money I had advanced. He said that he would do the best that he could, and that I should have the money back that I had advanced out of what should be left. * * * * * I then went to Rosita." On cross-examination he testified: "No part of the agreement was performed on my part after I went to Rosita; defendant said he would do the best he could; none of my obligations under the agreement were performed after I went to Rosita."

"Q. Did you feel under obligations to assist on the ranch after you left for Rosita?"

"I did not."

It is true he testifies that he did not abandon or modify the original agreement in the matter of his right to possess and control the products of the ranch, but of this the jury

were the judges in the light of all the circumstances. That they found that there was a modification of the agreement in this particular is evidenced by their verdict. We cannot say that their finding was unsupported by the evidence. That appellant became discouraged with the prospects of the adventure; that he left the ranch and removed to Rosita; that he ceased to perform his part of the agreement; and told the appellee "that he should do what he could with what hay and corn was left," are facts to which he testified himself, and are clearly open to the construction that he abandoned his right to the control and possession of the crops and turned the entire matter over to the appellee to close up to the best advantage. That the jury might have found otherwise, does not justify a reversal.

The judgment of the court below is affirmed with costs.

Affirmed.

IN RE SMITH.

Where an indictment contained two counts, and a *nolle prosequi* was entered as to one and the other quashed, *held*, that although the indictment, as such, was *functus officio*, yet it remained as a sworn accusation upon which the court was warranted in remanding the prisoner to answer a new indictment.

PETITION for *habeas corpus*. The case is stated in the opinion.

Mr. E. P. JACOBSON, for petitioner.

C. W. WRIGHT, Attorney-General, for respondent.

THATCHER, C. J. It appears from the pleadings, that the petitioner, Simon G. Smith, was indicted at the last January term of the district court of Arapahoe county. The indictment contained two counts, one charging him with larceny, the other with embezzlement. The petitioner had

fled to Missouri. Upon a requisition of the governor of this State on the governor of Missouri, and proceedings had in pursuance thereof, the accused was brought to this city and confined in jail to await his trial.

As to the count in the indictment charging embezzlement a *nolle* was entered. As to the count charging larceny, the petitioner moved the court to quash the same on various technical grounds, which motion was allowed.

The petitioner being discharged by order of court "from the premises in said indictment," he could no longer be put upon his trial thereon, unless, perhaps, upon the *nolled* count, if by leave of court upon the prosecuting attorney's motion, a fresh *capias* should issue, and the *nolled* count be thus revived. 1 Chitty's Cr. Law, p. 480* ; *State v. Thornton*, 13 Ired. 257.

Then follows this order of the court:

"And whereupon it is so ordered by the court that the said defendant be let to bail in the sum of six hundred dollars to answer unto any indictment that may be found against him by the next grand jury of this county ; and that in default of giving such bail he be remanded to the custody of the sheriff to await the action of said grand jury." Although, except in the respect above indicated, the indictment, *as such*, was *functus officio* ; although the petitioner could no longer be called upon to plead to it as an indictment, it nevertheless remained as a sworn accusation against the petitioner, affording *prima facie* evidence of probable guilt, upon which the district court was warranted in remanding him to answer a new indictment formally drawn and more specifically describing the particular crimes charged. This is a power which courts in this State are constantly exercising, and it is perhaps safe to say, that a court having cognizance of an offense has power to commit for it as a court, and the judge need not, therefore, for that purpose come down from the bench and act in his character as an examining magistrate. 1 Bishop's Cr. Proc., § 229, *note*, giving opinion of Chief Justice MARSHALL on this

point in *United States v. Burr*. Even where the prisoner is acquitted for a flaw in the indictment, he may be remanded to be tried at the next term on a new indictment. *United States v. Smith*, 2 Cranch's C. C. R. 111. In the case of *Gooden v. The State*, 35 Ala. 432, the court says: "Independent of statute, the circuit courts possess the undoubted power, where the judgment in a criminal case is arrested, and a *nolle prosequi* is entered by the State, to bind the defendant over to appear at the circuit court of the proper county to answer a new indictment for the same offense." See, also, *Nicholls v. The State*, 5 N. J. L. 626; *Peter v. The State*, 3 How. (Miss.) 433. Bishop, in his *Criminal Procedure*, § 229, says: "If an indictment is pronounced bad, the judge is not necessarily obliged to let the defendant go; but he may commit him, or hold him to bail to answer to a fresh indictment; or he may order the officer to take the prisoner before a justice of the peace to be proceeded against on fresh complaint."

We are satisfied that the court under the circumstances was clothed with authority to make the very order it did, unless the fact that the petitioner was brought into this jurisdiction from Missouri, whither he had fled, operates to divest the court of such authority.

It is contended that the moment one count in the indictment was quashed, and a *nolle* entered as to the other, the prisoner was entitled to return to the jurisdiction from which he was brought against his will; that under the Constitution of the United States (article 4, § 2) and the laws thereof (Revised Statutes U. S., § 5278), the court could not, without violating inter-State rights, remand the petitioner to answer to a fresh indictment. The question whether a fugitive from justice having been brought into this State on the charge of having committed certain specified crimes can be held to answer other charges, is not presented. The reasonable interpretation of the court's order is, that the petitioner shall be held to answer a fresh indictment, correct in form, charging the same crimes, for the

alleged commission of which he was before indicted. That he can be held to answer the same charge for which he was extradited the same as if a citizen, we have no doubt. The demurrer to the plea interposed to the sheriff's return is sustained, and the petitioner is remanded.

STREETER et al., impl. with PAUL v. THE MARSHALL SILVER MINING Co. et al.

1. Where the first of a series of pleas expressly designates for whom the counsel appear, the use of the words "the defendants" in the subsequent pleas designate the defendants named in the first plea, and cannot be held to be an appearance for a defendant served, but not named in the first plea.
2. Where there are several defendants, all served, but no appearance as to one, it is error to render final judgment against all without first entering judgment by default against the defendant not appearing.
3. An entire judgment against several defendants, if reversed as to one must be reversed as to all.
4. It is a fundamental rule that no damages will be allowed which are not the actual, natural and proximate result of the wrong committed.

Appeal from District Court of Clear Creek County.

DEBT upon an injunction bond, wherein the Marshall Silver Mining Company and others, the appellees, were plaintiffs, and Eli F. Streeter, Walter N. Webster, impleaded with Philip Paul, were defendants. The declaration is in debt, in the usual form, on an injunction bond, in a case in which Walter N. Webster and Joseph Rist were complainants and the above-named appellees were defendants, in which injunction was granted to restrain the said appellees from working certain property on the Seneca and Cayuga lodes in the county of Clear Creek.

The breach assigned was, that the said suit was dismissed and the injunction was dissolved as having been wrongfully issued; that by reason of the issuance of said injunction the appellees herein had suffered loss of profits in working the

property, and had been obliged to keep in their employ a large number of men, etc., and that the complainants in said injunction suit had failed to pay either the costs of the suit or the damages suffered by the appellees herein.

The pleadings, after the title, etc., begin : " And the said defendants, Walter N. Webster and Eli F. Streeter, by H. M. and W. Teller, their attorneys, come and defend the wrong and injury, when," etc. The subsequent pleas began as stated in the opinion. The defendants were all served.

The evidence, as appears by the record, was substantially as follows :

Solomon Robinson was sworn as a witness, on behalf of the plaintiff, and testified : " I know Compass and Square lode; was mining on the north wall of this lode in the fall of 1871; had been mining five or six months; we had a lease from the Marshall Silver Mining Company; we had possession of 250 feet south-west of the tunnel; we were working twelve men; the lease run until the 1st of May, 1872: we were working these men when the injunction was served; we had a good body of ore; the ore was yielding from 600 to 900 ounces per ton, worth \$1.10 per oz.; the crevice was from 1 to 6 inches in width; the second class ore run from 150 to 300 ounces per ton, and was worth 85 cents per oz.; pay streak was from 8 inches to a foot wide; two-thirds of the ore was second class; we only made two classes of ore; we took out, perhaps, a half a ton per day of both classes of ore, 333 pounds of the first class and 666 pounds of the second class; we paid \$3.50 per day to the men; it cost us \$42 per day to run the mine besides powder, candles, etc.; the difference between the amount received and the expenses would be the profits; we paid the company on the lease one-third of the amount taken out; we were stopped forty-five days by the injunction; we had four men employed during that time in running a drift; this drift was run to satisfy the court; can't say we took out pay in the drift; the twelve men all stopped work except the men in the drift; I had orders from the Marshall

Silver Mining Company to keep the men; I don't know as I can tell the reason why the men were kept; Marshall ordered me to keep the men I had, and have it understood that they were on pay; it was necessary to keep the men because the mine was liable to be jumped; the injunction was dissolved about the 20th of January, 1872; we had not the opportunity under the lease to get all the ore we could have taken out if injunction had not been served.

On cross-examination witness testified: "We worked on the lease until the 1st of May; I think the working would average as I have stated; the cost of steel, powder, etc., would not be a great deal; the lease was to John Wycoff, Charles Sargent and myself; we sold the ore to the mill; something over one-half run 900 ozs.; I think the average of the first class would be \$750 per ton; I think the average of the second class would be \$250 per ton; had been working on the ore vein when stopped, about a month; had been working under the lease from about the 1st of October; F. J. Marshall was agent of the Marshall Silver Mining Company; he told me to keep the men, and I kept the most of them; I kept eight of them; four of them were in the drift the most of the time, the others were not doing any thing the most of the time; the drift was run on the Compass and Square lode; I hardly thought it was necessary to keep four men to keep the mine from being jumped; over one-half the men have been paid; I paid three of them; I paid them \$90 each for wages that had accrued after the injunction was served; I worked in striking and blacksmithing for the four men; we had no other business; no person volunteered to employ us; I did not try to get work elsewhere; don't know whether Wycoff and Sargent were at work or not; I suppose they could have got work if they had wanted it."

The plaintiff then called F. J. Marshall who testified: "I am president of the Marshall Silver Mining Company, and was so in 1872; I gave directions when I was notified of the injunction to keep the men, but to stop work; I

received notice from my attorneys that injunction would be dissolved, and that was one reason why I kept the men; another reason was, I heard some hints that somebody would try to take possession by force. I know of expenses of Mr. Johnson, the surveyor, incurred in that case." The witness was here asked to state if it was necessary in the case to have survey and plat of the premises, and whether such survey and plat were made, to which the defendants by their counsel objected as being immaterial, but the objection was overruled, and the defendants excepted. The witness answered: "I regarded it necessary, and the survey and plat was made." The witness was then asked: "What did you pay Mr. Johnson for that survey?" To which question the defendant objected as being incompetent, and that what they paid would be no measure of damages in this action upon the bond, and if paid it was an expense not covered by the bond; but the court overruling the objection, the defendants excepted. The witness thereupon answered: "To the best of my recollection \$90, and his services were worth what we paid. I had some other expenses in going back and forth to Central and in looking up the witnesses." The witness was here asked to state, if he could, how much money he had expended in procuring witnesses in support of his motion to dissolve the injunction, to which the defendants objected; but the court overruling the objection, the defendants excepted, and the witness answered: "I am satisfied it was not less than \$100; this \$100 was spent in employing a man to look up the witnesses."

The plaintiffs thereupon rested their case.

The defendants thereupon called the witness Robinson, who testified: "We worked under the lease till May 1st, when it expired." The witness was then asked: "Did you or did you and your co-lessees after the 1st of May, 1872, take a new lease of this same property on the Square and Compass lode?" To which the plaintiffs objected, and the court sustaining said objection, the defendants excepted. The defendants then offered to show by this witness that

he, the witness, took a new lease from the 1st of May, 1872, upon the same terms as the former lease and of the same ground, and worked the same till the ore was worked out. To the reception of which the plaintiffs objected, and the court sustaining the objection, the evidence was not received, and the defendants excepted. Witness then proceeded: "I did not work out all the ground that would pay to work by the 1st of May, 1872; we had worked out on the 1st day of May about one-half the ground we found would pay to work; we had a pocket of ore 50 or 60 feet long; I judge we took out in the neighborhood of 100 tons of ore."

Defendants then introduced as a witness Walter N. Webster, who testified: "I know Charles Sargent; I had a conversation with him one week ago to-day about the amount of ore Robinson, Wycoff and Sargent were taking out of the Compass and Square lode when they were enjoined."

The witness was asked: "What was said about it by Mr. Sargent?" To which question the plaintiffs objected, "that it was since assignment to plaintiff and was incompetent," and the court sustained the objection, and the defendants excepted.

The jury returned a verdict in favor of the plaintiffs, a motion for a new trial was interposed and overruled, and judgment entered on the verdict in the sum of \$5,000 debt, and \$1,440 damages.

Messrs. H. M. & W. TELLER, for appellants.

Mr. HUGH BUTLER, for appellees.

ELBERT, J. There was no appearance in the court below by the defendant Paul.

Where counsel, in the first of a series of pleas filed, expressly designate the defendants for whom they appear, the use of the words "the said defendants" or "the defendants" in the subsequent pleas designate the defendants named in the first plea and cannot fairly be held to be an appearance for a defendant served but not named in the

first plea. *Gargan et al. v. School District No. 15* (*ante*, p. 53), and cases there cited. There being no appearance by the defendant Paul, it was error to enter final judgment against all the defendants, without first entering judgment of default against him. *Good v. Martin*, 1 Col. 406. An entire judgment against several defendants must be reversed as to all. It cannot be reversed as to one and affirmed as to the others. *Gargan et al. v. School District No. 15*, *supra*. In view of another trial it is perhaps well to notice some of the questions raised by the instructions and argued by counsel.

The defendant asked and the court refused to give the following instruction: "That the money alleged to have been paid for the expenses of men to watch or hold the mine against other than the defendants in this case cannot be allowed in this case, and it is not a legitimate item of the damages covered by the bond sued on."

The refusal to give this was error, and in contravention of the fundamental rule that no damages will be allowed which are not the actual, natural and proximate result of the wrong committed.

Another instruction asked and refused is as follows:

"That if they believe, from the evidence, that the Marshall Silver Mining Company, one of the plaintiffs, was the owner of Compass and Square lode; and that at time of service of writ of injunction referred to in bond upon which suit was brought, it had leased the same to Robinson, Wycoff & Sargent, and by the terms of such lease were to have one-third the proceeds of the ore taken out of the property so leased, then defendants in this case are not liable to the company or to any or all of these plaintiffs for the amount of such one-third, even, although the said lessees were prohibited by the injunction from working said property, unless it has been shown that said company, in consequence of the issuance of said writ of injunction, lost said one-third or some portion of it, or was unable to lease said property on the same terms, and that if the ore remained in the mine, in the absence of proof that the company could not lease the said

mine, and procure the ore to be taken out on the same terms as in the former lease, the said company cannot be held to have suffered any damage, by reason of the failure of lessees to take out such ore, and the jury should allow no damages to the said company on account of said injunction."

This instruction is not free from objection.

The premises do not warrant the broad conclusion that "the jury should allow no damages to the company on account of the injunction;" nor is the right to recover the value of the one-third of the proceeds at all dependent on the ability or inability of the company to lease its mine on the same terms. But in so far as it excludes the value of the one-third of the product of the mine going to the company under the terms of the lease, from the damages recoverable by the plaintiffs, it is correct. The company did not, by reason of the injunction, lose its ores, but their production for forty-five days under the terms of the lease. There was no loss of property; there may have been a loss of profits. If, for instance, the company was compelled to pay higher rates than under the terms of the lease for mining the same ores, there was a loss of profits in this respect to the extent of the increased cost, which was the legitimate subject of recovery. So, too, a loss of profits arising from loss of the use of the product or its value would afford ground of compensation."

Another instruction refused by the court is as follows:

"That plaintiffs in this case cannot recover of defendants herein any damages on account of any loss of profits alleged to have accrued to Robinson, Sargent & Wycoff, or either of them, growing out of the said lease testified to by Robinson, unless said plaintiffs have shown by the evidence that said parties were, by the delay and stoppage of the work under said lease, occasioned by the issuance of the writ of injunction, actually deprived of such profits, and that they were unable to procure a new lease upon the same terms as the first one, upon which to work the ground so leased by them."

This instruction was properly refused. Robinson, Sargent & Wycoff were lessees, and were entitled to recover the value of the lost period of their lease without reference to their ability to make a new lease on the same terms.

It is not intended here to lay down a rule covering all the damages recoverable on the bond, but simply the rule upon the points indicated.

The right of the obligees in this bond to maintain a joint action thereon is not called in question, and we are not to be regarded as deciding the question by implication. The judgment of the court below is reversed and the cause remanded for further proceedings according to law.

Reversed.

DEFAULT SHOULD BE ENTERED AGAINST DEFENDANTS served, but who have not appeared, before rendition of final judgment against all: *Bissell v. Cushman*, 5 Colo. 77.

NO DAMAGES WILL BE ALLOWED which are not the result of actual, natural, and proximate results of the wrong committed: *Clifford v. Denver & P. & P. R. R. Co.* 3 Colo. 337.

FILLEE v. CODY.

1. A stipulation of parties filed in the court below must be preserved in the bill of exceptions, to entitle it to examination in this court.
2. In the absence of a stipulation between the parties, and in the absence of an order of court permitting a bill of exceptions to be signed out of term, a bill of exceptions, so called, signed in vacation, is properly no part of the record.

Appeal from District Court of Gilpin County.

Messrs. BUTLER, WRIGHT & KING, for appellant.

Mr. WILLARD TELLER, for appellee.

MOTION to strike from the record, stipulation, bill of exceptions, and record of judgment, entered in vacation.

Per Curiam. The stipulation of parties filed in the court below is not a part of the record proper, and should have been preserved in the bill of exceptions. We consequently cannot examine it. *Wilson v. McDowell*, 65 Ill. 522.

The bill of exceptions in this cause was signed and filed in vacation. The record does not show any order of court fixing a time within which the bill should be prepared and

tendered. In the case of *Jordan v. Finley* (*ante*, p. 189), we held, that "in the absence of a stipulation between the parties, and in the absence of an order of court permitting the bill of exceptions to be signed out of term, a bill of exceptions, so called, signed in vacation, is properly no part of the record." Even if we could consider what purports to be the stipulation of the parties herein, the bill of exceptions was not filed within the time limited by the order of the judge made in pursuance of the stipulation. In a former opinion in this case we held that the proceedings had and judgment rendered by the judge in vacation were void. A transcript of the record in this respect can serve no purpose. The motion of the appellee is allowed. *Motion allowed.*

PAPERS FILED IN CAUSE which are not intrinsically part of the record on appeal cannot be made so, by incorporating them otherwise than by bill of exceptions: *Wiles v. Campbell*, 6 Colo. 127.

HECKMAN v. MANNING.

1. A release must rest upon a consideration; a seal imports a consideration, but where the consideration is shown by the instrument itself, the instrument is valid without a seal.
2. The release of one of two or more joint, or joint and several obligors or promisors, operates to release the others. The rule is elementary.

Appeal from County Court of Arapahoe County.

THE case is stated in the opinion.

Messrs. STALLCUP & LUTHE, for appellants.

Messrs. SYMES & DECKER, for appellee.

STONE, J. Manning, Harris and Heckman were makers of a joint and several note to one Borner, payee. The note was for the purchase-price of a tract of land of which the three parties took an undivided one-third each, through conveyances to them. Manning claimed to have paid the note in full before maturity. He then transferred it to one Crook, who brought suit thereon against all the makers of

the note. Before judgment in this action the plaintiff settled with Harris, one of the defendants, upon the payment by the latter of \$211 in money and deeding back his one-third interest in the land. A receipt for the payment in full of his share of the note was given Harris, and a stipulation of release therefrom was filed in the cause, and the suit was thereupon dismissed as to Harris. Upon motion on their behalf, the court then ordered the same dismissed as to the other defendants, Heckman and Manning. The present suit was afterward brought by Manning against Heckman, to recover one-third the amount of the same note as for contribution.

To this action there were several defenses pleaded, one of which was that in the former suit upon this note, in which the said Crook was plaintiff, and all the makers of the note defendants, the said plaintiff, and then owner of the note, had settled with Harris, one of the joint makers of the note, and released him from all liability thereon, and that by virtue of said release, and by judgment of the court, the defendant Heckman was also released and fully discharged therefrom. As this last-mentioned ground of defense seems decisive of the case, we need not notice the others. The finding of the court below upon this point was that the release of Harris from the note was not a technical release, and that "a release to be effectual must be under seal."

This is certainly not the law. A release, equally with an obligation, must rest upon a consideration. A seal imports the consideration, and hence it need not be otherwise shown. But where the consideration is shown by the instrument itself, there is then no reason for requiring a seal, and the instrument is as valid without it. Where the consideration is neither expressed or implied, it must be proved, and may be proved by parol evidence. *Benjamin v. McConnell*, 4 Gilm. 545; *Ryan v. Dunlap*, 17 Ill. 43; *Lucas v. Harris*, 20 id. 169; *White v. Walker*, 31 id. 434; *Ill. Cent. R. R. Co. v. Read*, 37 id. 511; *Burch v. Hubbard*, 48 id. 164;

Turner v. Hitchcock, 20 Iowa, 318; *Devlin v. Riggsbee*, 4 Ind. 464; 2 Daniels' Neg. Inst., § 1290.

The doctrine that a release of one of two or more joint, or joint and several obligors or promisors operates to release the others, is a common-law rule which has been so long and well settled in its application by the courts of this country, as to be elementary. 2 Daniels' Negotiable Instr., § 1294; *Tuckerman v. Newhall*, 17 Mass. 581; *Benjamin v. McConnell*, *supra*.

Was the release in this case sufficient? The stipulation of release in question is as follows:

Allen Crook <i>agst.</i> George Manning, O. N. Heck- man, David D. Harris.	}	<i>Of the April term, A. D. 1877, of the county court of Arap- ahoe County, Colorado. In assumpsit.</i>
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It is hereby stipulated between the plaintiff and David D. Harris, one of the defendants in said cause, that the said Harris, having fully settled with plaintiff for all liability on his part as to the cause of action sued on in this cause, and he being discharged therefrom, the said suit shall be dismissed as to said Harris without costs as to said Harris.

(Signed) DAVID D. HARRIS,
 SYMES & DECKER,
 Plaintiff's Attorneys.

This stipulation made in a suit on the identical note which is sued on in the present case and including the defendant in the present case, could scarcely be made stronger as a release. It is entitled in the cause; it declares that Harris, one of the joint and several makers of the note, has fully settled with the owner of the note for all liability on his part; "that he is discharged therefrom, and the suit as to him dismissed; and this stipulation was thereupon made the foundation of the judgment of the court, dismissing the suit as to both the other makers of the note. A consideration is clearly expressed in the instrument, and besides, the testimony in this case fully shows the nature of the considera-

tion, to-wit : that the released party, Harris, paid \$211 in money and deeded back his entire interest in the land, for the purchase of which he had joined in the note. There is in the release no reservation of a right to further proceed against the other promisors in the note. And it has been held, upon the authority of the English doctrine (§ 5, Bacon's Abr. 702 *g.*), that even such a reservation cannot avail against the co-obligors. *Rice v. Webster*, 18 Ill. 332; *Benjamin v. McConnell*, *supra*. This rule, that the discharge will not be affected by such reservation, is modified in the case of *Parmelee v. Lawrence*, 44 Ill. 405, to the extent only that where the release of one of several obligors *shows upon its face*, and in connection with surrounding circumstances, that it was not the intention to release the co-obligors, the instrument should be construed merely as a covenant not to sue. Here there is no such express or manifest intent. The release was a full and complete discharge of Harris, and by operation of law, effected as complete a release of his co-obligors, the appellant and appellee in the case before us. This release was a valid defense for appellant as defendant in the court below, and judgment should have been rendered in his favor.

The judgment of the court below is

Reversed.

PRICE et al. v. KRAMER et al.

1. Where the owner of a herd of cattle permits them to run in two counties it is his duty to make return to the assessors of both counties, showing the number he owned running in each on the first day of May. Failing to do so the assessors may act upon such means of knowledge as they possess in making the assessment. The owner, if aggrieved, may present the facts to the board of county commissioners.
2. Against an illegal tax the owner of personal property has a full and adequate remedy at law, and may not resort to a court of equity and through its instrumentality review and correct the assessment roll.

Appeal from District Court of Pueblo County.

KRAMER, the appellee, filed his complaint in the district court of Pueblo county, alleging:

First. That he is the owner of nine hundred cattle branded thus, Q on the left side and hip, and he does not know how many of said cattle are Texan and how many are American cattle, but thinks that about one-half of them are American cattle, and the other half are half breeds and Texan cattle; and that he is also the owner of thirty horses branded thus "Q" on left shoulder. That he was the owner of said cattle and horses during the year 1875, and has been ever since. That he resides in Pueblo county, aforesaid, and has so resided in said county all the time during the ten years last past. That all of said cattle and horses were assessed for taxes, and said taxes were levied and collected on the same, in, for, and by Pueblo county, aforesaid, for the years 1875 and 1876. That for the year 1875, said herd of cattle and horses were assessed for taxes, in said Pueblo county, at a less number than herein stated, and for the year 1876 at a greater number than herein stated, but that it was the same herd that was assessed in both instances; and the amount of said taxes so assessed and levied by Pueblo county, aforesaid, and which the plaintiff paid on said cattle and horses, was for said year 1875, one hundred and thirty dollars and seventy-two cents, and for said year of 1876, it was two hundred and twelve dollars and eighty-five cents.

Second. That the board of county commissioners of Bent county in the State of Colorado, one of the defendants herein, claims the right to tax and have taxed the same cattle and horses, and all of them, in and for Bent county, aforesaid, for the same years of 1875 and 1876, and have directed M. B. Price, one of the defendants herein, as treasurer of said Bent county, to collect said taxes on the same for said years of 1875 and 1876, and said Price, as such treasurer, during the year 1877 actually levied upon and seized one hundred of said cattle for taxes before that time

assessed and levied upon said cattle and horses, in, for, and by Bent county, aforesaid, for said years of 1875 and 1876, and threatens to sell and seize other property belonging to the said plaintiff for said taxes. That the amount of taxes thus levied and claimed by said Bent county upon said horses and cattle was and is two hundred and seventy-eight dollars and thirty-one cents for said year of 1875, and six hundred and fifty-three dollars and thirty cents for said year of 1876; and that said cattle and horses were assessed and taxed in Bent county, aforesaid, at a larger number than herein stated, but that it was the same herd that was thus taxed.

Third. The plaintiff further avers that in the year 1876, after the first day of May of that year, and after the assessment for taxes had been made in and for that year within said county of Bent and said Pueblo county, he purchased another herd of cattle running at large on the range, estimated by him to be four hundred cattle, in addition to the cattle above mentioned, and that the cattle thus purchased are still owned by him, are branded thus on left side and hip.

Fourth. That all of said cattle and horses above mentioned, including those thus purchased in 1876, were assessed for taxes and were taxed in and by both and each of said counties of Bent and Pueblo for the year of 1877. That said Bent county, claiming the right to tax all of said cattle and horses for said year of 1877, has levied a tax of seven hundred and eighty-four dollars and fifty-five cents on the same for said year of 1877, and has directed its said treasurer to collect the same from the plaintiff and out of his property, and said treasurer is threatening to do so.

And plaintiff further avers that said Pueblo county, claiming the right to tax the same cattle and horses, for the year 1877, has levied a tax of four hundred and five dollars and seventy-six cents for said year 1877, and has directed George W. Morgan, one of the defendants herein named, as its treasurer, to collect the same from the plaintiff, and out of his

property ; and said Morgan as such treasurer is threatening to do so ; and that the plaintiff is in danger of being obliged to pay taxes twice upon the same property, to-wit, said cattle and horses for each of said years of 1875, 1876 and 1877 ; said taxes being claimed by each of said counties as above stated.

Fifth. That the plaintiff is ignorant of the respective rights of the defendants. That, although plaintiff resided in Pueblo county as above stated during said years, and although on the 1st day of May of 1875, kept, held, and herded all of said horses and one hundred and twenty of said cattle in Pueblo county aforesaid, and on the 1st day of May of 1876, kept, herded and held all of said horses and two hundred of said cattle in Pueblo county aforesaid, and on the 1st day of May of 1877 kept, held and herded all of said horses and three hundred of said cattle in Pueblo county aforesaid, as it is his habit to keep his horses and such of his cattle as are weak, so far as he can conveniently, near his residence in Pueblo county, aforesaid, during the latter part of the winter, and a part of the spring, yet the said cattle and horses thus kept, herded and held, as above stated, during the greater portion of each of said years, were running at large, and all the rest of said cattle were running at large during each and all of said years of 1875, 1876 and 1877, and when so running at large, went and ranged where they happened to be driven by the storms, or where their own inclinations led them to go, and that sometimes during said years the greater portion of them (the exact number the plaintiff does not know) were in fact in Pueblo county aforesaid, and at other times the greater portion of them (the exact number the plaintiff does not know) were in fact in Bent county aforesaid, and that the plaintiff does not know how many of them were in either or each of said counties on the 1st day of May of each or either of the years 1875, 1876 and 1877, nor where as a matter of law those that were thus running at large were or would be said

to be held, kept, or herded on the 1st day of May of each or either of said years.

Sixth. The plaintiff admits that either the one or the other of said counties has the right to tax said cattle and horses for each of said years 1875, 1876, and 1877, but does not admit that the same cattle and horses, above mentioned, are taxable in both of said counties for the same year or each or either of said years. And plaintiff is ready and willing to pay into court, to be disposed of as the court shall direct, the said several sums claimed by the treasurer of Bent county as above stated, for taxes on said cattle and horses for each or either of said years of 1875, 1876 and 1877, and hereby offers to deposit the same in court, or to deliver the same to such person as the court shall direct, to be held subject to the order of this court. And the plaintiff is also willing and ready and offers to deposit in court, or deliver to such person as the court shall direct, the said sum of money claimed by the treasurer of Pueblo county, as above stated, for taxes upon said cattle and horses for the year 1877, to be held subject to the order of the court.

Seventh. That this action is not brought by collusion with either of said defendants.

Therefore the plaintiff demands judgment :

First. That the defendants be restrained by injunction from taking any proceedings against the plaintiff in relation to said taxes, or either of them, for either of said years 1875, 1876 or 1877.

Second. That they be required to interplead together concerning their claims to the said taxes upon the said cattle and horses for each of said years of 1875, 1876 and 1877.

Third. That some person be authorized to receive said several sums of money claimed for said taxes upon said cattle and horses by said counties, and their respective treasurers, for each of said years of 1875, 1876 and 1877, pending such litigation.

Fourth. That upon delivering to such receiver, the plain-

tiff be discharged from all liability to either of the defendants in relation thereto.

Fifth. And that the plaintiff's costs be paid out of the same.

LUDWIG KRAMER,
Plaintiff.

By BENJ. MATTICE,
Attorney for Plaintiff."

The defendants demurred as follows :

"M. B. Price, treasurer of Bent county ; The board of county commissioners of Bent county ; Geo. W. Morgan, treasurer of Pueblo county, and the board of county commissioners of Pueblo county, *ats.* Ludwig Kramer.

The defendants, M. B. Price, treasurer of Bent county, and the board of county commissioners of Bent county, demur to the plaintiff's complaint on the following grounds :

First. That several causes of action have been improperly united in this, that the plaintiff's grounds for relief by way of interpleader as to the taxes assessed against him for the years 1875, 1876 and 1877 constitute, as to the taxes of each year, a separate cause of action to be separately stated.

Second. That the complainant does not state facts sufficient to constitute a cause of action.

Third. The complaint is ambiguous, unintelligible and uncertain in this :

a. It does not show that the cattle and horses mentioned in the complaint were *all* the cattle and horses owned by plaintiff and ranging in Bent county and Pueblo county during the years 1875, 1876 and 1877.

b. It does not appear with sufficient certainty that the taxes assessed against the plaintiff by Pueblo and Bent counties, and each of them for the years aforesaid, were for the same cattle and horses.

By CHAS. E. GAST,
their Attorney.

The demurrer was overruled, and the defendants electing to stand by their demurrer, the court entered judgment thereon in favor of the plaintiff, in accordance with the prayer of the complaint. The defendants appealed.

Mr. JOHN F. BOSTWICK, and Mr. CHAS. E. GAST, for appellants.

Mr. BENJAMIN MATTICE, and Messrs. WELLS, SMITH & MACON, for appellee.

ELBERT, J. The bill alleges complainant's ownership of thirteen hundred head of cattle, but does not show how many head were listed to him by each county for the several years named. These facts were easily ascertainable from the assessment rolls, and the failure to allege them leaves the bill in this respect uncertain. Neither does it show that the number listed in one county corresponded with the number listed in the other county for any one year. On the other hand, it is alleged that for the year 1875, the complainant was listed in the county of Pueblo for a less number and for the year 1876 for a greater number than he owned, and in the county of Bent for the year 1876, also for a greater number. The general allegations that "all of the said cattle were taxed in said counties," and that "it was the same herd" must be taken subject to these more specific allegations.

There is no allegation that the board of county commissioners of Pueblo county claims the right to tax the cattle of complainant, that on the 1st day of May of the year for which the tax was levied, were in the county of Bent; nor is there any allegation that the board of county commissioners of the county of Bent claims the right to tax the cattle of complainant, that on the 1st day of May were in the county of Pueblo. Nor could any doubt arise upon either proposition if such right were asserted by either defendant. The law is plain, * * * "horses, mules, cattle and sheep running at large and not worked, shall in all cases

be returned and assessed in the county in which they are being herded or kept on the 1st day of May in each year." Applying the most liberal construction to the allegations of the bill of complaint, they amount to this—that the complainant is the owner of thirteen hundred head of cattle, which roam at will in both the counties of Pueblo and Bent; that they are scattered here and there as their inclinations may lead them or the storms may drive them; that he is ignorant of how many head were on the 1st day of May of either of said years named, in the respective counties; and that consequently he is ignorant of how many head each county had a legal right to tax for either of said years; that for each of said years both of the said defendants have taxed him in some instances for more cattle than he owned in both of said counties, and in some instances for a less number; that consequently for each of said years he has been listed and taxed for too large a number of cattle by one or the other of the said defendants; but by which he does not know, because he is ignorant of the *locus* of his cattle on the 1st day of May of the several years named.

It is plain that the whole difficulty grows out of uncertainty respecting a question of fact, namely: the *locus* of the complainant's cattle on the 1st day of May of the years 1875, 1876 and 1877. Is this a proper case for the interference of a court of equity by an order of interpleader?

Under the law it was the duty of the complainant to make return to the assessors of both counties, showing the number of cattle he owned running in each of the counties on the 1st day of May. In estimating cattle, the result may not be reached with entire certainty, but the duty is nevertheless imposed upon the owners to make some return upon which the authorities may act. Failing to furnish the information it is the duty of the assessor to act upon what means of knowledge he possesses. In any case, if injustice is done, either in assessing him for a larger number of cattle than are properly taxable, or in assessing him at all, he

may present the facts to the commissioners, who constitute a board of equalization with power to correct the assessment roll. Revenue Laws of 1870, §§ 24, 29 and 39.

In the case of the *People ex rel. Crawford v. Lathrop et al.*, 3 Col. 465, in speaking of the same provisions re-enacted, the court say: "We find here a complete system, with well-defined and minutely prescribed rules and regulations, guarding the property rights of the citizen, guarding equally the revenue necessities of the State, acting through the instrumentalities of owners and assessors chosen by the electors of the several counties, listing, valuing and returning taxable property under the sanction of an oath, with the board of county commissioners acting as a board of appeal and review, all for the one purpose of ascertaining, determining and fixing the value of taxable property in each county of the State as a basis of taxation.

Here is a mode prescribed and a tribunal established by the law, for the purpose of determining the very question out of which the complainant's grievances arise. It does not appear that the complainant ever listed his property in either of the counties for either of the years named; nor does it appear that having been listed as he claims for too many cattle in each county, that he ever appeared before the county commissioners to have the assessment roll corrected. The proposition that a court of equity will take jurisdiction in such a case amounts to this: that the owner of personal property of doubtful *locus* may neglect his statutory duty of listing his property in the proper county, may neglect to appear before the tribunals established by law for the correction of errors in assessments, and by his bill of interpleader, devolve the duties of himself, the assessor and the board of county commissioners upon a court of equity, and through its instrumentalities review and correct the assessment rolls. The proposition is not to be entertained. Nor is the plea of difficulty and expense a ground for equitable interference.

If there be difficulty and expense involved in determin-

ing the number of his cattle for which the complainant was legally taxable in each county, it is an incident to the kind of property and the complainant's mode of keeping it. Having neglected his statutory duty to list it, there is no propriety or equity by an order of interpleader to release him and throw this hardship and expense on the defendants.

Against an illegal tax complainant has a full and adequate remedy at law, and we see no reason why in this case he should not be remitted to that remedy. *Cooley on Tax*. 528; *Brewer v. Springfield*, 27 Mass. 152; *Brooklyn v. Messerole*, 26 Wend. 132; *Rev. Law*, Sess. 1870, p. 123, § 106.

The text of Mr. Story (2 Story's Eq. Juris., § 813 a), relied on by counsel for complainant, does not contemplate any such case, nor are the authorities upon which the text is based at all like the case at bar. In both the case of *Thompson v. Ebberts*, 1 Hopkins, 272, and in the case of *Mohawk, etc., Co. v. Clute*, 4 Paige, 384, there was a doubt of law—not a doubt of fact—arising from the laches of the complainant, and which the complainant's duty required him to ascertain.

The decree of the court below is reversed and the case remanded.

Reversed.

INJUNCTION WILL NOT LIE TO RESTRAIN COLLECTION OF TAX, and thereby to review and correct the assessment roll, the owner of personal property having a full and adequate remedy at law: *Woodward v. Ellsworth*, 4 Colo. 581; *Breeze v. Haley*, 10 Colo. 12.

HOPPIE v. BEST et al.

1. Assignments of error not based upon exceptions duly taken and reserved, will not be considered in this court, unless such alleged error is apparent upon the record proper.
2. Where a cause is brought into the district court from a justice's court by *certiorari*, it is in the power of the court to render an independent judgment upon the law and the evidence, without reference to the inquiry whether the judgment of the justice was an entirety or otherwise.

Error to District Court of Gilpin County.

THE case is stated in the opinion.

Mr. L. C. ROCKWELL, for plaintiffs in error.

Messrs. BELFORD & REED, for defendants in error.

STONE, J. The judgment of the court below was rendered upon a review of the evidence and proceedings had before a justice of the peace brought up to the district court by *certiorari*. No exception was taken to the judgment or to any of the proceedings in the court below. It has been settled by repeated decisions of this court, that assignments of error, and not based upon exceptions duly taken and reserved, will not be considered here, unless such alleged error is apparent by the record proper, and not necessary to be preserved by bill. *Patton v. Coen & Ten Broeck, etc.*, 3 Col. 267; *Wasson v. Dyer*, id. 398. The error here complained of, however, goes to the form of the judgment of the court in dismissing the case as to one of two defendants, and affirming the judgment of the justice as to the other, and needs no exception. This question was directly passed upon by this court in the case of *Miller v. Sparks*, decided at the December term, 1878 (*ante*, p. 303), where it was held that the power of the court to render such a judgment is full and complete under the concluding clause of the 7th section of the act concerning *certiorari* to justices' and probate courts, providing that the district court "may render such judgment as the facts and the law warrant." That the judgment below was rendered upon a consideration of the facts as well as the law is evident from the record, and upon the authority of the decision in the case of *Miller v. Sparks, supra*, the judgment of the court below in this case will be

Affirmed.

FAILURE TO OBJECT TO EVIDENCE is a waiver of the objection: *Piela v. People*, 3 Colo. 244.

JOHNSON v. BUELL.

To the extent that a lode in its onward course or strike departs from the side lines of the patented location, the plaintiff in ejectment is not entitled to recover.

Error to District Court of Gilpin County.

THE case is stated in the opinion.

MR. L. C. ROCKWELL, and MR. CLINTON REED, for plaintiff in error.

MESSRS. H. M. & W. TELLER, and MR. G. B. REED, for defendant in error.

ELBERT, J. This was an action of ejectment. The law as to the principal question discussed by counsel in this case has already been determined by this court. To the extent that the Ellieth lode in its onward course departed from the side lines of the patented location, the plaintiff was not entitled to recover. *Wolfley et al. v. Lebanon Mining Company* (ante, p. 112).

The condition of the record is such that we cannot review the finding of the court upon the evidence. The map testified to by the witness Sayr is not preserved in the record, although it appears to have been put in evidence. The "Johnson shaft," the "Baxter barn and the shaft near it," "the shaft out of which the bottom fell," and other localities mentioned in the testimony of the several witnesses, are not designated on any of the maps or plats preserved in the record; nor can their *situs* on or off the respective mining locations be fixed from any thing in the evidence, except as a matter of conjecture. The entire testimony centers around these several localities, and they are left afloat. For this reason it is impossible to examine the evidence, or pass on the questions made respecting it with any certainty.

The judgment of the court below is

Affirmed.

DECKER et al. v. MYLES.

1. A notice to lien claimants published three times in three successive weeks in a weekly newspaper, although less than twenty-one days intervened between the date of the first publication and the time other lien claimants were therein notified to appear, *held*, a sufficient compliance with the statute (Laws 1872, p. 152).
2. Summons in proceedings under the Mechanic's Lien Law is to be served and returned as in chancery proceedings, and the defendants proper are the owners of the property to be charged.

Appeal from District Court of Boulder County.

MYLES, the appellee, filed his complaint in the district court of Boulder county on the 31st day of January, 1878 averring substantially :

That on April 3, A. D. 1877, and for two years previous, the Victoria Mining Company was the owner of the Victoria mine, Gold Hill mining district, Boulder county, aforesaid.

That said company became indebted to one Rogers and others, for work done, etc., on said lode, commencing March 1, A. D. 1876, ending June 1, 1876 ; that June 2, A. D. 1876, said Rogers filed in the office of the clerk, etc., of said county, notice of intention to claim and hold a lien on said Victoria lode, for work done by himself and others who had duly assigned their claims to him.

That November 21, 1876, said Rogers for himself and as assignee, etc., filed in Boulder county court, his petition to enforce and foreclose the lien claimed by him on said Victoria lode ; that said Rogers "caused to be published in the Boulder *Banner*, a weekly paper published in Boulder, Boulder county and State of Colorado, a notice to all parties holding or claiming liens upon said property, notifying them that he had filed his petition for the purpose of enforcing his said lien, and that they should appear at said county court on the 11th day of December, A. D. 1876, and exhibit proof of their said liens ;" which said notice was published three weeks, the first insertion being on the 23d

day of November, and the last insertion being on the 7th of December, A. D. 1876.

That January 2, A. D. 1877, no others appearing, the county court granted a decree upon said petition, against the said Victoria Mining Company and said lode, that said Rogers have a lien upon the said lode, for the sum of \$1,399.15, with interest, etc., to be paid in ninety days; in default whereof, the master to sell the lode at auction and pay said decree.

That E J. Morath was appointed a special master to execute said decree; that no part of said amount was at any time paid.

That said Morath thereupon exposed the premises to sale; that Charles G. Buckingham became the purchaser; that the sale was reported and confirmed; that April 11, 1877, the master conveyed the premises in pursuance of the sale to Buckingham; Buckingham conveyed to Neikirk; that on August 14, 1877, said Neikirk "executed and delivered to Albert Myles a warranty deed of said premises."

That on December 8, 1876, George W. Tifts *et al.* alleging themselves to be partners, etc., filed in Boulder district court their petition against said Victoria Mining Company of Colorado, in and by which they prayed the said court to decree a lien on said Victoria lode, and against said Victoria Mining Company, for a balance alleged to be due for material furnished by them to said company and used upon said lode, and which said materials were alleged to have been furnished May 10, A. D. 1876; that October 1, A. D. 1877, such proceedings were had, that a decree was by said court granted, that said G. W. T. *et al.* should have a lien upon said Victoria mine for \$1,239.20, with interest from May 10, 1876, to be paid within ninety days, in default, James W. Decker, referee, should sell said premises or so much thereof as might be necessary to pay the amount, and upon said sale, etc.

That by virtue of said decree, said Decker has advertised the said Victoria lode for sale on the 2d day of February,

A. D. 1878, at 2 o'clock, P. M. (Notice set out.) That the premises so advertised are the same so sold by Morath and which have become the property of plaintiff; that said Victoria Mining Company has not since said 3d day of April, A. D. 1877, had any right in said premises; that plaintiff is the absolute owner; that the purchaser at said sale will obtain no title; that said sale, if made, will becloud the title of plaintiff to said premises; that said sale is designed to compel plaintiff to compromise the claim of said Tifts, Sons & Co.

Prayer for injunction and general relief. The defendants demurred and moved to dissolve the injunction which had been issued. The demurrer and motion were overruled, and the defendants appealed.

The only questions raised by the appellants in this court are stated in the opinion.

Messrs. WELLS, SMITH & MACON, for appellants.

Mr. PLATT ROGERS, for appellee.

STONE, J. Two questions are raised by appellants: 1st. Whether the notice to other lien claimants was published in compliance with the statute; and 2d. Whether lien claimants not made parties and served with process are affected by the decree. The 9th section of the lien law of 1872 (Sess. Laws, p. 152), under which the proceedings were had, requires that "the plaintiff shall cause a notice to be published at least once a week for three consecutive weeks in some newspaper published in the county, if there be one, and if not, then by posting the same in the three most public places in the county, notifying all persons holding or claiming liens under the provisions of this act on said premises, to be and appear in said court on a day specified therein, and during a regular term of said court, and to exhibit then and there the proofs of their said liens."

The lien claimant, from whom the appellee derived title under the decree, caused such a notice to be published three times in three consecutive weeks in a weekly paper,

although less than twenty-one days intervened between the date of the first publication and the time the other lien claimants were therein notified to appear, and the question is presented, whether this was a sufficient notice under the statute above quoted.

An examination of all the authorities we have been able to find, bearing upon this and similar cases, shows some contrariety of decisions by the courts of different States; much of this apparent conflict, however, is due to the construction put upon the precise language of different statutes.

The case most in point against the sufficiency of this notice is that of *Shipley v. Mitchell*, 7 Blackf. 473, where under a statute requiring publication "for three successive weeks" before, etc., it was held that, while the language admitted of two constructions, the court was inclined to adopt that which required three full weeks to intervene between the date of the first publication and the time named. In a Pennsylvania case, where a notice was required to be given to a board of commissioners "three weeks before the time of meeting," the court say: "The order was not for notice during the three successive weeks, nor by a given number of insertions in newspapers in successive weeks, but it required a certain duration of time before the time of meeting," and, therefore, it was held that "three full weeks' notice" was necessary. *In re North Whitehall Township*, 47 Penn. St. 160.

In the case of *Mitchell v. Woodson*, 37 Miss. 573, it was held that where the notice was required to be "published weekly for one month," a full calendar month was intended and must be covered by the period of publication, dating from the first. The question in that case seemed to be merely whether a calendar or lunar month was intended, and hence is scarcely in point. The case of *Early v. Doe*, 16 How. 615, which is strongly relied on by counsel for appellant, is upon a statute requiring publication in some newspaper "once in each week, for at least twelve

successive weeks." The court held that eighty-four days, the full period of twelve weeks, must intervene between the first publication and the day of sale, in order to give full force and effect to the language of the statute. It is to be observed that the words "at least" are so placed in the sentence as to qualify the number of weeks, and not the number of publications in each week, as is the case in our statute; and in construing this so as to give meaning to the precise language employed, the court say: "We do not doubt if the statute had been 'once in each week for twelve successive weeks' a previous notice of the particular day of sale having been given to the owner of the property, that it might very well be concluded that twelve notices in different successive weeks, though the last insertion was on the day of sale, was sufficient. But where the legislature has used the words 'for at least twelve successive weeks' we cannot doubt that the words 'at least,' as they would do in common parlance, mean a duration of the time that there is in twelve successive weeks or eighty-four days. Every statute must be construed from the words in it, and that construction preferred which gives to all of them an operative meaning." Besides these cases which are cited as sustaining the construction claimed by appellants, there are three cases, which we have not been able to consult, decided by some of the district courts of Pennsylvania, cited as sustaining the same view, by Mr. Freeman, in his work on Executions, wherein he states rather broadly, and with less than his usual care, we think, that "a majority of the cases upon this subject, *

* * shows that the statute requiring notice for three weeks cannot be satisfied by a publication for less than twenty-one days." On the contrary a different construction is put upon such statute by the highest courts of the States of Illinois, New York, Massachusetts, and Maine. In *Garrett v. Moss*, 20 Ill. 554, a sale was held valid, made under a decree which required notice of the sale to be advertised in a certain newspaper "for three weeks success-

ively," although less than twenty-one days intervened between the date of the first publication and the day of sale. In *Pearson v. Bradley*, 48 Ill. 250, the same construction is put upon a statute requiring the notice to be published "for three successive weeks, once each week," and while the court say that the statute may receive either construction, they further observe that "the legislature, if it had intended to require merely an insertion in three different weekly issues of a newspaper, prior to the day of sale, would naturally have used precisely the language they did use, while if they had intended the first publication should be three full weeks before the sale, they would probably have employed terms more explicit and unmistakable. In *Andrews v. The People*, 84 Ill. 34, where the notice was to be published "three times for three successive weeks," the court, following the decision in *Pearson v. Bradley, supra*, say: "It is true, three full weeks did not elapse between the dates of the first and last insertion, nor does the reading of the statute require that it should. The publication was made more than three times, and for three successive weeks; *

* * we are inclined to hold the notice given a substantial compliance with the statutes." In *Frothingham v. March*, 1 Mass. 253, the notification was required to be "printed three weeks successively," which was to be deemed equivalent to giving "thirty days' public notice by posting up notification of such sale." The court say: "If the law required that all or any of the publications should be thirty days previous to the sale, the defendant has broken his covenant, otherwise not. * * In this case

* * the notification was printed three weeks successively. * * The defendant then has brought his case within the express words of the statute, and as it appears to me it is within the *sense*, the plain and obvious meaning of the words; nor can I conceive any reason for giving them any other construction than that which arises from the common and obvious import of the words used in the act." The foregoing is quoted from the opinion of

SEDGEWICK, J. Separate concurring opinions upon the same point were rendered by THACHER and SEWELL, JJ. In the case of *Dexter v. Shepard*, 117 Mass. 480, the sale of premises was to be "by public auction, first publishing a notice of the time and place of sale, *once each week for three successive weeks*, in one or more newspapers," etc. The court say: "The notice of the time and place of sale was given in exact conformity to the terms of the power. There is nothing in the mortgage that requires the first advertisement to be published three weeks before the time appointed for the sale. This point is fully disposed of by the decision in the case of *Frothingham v. March*, 1 Mass." The cases of *Bachelor v. Bachelor*, 1 Mass. 256, and *Cass v. Bellows*, 31 N. H. 501, cited by counsel for appellee, are upon a different question, and not in point in this case.

In *Sweet v. Sprague*, 55 Me. 190, the publication was required "three weeks successively." The publications were made on the 15th, 22d and 29th days of the month, and the sale was advertised for the 30th of the same month. Although but fifteen days thus intervened between the first publication and the day of sale, the court holds that the statute was complied with. In New York this precise question was decided by the supreme court in the case of *Sheldon v. Wright*, 7 Barb. 40 (overruling an adverse anonymous opinion in 1 Wend. 90), which decision was afterward affirmed by the court of appeals, reported in 5 N. Y. 497.

Another case directly in point is that of *Olcott v. Robinson*, 21 N. Y. 150, wherein the court of appeals overrule the previous adverse decision of the same case in the supreme court reported in 20 Barb. 148. The statute required the notice to be "advertised previously for six weeks successively." The notice was published six times and in six successive weeks, although but thirty-eight days intervened between the first publication and the day of sale, and upon a review of the cases the court say: "It would seem, therefore, that the weight of authority preponderates decidedly in favor of holding that the publication of the notice, in the

present case, was sufficient." To the same effect is the case of *Chamberlain v. Dempsey*, 22 How. Pr. 357, where the publication was required "for three weeks immediately previous to the time of sale, at least twice in each week." A still later case sustaining the same rule of construction, decided by the court of appeals, is that of *Wood v. Morehouse*, 45 N. Y. 375.

From a review of all the cases cited by counsel on both sides of this case, and all the other cases we have been able to find that bear upon the question, we are satisfied that while the statute in the present case will bear either of the two different constructions contended for, the one acted upon in this case seems to be the most obvious and is supported by the weight of authority. Had the legislature intended that the first publication of such notice should be three full weeks or twenty-one days previous to the time designated therein, nothing could have been easier than to have so expressed it.

One of the statutes enacted by the first legislative assembly of the Territory of Colorado, providing for service as to non-resident defendants, by publication, was in the following language, than which nothing could be more unmistakable in meaning: "Such publication to be made for four successive weeks, the first of which shall be at least thirty days before the return day of the summons." Acts of 1861, p. 183. This mode of service was also applied to proceedings to enforce our first Mechanics' Lien Law. Id., p. 260, § 10.

That the present statute omits to distinctly express that the first publication shall be a given number of days before the time named, tends to strengthen the conviction that a different meaning was intended. Another consideration that should have some weight is that, undoubtedly, titles have passed throughout the State upon notices published as was that in the present case, and their disturbance should be avoided if consistent with a rightful construction of the act in question. That the mode of publication pursued in

this case was within the meaning of the statute, we think is supported by reason and authority.

The other question raised by appellants is, we think, settled by the statute itself.

Section 2 of the Mechanics' Lien Act provides the mode of giving notice by lien claimants of their intention to hold and claim a lien, by filing a statement for record with the county clerk and recorder, and declares that "from the time of such filing all persons shall be deemed to have notice thereof." Section 9 of the act provides the manner of enforcing the lien by action in the proper court.

Summons is to be served and returned as in chancery proceedings. The defendants proper, and who are to be thus served, we understand to be the owners of the property sought to be charged. Then follows the direction for publication of the notice in the newspaper or by posting. "notifying all persons holding or claiming liens under the provisions of this act, on said premises, to be and appear in said court on a day specified therein, and during a regular term of said court, and to exhibit then and there the proof of their said liens. * * * Judgment shall be rendered according to the rights of the parties, and all liens not so exhibited and proved shall be deemed to be waived in favor of those which are so exhibited."

Here, then, is the statutory mode of giving notice to other lien claimants; first, of the intention to claim a lien by filing the statement; and, second, of the time and place of enforcing the same by the publication aforesaid. Upon compliance with these statutory requirements, by the party enforcing the lien, the other lien claimants are concluded. Phillips on Mechanics' Liens, §§ 341, 401.

The judgment of the district court must be

Affirmed.

MECHANIC'S LIENS—NOTICE.—Mechanic's lien proceedings are equitable in their nature and governed by the rules of chancery practice: *San Juan & St. L. M. & S. Co. v. Finch*, 6 Colo. 221, 223. All persons in interest, whether of the property or as lien claimants, are to be notified under the statute, but the defendants proper, who are to be summoned, are the owners of the property sought to be charged: *Snowgrass v. Holland*, 6 Colo. 593. A notice similar to that in the principal case was held sufficient in *Hunt v. Bureka G. M. Co.* 14 Colo. 463.

LAWRENCE et al. v. ROBINSON et al.

1. An agreement to engage in the business of prospecting for and the development of lode mining property, for the joint use of all, is in the nature of a partnership agreement, and under such an agreement each party thereto becomes the agent of the other.
2. Where no time of duration is limited by such agreement, it is determinable, under equitable restrictions, at pleasure, but such determination cannot operate to defeat rights accrued under it while it was in force.

Appeal from District Court of Custer County.

LAWRENCE and Hilburn, the appellants, commenced an action against Robinson and others, the appellees, in the district court of Custer county. The complaint was as follows:

That on or about the 1st day of July, 1878, the said plaintiffs, and the said William J. Robinson and Matthew J. Junkin, were citizens of the United States, residing in said county of Custer, State of Colorado. That on said day these plaintiffs and the said defendants, Robinson and Mathew J. Junkin, made and entered into a contract in and by which it was then and there mutually agreed by and between them, the said parties, plaintiff and defendant last named, that they would each and all engage in the business of prospecting for, and development of lode mining property in Hardscrabble mining district, Colorado. That each and all of the said parties should give his time and attention to said business, and should furnish his work and labor for the purposes of said business. That each of them should furnish equal shares and proportions of all moneys and materials and labor necessary for the purposes of said business of discovery and development, and that each of the said parties should also furnish his proportionate share of the tools and implements necessary and proper for the said work. That any and all mining property discovered or developed by them, or by any one or more of them, should be held by them, and each of them, and all of them, as tenants in common, and each having and holding an un-

divided one-fourth interest. That any mining property so struck, discovered or developed in said district, when developed by them, or either of them, sufficiently to be recorded, should be recorded in the names of all the said parties to said agreement, and for their mutual use and benefit as aforesaid. And that all mining property discovered, developed, located or recorded by them, or either of them, in said district, should be the property in common of the said parties thereto, and should be held by them, as the sole and only owners thereof.

That under and in pursuance of said agreement, the said parties thereto did, and after the said 1st day of July, 1878, enter upon the said business of prospecting for, and discovery and development of mining property in the said Hardscrabble mining district, and that in pursuance of such business they did discover and develop, and cause to be surveyed and recorded, in the records of Custer county, certain lode mining property hereinafter described. That the said plaintiffs also, in pursuance of said contract, gave their time and attention to the said business, and bestowed thereon their work and labor, and also furnished their proportionate share of all money, materials, and tools, and provisions necessary for carrying on the said business, as well for discovery and development as for the location and record of said property, and have from said 1st day of July, 1878, up to the present time of filing this complaint, been at all times anxious and ready and willing to carry out and abide by such contract in all respects, and to discover and develop mining property, and cause the same to be located and recorded for the joint use and benefit of all of the parties to said contract.

That in pursuance of such agreement, and in carrying on the said business, the said plaintiffs and the said defendants, Robinson and Mathew J. Junkin, did on the 1st day of July, A. D. 1878, locate in said mining district, a lode, known and called the Victor ledge, or lode; and on the 2d day of July they also located and since caused to

be recorded, a lode, or ledge, in said mining district, known and called the Calumet lode, or ledge, which said locations were made in the name of all the said parties, and in pursuance of the agreement above set forth.

That on the 16th day of August, A. D. 1878, one of said parties, to wit: John W. Lawrence, having made a discovery, and commenced to work therein, located two mining claims in said mining district, by setting up a stake with his name written thereon, which said claims are not yet located in form, but are still claimed by the said Lawrence; and that said claims were prospected for and found by him while he was at work under the said agreement; and that he holds the same for the sole use and benefit of all of said parties to said agreement; and that he is ready and willing, and always intended to cause the same to be fully and completely located and recorded in the names of all the parties to the said agreement, and for their sole use and benefit, in accordance with the tenor and effect of said agreement.

That on the 19th day of August, A. D. 1878, the said Edward A. Hilburn discovered a lode in said Hardscrabble mining district, and erected thereon a discovery stake, with the names of all the parties to said agreement thereon, and the name of the lode, to wit: the Spar lode, or ledge, and the date of discovery thereon. That said lode, ledge, or deposit, was prospected for, discovered and staked under and in pursuance of the said agreement above set forth, and for the use and benefit thereto, as shown by the certificate of location on record.

That on the 19th day of August, A. D. 1878, the said William J. Robinson discovered a lode in said district, and erected thereon a discovery stake, with the names of the said parties to said agreement thereon, and the name of the lode, to wit: the No. Five lode. That on the 21st day of August, A. D. 1878, these plaintiffs also discovered another lode in said district, and erected thereon a discovery stake with the names of all the said parties to said agreement, and the name of the lode, to wit: the Whetstone lode, and the

date of the discovery written thereon. That said lodes were prospected for, discovered and located, and recorded, under and in pursuance of the said agreement above set forth, and for the use and benefit of the said parties thereto, as shown by the certificate of location on record. That on the 30th day of August, A. D. 1878, the said defendant, William J. Robinson, discovered a lode, and erected a discovery stake thereon, which stake had the names of all the parties to said agreement, the name of the lode, to wit: the Iron Mine lode, and date of discovery written thereon, which said discovery and staking was also done for the use and benefit of the said parties to said agreement, and in pursuance thereof. That on the 30th day of August, A. D. 1878, the plaintiff, Edwin A. Hilburn, discovered a lode in said district, and erected a discovery stake thereon, with names of the said parties to said agreement, and the name of the lode thereon, to wit: the No. Nine lode, and the date of discovery written thereon. That afterward, to wit: on the 16th day of October, A. D. 1878, the certificate of location of said lode was duly recorded in the names of the parties to said agreement above mentioned, and in pursuance thereof, as shown by said certificate of location on record in the office of the county clerk and recorder for Custer county, Colorado.

That while said agreement was in force, and on the 2d day of September, A. D. 1878, the said defendants, William J. Robinson and Mathew J. Junkin, discovered and located a certain lode, ledge, or deposit, in said mining district, called the Plata Verde lode, and caused the certificate of location thereof to be recorded in the office of the recorder of deeds of Custer county, on the 11th day of September, 1878, which certificate is in words and figures following, to wit:

STATE OF COLORADO, }
County of Custer. }

The Plata Verde lode, or ledge, located by William J.

Robinson and Mathew J. Junkin, on the 2d day of September, A. D. 1878, claim 1,500 feet horizontal lineal measurement, 500 feet on the S., $70^{\circ} 30' W.$, true (var. $14^{\circ} E.$) side, and 1,000 feet on the N., $70^{\circ} 30' E.$, true (var. $14^{\circ} E.$) side of discovery shaft, and 150 feet on the N. side of center line; said Plata Verde claim is marked and described by a substantial stake at each of the four corners, and also a stake at the center of each side line; situate in Hardscrabble mining district, Custer county, State of Colorado. The discovery shaft of said claim is situated south $79^{\circ} 40' E.$, true (var. $14^{\circ} E.$) distance, 1,160 feet from the section corner for sections 9, 10, 15 and 16, of township 22 south, range 72 west, and in said Plata Verde ledge, deposit of mineral bearing rock in place, or lode claim, located in the north-west $\frac{1}{4}$ of section 15, of township and range aforesaid, and in the south-west $\frac{1}{4}$ of section 10 of same township and range, and are the surface boundaries of above-named lode claim, more fully and clearly described in the field notes of the surveyor accompanying and made a part of this certificate, with var. $14^{\circ} E.$, run from center of discovery shaft south $70^{\circ} 30' W.$, true 500 to the north-east of center line; thence south $19^{\circ} 30' E.$, 150, to south corner; thence north $70^{\circ} 30' E.$, 750, to the S. S. L. C. stake; thence north $70^{\circ} 30' E.$, 750, to east corner; thence north $19^{\circ} 30' W.$, 300, to north corner; thence south $70^{\circ} 30' W.$, 750, to N. S. L. stake; thence south $70^{\circ} 30' W.$, to west corner; thence south $19^{\circ} 30' E.$, 150, to west end of center line, or point of commencement of surface boundary survey. The individual interest of the several locators is as follows, to wit: William J. Robinson, one-half, Mathew J. Junkin, one-half.

Survey made September 10, 1878, by Carl Wulstein, U. S. mineral land surveyor.

That the greater part of the ground now covered by the said Plata Verde lode had before that time been partially appropriated and designated as the property of the said Hilburn, Lawrence, Robinson and Mathew J. Junkin, by all the said last-mentioned parties who, on the 11th day of

July, 1878, discovered mineral therein, and thereupon erected a stake at the point where such discovery was made, with the following inscription thereon :

"July 11th, 1878.

THE CLIFF LODGE OR DEPOSIT.

We, the undersigned, claim 1,500 feet of this claim, (1480 feet) fourteen hundred and eighty feet north of west, and (20) twenty feet south of east, Hardscrabble mining district, Custer county.

E. A. HILBURN,	W. J. PALMER,
J. W. LAWRENCE,	M. J. JUNKIN."

That such digging and staking was done for the use and benefit of the said parties on said stake named, by virtue of the agreement above mentioned, and the said stake was erected to give notice of the rights of the parties ; and the said plaintiffs had always intended to go on and complete the development of the said property, and procure the same to be properly recorded. But the said defendants herein afterward, to wit : on the 2d day of September, 1878, by changing the apparent direction of the said lode, or ledge, and by changing discovery at another place, have located nearly the entire claim that was intended to be covered by the said Cliff lode, and are now claiming the same, and plaintiffs aver that the location of the Plata Verde is on the same lode, ledge, or deposit, and principally on the same ground covered by the said Cliff lode.

That while said agreement was in force, and on the 6th day of September, 1878, said Robinson and Mathew J. Junkin discovered, developed and located, in the names of all the parties to the said agreement, and for their use and benefit, a claim known and called the Mino Rico lode, ledge or deposit, and caused the same to be recorded in the office of the recorder of deeds of said Custer county, which certificate of location was in words and figures following, to wit :

STATE OF COLORADO, {
County of Custer. }

The Mino Rico ledge, or lode, located by William J. Robinson, Mathew J. Junkin, John W. Lawrence, Edward A. Hilburn, Frank W. Junkin, on the 6th day of September, A. D. 1878, claim 1,500 feet, horizontal lineal measure, 500 feet on the S., $70^{\circ} 30' W.$, true (var. $14^{\circ} E.$) side, and 1,000 feet on the N. $70^{\circ} 30' E.$, true (var. $14^{\circ} E.$) side of discovery shaft, and 77 feet on the south side of center line, and 150 feet on the north side of center line. Said Mino Rico claim is marked and described by a substantial stake at each of the four corners, and also a stake at the center of each side line; is situate in Hardscrabble mining district, Custer county, State of Colorado. The discovery shaft of said claim is situated north $89^{\circ} 20'$ east, true (var. $14^{\circ} E.$) distance 1,060 feet from the section corner for sections 9, 10, 15 and 16, of township 22 S., range $72^{\circ} W.$, and is said Mino Rico ledge, deposit of mineral bearing rock in place, or lode claim, located in the south-west $\frac{1}{4}$ of section 10, and in the north-west $\frac{1}{4}$ of section 15, of township and range aforesaid, and are the surface boundaries of above-named lode claim, more fully and clearly described in the field notes of the surveyor accompanying and made part of this certificate, with (var. $14^{\circ} E.$) run from center of discovery shaft S. $70^{\circ} 30' W.$, true, 500, to the N. E. of center line; thence S. $19^{\circ} 30' E.$, 77, to the south corner, being also the west corner of the Plata Verde ledge claim; thence along the north side line of the Plata Verde ledge claim N. $70^{\circ} 30'$, 750, to the S. S. L. C. stake; thence N. $70^{\circ} 30'$, 750, to the east corner; thence N. $19^{\circ} 30' W.$, 227, to the N. corner; thence S. $70^{\circ} 30' W.$, 750, to the N. S. L. C. stake; thence S. $70^{\circ} 30' W.$, 750, to the west corner; thence S. $19^{\circ} 30' E.$, 150 to the west end of the center line, or point of commencement of surface boundary survey. The individual interest of the several locators is as follows, to wit: William J. Robinson, one-fifth; Mathew J. Junkin, one-fifth; John W. Lawrence, one-fifth; Edward A. Hilburn, one-fifth; Frank W. Jun-

kin, one-fifth. Survey made September 10, 1878, by Carl Wulstein, U. S. mineral land surveyor.

These plaintiffs aver that the said Frank W. Junkin had not, at the time of the making of the said record, any right to any share whatever in said claim, to the knowledge of these plaintiffs, and that if he has any right to share in any part or portion of said Mino Rico lode, it exists only by virtue of some agreement made with the said defendants, or one of them, and not with either of these plaintiffs, nor was any contract made with their consent; and that the said apportionment of one-fifth to each of said parties named therein, as set forth in said certificate, is erroneous, and was not made with knowledge of plaintiffs or by their consent. These plaintiffs further aver that all of the said above-mentioned lodes are all located upon the public lands of the mineral region belonging to the United States, and was at the time of location unoccupied. That ever since the recording of said Plata Verde lode, the said Robinson and Mathew J. Junkin, as these plaintiffs are informed and believe, have claimed, and are now claiming that these plaintiffs are not entitled to any interest in or to any part or portion of the said Plata Verde lode, and deny that the plaintiffs have any interest therein by virtue of said agreement, or by virtue of the location of the said lode, or by virtue of the staking of said Cliff lode above mentioned. That on the 22d day of October, 1878, at said Custer county, these plaintiffs presented to said Robinson and Mathew J. Junkin, deeds of quit-claim of the interest as it appears of record, to an undivided two-fourths of said Plata Verde lode, which said deeds were from the said Robinson and Mathew J. Junkin to these plaintiffs, and requested the said parties last mentioned to sign the same; and that at the same time they also presented and offered to deliver to the said Robinson and Mathew J. Junkin, deeds of quit-claim executed by these plaintiffs to the said Robinson and Mathew J. Junkin, of an undivided two-fourths of all lodes discovered, developed, located, or recorded by them, or

either of them, in said Hardscrabble mining district since the 1st day of July, 1878; and that on the 22d day of October, 1878, these plaintiffs also demanded a deed, and presented to the said Robinson and Mathew J. Junkin and Frank W. Junkin.

These plaintiffs further allege that they are informed and believe that the said defendants are each claiming one-fifth interest in said Mino Rico lode, when in truth and fact they are entitled to but two-fourths of the lode; and the said Frank W. Junkin has conspired with the said Robinson and Matthew J. Junkin to cheat and defraud these plaintiffs of one-tenth of said Mino Rico lode.

That said Plata Verde and the said Mino Rico lodes are of great value for the silver mineral they contain. That the said defendants, Robinson and Matthew J. Junkin, are in possession of the said lodes, and are taking out of the said Plata Verde lode large quantities of rich and valuable silver bearing ore of great value. That they, the said defendants last named, not only deny plaintiff's rights, title and interest to said lodes, but also to their interest in and to the ore mined therefrom, and are now threatening to sell said ore, and the said Plata Verde lode, and that the plaintiffs believe they will sell the said lode, and ore mined and taken from the same, unless prevented by an order of this court. The plaintiffs therefore pray that they may have judgment herein against the said defendants. That the said lode mining property above described, as discovered, developed, located or recorded, by the plaintiffs and the said Robinson and Matthew J. Junkin, or either of them, in Hardscrabble mining district, Custer county, Colorado, since the 1st day of July, 1878, shall be adjudged to be the property of the said Hilburn, Robinson, Lawrence and Matthew J. Junkin, as tenants in common, the same as though the said lode property had been located and recorded in the names of all the said last mentioned parties, and in accordance with the terms of the said contract. That the said Hilburn, Robinson, Lawrence and Matthew J. Junkin be adjudged and

decreed to make, execute, and deliver, each to the other, such deed or deeds as may be necessary to convey to each other, such undivided interest in any and all mining property, developed and discovered, located or recorded, in said Hardscrabble mining district, by any one or more of them, and not located and recorded in the names of all, as by virtue of said agreement they are entitled to hold. That the said defendants may also be decreed and adjudged to convey to the said plaintiffs herein a sufficient interest in the said Mino Rico lode, to make the interest of the said plaintiffs an undivided two-fourths, in accordance with their rights under said contract. That an accounting may be taken of the value of all ores taken out of said Plata Verde lode, or any other of said lodes above mentioned, and sold or converted to the use of the defendants, by said defendants, or either of them, and also an account of moneys paid out or expended by said parties to said agreement, since the 1st day of July, 1878, in and about the said business of prospecting for development and recording of lodes. And that the said parties may be decreed to pay each to the other such sums as shall be found due to the other, for, or on account of moneys paid or for moneys received for sale of ore, or otherwise, mined or taken from any lode property found to be the property of the said parties. That the said defendants be enjoined from carrying away or disposing of any ore mined or taken out of said lodes above mentioned, or from selling, bonding, or in anywise disposing of or incumbering more than two-fourths of said lodes, until the further order of court; and that to secure this end, a temporary injunction may issue therefor out of this court. That some proper person may be appointed by this court, as a receiver, to take charge of any and all ores that may now be mined in said lode, or that has been taken out of said lodes above mentioned, with power to dispose of the same for the use and benefit of all of the parties to the said agreement above mentioned, and that the plaintiffs have judgment against said defendants for their costs expended herein, and

such other and further relief as may herein be meet and proper.

To this complaint a demurrer was interposed, the demurrer was sustained and the plaintiffs appealed.

Mr. W. H. OFFENBACHER, and Messrs. H. M. & W. TELLER, for appellants.

Messrs. WELLS, SMITH & MACON, for appellees.

ELBERT, J. The bill alleges an agreement between the complainants and two of the defendants to "engage in the business of prospecting for and development of lode mining property," for the joint use and benefit of all. Such an agreement is like a partnership and each party thereto becomes the agent of the other in prosecuting the joint adventure. *Murley v. Ennis*, 2 Col. 300.

The allegations of the bill do not support the view taken by the court below. The bill does not seek to enforce an agreement to enter into a partnership, but rights under an agreement in the nature of a partnership entered upon and acted under by the parties. On the facts alleged, which the demurrer admits, the complainants were entitled, if not to all the relief prayed, to at least a specific performance as well as an account of profits wrongfully appropriated. That no time was limited by the agreement during which it should continue in force left it, under equitable restrictions (1 Story's Eq. Jur., § 668), determinable at pleasure, but could not operate to defeat rights accrued in virtue of its covenants while it was in force. That the property, touching which relief is sought, was acquired under the agreement, and while it was in force, is sufficiently alleged. The court erred in sustaining the demurrer and dismissing the bill.

The decree of the court below is reversed and the cause remanded for further proceedings.

Reversed.

BACON v. LAMB.

Where personal property was delivered and received in satisfaction of a promissory note, and the note surrendered and canceled, *held*, to be a payment of the note within the meaning of the term "paid" in an action upon a collateral agreement to pay money upon the payment of the note.

Appeal from County Court of El Paso County.

THE facts are stated in the opinion.

Mr. T. A. McMorris, for appellant.

Mr. Wm. Harrison, for appellee.

THATCHER, C. J. August 4, 1875, A. C. Hunt being indebted to John H. Bacon, the plaintiff, in the sum of ten thousand dollars, gave him his three promissory notes, one for \$3,000, one for \$4,000, and another for \$3,000. To secure these notes, he gave Bacon a chattel mortgage upon a band of horses upon his ranch in Douglas county. The first note due, being one of the three thousand dollar notes, Bacon assigned to Burr and Lamb, of which firm the defendant Lamb is the surviving partner. August 9th, A. D. 1875, Burr and Lamb executed the following instrument in writing :

"§512 96-100.

COLORADO SPRINGS, Aug. 9, 1875.

When a note dated August 4, 1875, made by A. C. Hunt to order of John H. Bacon for \$3,000, payable one year after date, and now held by us, is paid, we promise to pay, to the order of Charles Holmes, five hundred and twelve and ninety-six one-hundredth dollars, with interest at ten per cent after maturity. Value received.

BURR & LAMB."

Holmes subsequently assigned it to Bacon who now brings suit upon it, and upon certain items of account. The trial was to the court, from whose finding it is clear this written instrument was rejected on the ground that it was not due,

the contingency not yet having happened upon which it was made payable. This is really the only point argued by counsel. Was the note described in the instrument sued on ever paid? Did the contingency therein mentioned happen? Bacon, and one J. L. Williams as the agent of Lamb, with the three notes and the chattel mortgage in their possession, demanded of H. R. Hunt (acting as the agent of A. C. Hunt) that he should turn over to them the band of horses covered by the mortgage. This he refused to do. Finally, after exchanging several propositions, the agent delivered the mortgaged property to Bacon and Williams, and they canceled and surrendered the three notes. This, stripped of all unnecessary verbiage, was the character of the transaction. The horses were taken to Colorado Springs and there sold for about \$2,825, which was less than the face of Lamb's note. As his note first fell due, and Bacon being liable thereon as indorser, it was agreed that the horses should be sold for Lamb's benefit. Whatever view may be taken of the evidence, whether the conclusion be reached that they were sold under the written stipulation, or whether Bacon and Williams made the purchase of the horses for Lamb, the controlling fact remains that the \$3,000 note, described in the instrument sued on, as well as the other two notes, were canceled and surrendered, and in full satisfaction therefor the band of horses was received, with the consent of both Bacon and Lamb's agent, Williams. This must be construed to be a payment within the meaning of that word as used in the written instrument. It was a satisfaction and discharge of the note. The fact that the horses did not thereafter sell for a sufficient amount to cover the note and interest is not material, since they were accepted in full satisfaction. It is clear that Hunt was no longer indebted to either Bacon or Lamb. The contingency therefore happened upon which the note was made payable.

The judgment is

Reversed.

WOODWARD v. ELLSWORTH.

1. Illegality in a tax assessment will not upon that ground alone warrant the issuance of an injunction to restrain the sale of personal property to satisfy the taxes. The statute furnishes another remedy in such cases which is complete and adequate. Under the statute a perpetual lien only attaches by virtue of the levy to the specific property levied upon.
2. The property of a national bank organized under the act of June 3d, 1864, levied upon by a county treasurer to satisfy a tax levied after the bank has become insolvent, cannot be subjected to such demand against a claim for the property by a receiver subsequently appointed.

Appeal from District Court of Clear Creek County.

THIS was an action by Ellsworth, the appellee, as receiver of a national bank, to enjoin Woodward, the treasurer of Clear Creek county, from disposing of or interfering with certain personal property, belonging to the bank as it was alleged, to satisfy a tax levied subsequent to the insolvency of the bank. The complaint was demurred to, and the demurrer, as well also a motion to dissolve a temporary injunction theretofore issued, were overruled. The defendant appealed.

MR. L. C. ROCKWELL, and MR. W. T. HUGHES, for appellant.

MESSRS. BUTLER, WRIGHT & KING, and MR. ED. O. WOLCOTT, for appellee.

THATCHER, C. J. It is alleged in the complaint, and admitted by the demurrer that the First National Bank of Georgetown, organized under the act of Congress to provide a national currency, approved June 3, 1864, suspended business July 30th, 1877, then being insolvent; that August 18, 1877, the complainant was appointed by the comptroller of the currency receiver of said First National Bank; that within ten days thereafter he qualified as such receiver; that upon examination of the books and accounts of said bank the receiver found it had been insolvent for more than

three years previous to its suspension ; that for the year 1877 the bank was assessed for taxation upon "the sum of \$25,000 as the amount of capital used by said bank over the amount invested in United States bonds ;" that the sum due for taxes on said amount was the sum of one thousand and fifteen dollars ; that at the time of the suspension of the bank, Cushman, who was its president, was possessed of his own right of a cabinet consisting of rare minerals and birds ; that the said Cushman sold and assigned the same to the complainant for the benefit of creditors, and that he still has possession of the same, as assets of the bank ; that Thomas Woodward, as treasurer of Clear Creek county, was, April 16, 1878, "about to distrain and levy upon said cabinet and sell the same for the purpose of collecting the said ten hundred and fifteen dollars claimed as taxes aforesaid." The court issued a temporary injunction restraining the defendant from seizing and selling the cabinet or other personal property then in the hands of the receiver. A motion to dissolve the injunction was made and denied. From the order denying the motion to dissolve, this appeal was taken. Whether the assessment and levy of the tax upon twenty-five thousand dollars of the capital stock of the bank, were legal or illegal upon the facts set out in the complaint, we need not investigate. It is sufficient upon this question to say that even if illegal, that ground alone would not ordinarily warrant the issuance of an injunction to restrain the sale of personal property to satisfy the taxes. The statute furnishes another remedy in such cases which is complete and adequate. *Price et al. v. Kramer* (ante, p. 546).

But it is upon an entirely different ground chiefly that equitable relief is sought. The circumstances of this case are peculiar. The personal property, the sale of which is restrained, was neither assessed nor levied upon. Under the statute, a perpetual lien only attaches by virtue of the levy to the specific property levied upon. General Laws, § 2337. Other property, however, may be distrained and

sold, but not having been levied upon, it is not affected with the statutory lien. As therefore the tax, if legal, was merely a debt against the bank at the time the receiver was appointed, the question arises as to the status of the assets of the bank after that date.

Section 50 of the National Bank Act provides that the receiver "shall take possession of the books, records and assets of every description of such association, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders provided for by the twelfth section of this act; and such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller of the currency, and also make report to the comptroller of the currency of all his acts and proceedings. The comptroller shall thereupon cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof. And from time to time the comptroller, after full provision shall have been first made for refunding to the United States any such deficiency in redeeming the notes of such association as is mentioned in this act, shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction."

By section 47 it is provided that the *United States shall have the first and paramount lien upon all the assets* of such insolvent bank for the purpose of making good any deficiency (in the proceeds of the bonds pledged by the bank) to meet the amount expended in paying the notes of the bank. This lien, it is further declared, shall

have the preference to all other claims whatsoever, except the necessary costs and expenses of administering the assets. In *National Bank v. Colby*, 21 Wall. 609, the supreme court of the United States held that the property of an insolvent national bank, attached at the suit of a creditor, before the appointment of a receiver, cannot be subjected to a sale for the payment of his demands, against the claim for the property by a receiver of the bank subsequently appointed. The court, in construing the Banking Act, says: "There is in these provisions a clear manifestation of a design on part of Congress: 1st. To secure the government for the payment of the notes, not only by requiring in advance of their issue a deposit of bonds of the United States, but by giving to the government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank; and 2d. To secure the assets of the bank for ratable distribution among its general creditors. This design would be defeated if a preference in the application of the assets could be obtained by adversary proceedings. The priority of the United States and the ratable distribution among the general creditors, so studiously provided for in the act, would in that case be lost." See, also, *Ocean National Bank v. Carll*, Thompson's National Bank Cases, p. 793.

Whatever might be the rights of the defendant if the statutory lien had attached to the specific property by virtue of a levy thereon prior to the insolvency of the bank, we are satisfied that, accepting as true the averments in the complaint, the court did not err in issuing the preliminary injunction. The order denying the motion to dissolve the same will be

Affirmed.

GREEN et al. v. RICHARDSON, Ex'r.

A third party for whose benefit a simple contract has been entered into for a valuable consideration moving from the promisee, may maintain an action thereon in his own name, or plead it by way of set-off.

Appeal from District Court of San Juan County.

THE case is stated in the opinion.

Messrs. HUDSON & SLAYMAKER, and Mr. C. S. THOMAS, for appellants.

Messrs. WILSON, GERRY & TAYLOR, and Mr. JAMES A. LOWRIE, for appellee.

ELBERT, J. The complaint alleges that on or about September 17th, 1877, defendants executed their promissory note of that date for \$439.45 with interest from date at the rate of two per cent per month until paid, payable on or before October 10th to the plaintiff or order; that defendants never paid said sum of money or any part thereof either when the same became due, or at any time since then, and plaintiff prays judgment for \$439.45 with interest at two per cent per month from September 17, 1877, and for costs of suit.

The defendants interpose the following answer.

"I. The defendants admit that on the day named in said complaint the defendants executed and delivered to the plaintiff the note described in the complaint, and that the same is now due and unpaid.

II. And for further defense, and for a set-off against the plaintiff, defendants allege: *First*. That on July 13, 1877, one Alfred Moison executed and delivered his promissory note to the defendants in their firm name of Geo. Green & Co., and thereby for value received promised to pay to the defendants, as such partners, in sixty days after July 13, 1877, the sum of one thousand one hundred dollars together with interest on said sum from said date until the

same was paid, at the rate of two per cent per month. *Second.* That on the said date, to secure the payment of said sum and said note, said Moison executed and delivered to one N. E. Slaymaker, for the use and benefit of the defendants, a trust deed upon certain premises situate in the town of Silverton, San Juan county, State of Colorado, then owned by said Moison, viz.: Lot number 17 in block No. 11, of said town. *Third.* That on July 14, 1877, the plaintiff agreed by and with said Moison to purchase from him the said premises at the agreed price of \$1,600, and thereupon said Moison, at the request of the plaintiff, conveyed the said premises to him and one Emile Charest, and thereupon the plaintiff, in consideration of said conveyance, agreed by and with said Moison and then promised to pay to him the sum of \$500, in cash, and to assume and pay to the defendants the amount due from said Moison to defendants upon the note of \$1,100, hereinbefore described, when said note by its terms fell due, the said amount then being a lien upon said premises as the purchase-money for said premises, and then paid said Moison the sum of \$500, in cash. *Fourth.* That the amount due upon said note by the terms thereof became due and payable on September 12-15, 1877, and that the plaintiff has not paid the same. *Fifth.* That the defendants realized upon the security given them by said Moison, viz.: said deed of trust on November 28, 1877, the sum of \$930, and there is now due and unpaid upon said note the sum of \$263.50, together with interest thereon at the rate of two per cent per month from November 20, 1877, which said sum and interest the defendants claim as a set-off against any amount which may be due from them to the plaintiff upon the cause of action set forth in the complaint, and for which they ask judgment against the plaintiff." To this answer the plaintiff demurred, assigning as ground of demurrer: "*First*, the answer is insufficient in law. *Second*, the promises claimed to have been made by plaintiff constitute no ground of defense or set-off. *Third*, plaintiff is not liable upon the

promises claimed in the answer. *Fourth*, the answer sets up no ground of defense."

The demurrer was sustained, and the defendants, electing to stand by their answer, judgment was entered for the plaintiff.

The court erred in sustaining the demurrer. The promise of the plaintiff set up in the answer was not an undertaking to answer for the debt, default, or miscarriage of another, but to pay his own debt in a particular manner. It was an original undertaking and not within the Statute of Frauds. Brown on Stat. of Frauds, §§ 165, 166. A third party, for whose benefit a simple contract has been entered into for a valuable consideration, moving from the promisee, may maintain an action in his own name, or may plead it by way of set-off. *Lehow v. Simonton et al.*, 3 Col. 346.

The judgment of the court below is reversed and cause remanded.

Reversed.

KNOX et al. v. McFARRAN.

1. In an action of ejectment it is competent to show that a conveyance relied upon by one of the parties to the action was made with intent to defraud creditors.
2. To show that a conveyance was made with intent to hinder, delay or defraud creditors the declarations of the grantor, made before or at the time of the conveyance, are admissible, but not his declarations thereafter.
3. One who takes property in payment or security of a pre-existing debt is to be regarded as a purchaser for a valuable consideration.
4. Resulting trusts are not within the Statute of Frauds, and may be shown by parol; the agreement, however, from which the trust springs, must have been a part of the original transaction—a subsequent agreement cannot raise a trust.

Appeal from District Court of El Paso County.

EJECTMENT. The declaration averred seizin in fee; plea of the general issue. It was stipulated between the parties

at the trial "that the chain of title to the property in controversy from the United States to David M. Rose, is in all respects legal and perfect."

The plaintiff then gave in evidence a deed of conveyance from Rose to James Knox, one of the plaintiffs, duly acknowledged and recorded. The deed bore date January 5, 1876, purporting to be from Rose to Knox, trustee, in consideration of \$420; conveying the premises in controversy in fee, and containing the usual covenants of warranty. The plaintiff then rested.

The defendant offered and read in evidence the deposition of D. M. Rose, as follows:

"I owned the lot in controversy in 1874-5, and sold it about January 3d, 1875, I think, to Mr. Wm. Kettlewell, and gave him a bond for deed — price, \$350. The title bond was assigned to Mr. Sybrandt by Kettlewell, and by Sybrandt to A. A. McGovney; the latter informed him to that effect about three months after the title bond became due and wanted he should call at Mr. McGovney's office and see him in regard to it; he called at McGovney's office accordingly, who wanted to make arrangements to pay for lot in lumber; made arrangements then with him to take \$100 in lumber, the rest he was to pay in cash within one month. The money was not yet due but Mr. McGovney would pay it before due by virtue of this arrangement. McGovney was in possession of this title bond when I went to his office. McGovney was in possession of the premises a few days previous to January 1, 1876; I received this title bond from McGovney about the 5th of January, 1876, and burnt it; the contents of the bond were, binding myself that if certain notes were paid that I should make a good, clear title to the lot; 'if they failed to pay said notes the lot, with all buildings, reverted to me, and if I failed to make a deed upon payment of the purchase-money I forfeited double the amount of the notes'; I was paid by McGovney for the lot; I made out a deed to James Knox, trustee, at the request of McGovney; Knox paid me no consideration for making the deed to him."

On cross-examination — “I do not know that McGovney did not pay for the lot for James Knox.”

Defendant offered in evidence a certified copy of the proceedings had in the probate court of El Paso county, December term, 1875, in a suit between James McFarran and A. A. McGovney *et al.*, wherein judgment had been rendered against McGovney for \$550 and costs, execution in February, 1876, and levy and sale of the premises in controversy to James McFarran, leaving the sum of \$505.80 made on the writ, exclusive of costs. The defendant next gave in evidence an abstract and certificate of record of the judgment bearing date December 22, 1875. Also sheriff's deed to James McFarran, dated February 12, 1877, and recorded June 8, 1877; also deposition of A. A. McGovney, who testified that he had at one time a contract for a deed to the premises in dispute, executed by D. M. Rose to William Kettlewell, by him assigned to Peyton & Hunt, by them to Sybrandt and Augustus, and by them to witness. “This contract was in writing and is not now in my possession. I turned it over to James Knox about December 10, 1875. The contract was assigned to me sometime in October, 1875. After I turned the contract over to Knox, I saw it in his possession again about January 5, 1876. Knox at that time delivered the contract to D. M. Rose and took a deed instead. At the time Knox took the deed I may have had the contract temporarily in my possession.

I think I took the contract to Rose and demanded a deed, and Rose executed the deed to James Knox, trustee, and delivered it to him. I assigned the contract to Knox in writing. The best of my recollection the assignment was as follows: ‘For and in consideration of one dollar, to me in hand paid, I hereby assign all my title and interest in and to the annexed contract to James Knox, for his use and benefit. Witness my hand and seal, this 10th day of December, 1875.’ Knox did not pay the one dollar, mentioned in the assignment, or any other sum, in consideration thereof, at the time the assignment was made. At the time

this contract was assigned to Knox I had paid Rose on it about \$140 or \$150, leaving a balance unpaid January 1, 1876, when the contract became due, of about \$275. This balance due was paid by me about January 5, 1876. I don't think I conveyed, about December 10, 1875, any other real estate to Knox, or any other person. I did not convey any to Knox. I conveyed some to Mr. Capehart, that the firm of McGovney & Co. were interested in. I conveyed about four pieces to Capehart, which property belonged to the firm of A. A. McGovney & Co., but had been deeded to Capehart and myself, individually, for the purpose of protecting the company's interest, as I had become involved in some private matters in which the company was not interested. I did not, during the fall of 1875, or the following winter, convey or transfer any property or interest for the purpose of protecting it against my individual creditors. I turned some property over to my creditors to be held by them as security for what I was owing them. I did not, during that fall and winter, transfer all my interest in my real property to Capehart, and Knox, and others. I retained some of my real estate and all my personal property. I retained all the real estate belonging to me in fee simple, which consisted of a house and lot where I lived, and claimed by me as a homestead. I can't recollect the description of the real estate conveyed to Capehart; it was in Colorado Springs; there were buildings on two of these lots. In January, 1876, I conveyed my interest in a mine, in Lake District, to J. T. Wilson, one of my creditors. Don't know its value. The property conveyed to Capehart was conveyed to him for the purpose of liquidating the company's debts, or holding it for that purpose, and he gave me his note for \$3,000 to protect me in case of his death, or against his acts; but when he turned the property over to creditors, or received a credit for it and the company's indebtedness, I canceled his note and returned it to him. At the time the contract was assigned to Knox I was indebted to him as cashier of the First National Bank. I

was not indebted to him individually, but was owing the bank."

Cross-examination: "To the best of my knowledge I made the assignment of the contract under seal. I assigned the contract to Knox because I was owing the First National Bank, of which Knox was cashier, and I assigned to him to be held as collateral security for my indebtedness. At the time of this assignment I owed the bank about \$4,300; part of it was my own paper and part was paper of parties I had indorsed and who had failed to pay. I was still indebted to the bank at the time the deed was made from Rose to Knox. I had an agreement to receive a credit upon this indebtedness for the property, but don't know whether credit was made or not. I have not examined the paper at the bank to see. I have never received any credit of the bank for only this and one other piece of property that I know of, and that credit was of \$2,000. I don't know of my own knowledge that this credit has been made; it was agreed upon."

Re-examination by defendant's counsel.—"This agreement, to give me credit, was made with the First National the latter part of November, 1876. There was no written agreement to show that this assignment was made for the benefit of the bank. I was a director of the First National Bank from October 1st, 1874, to about the 1st of November, 1875. There was an agreement in writing, signed, authorizing Knox to hold the agreement and premises as collateral security for the bank. This agreement was made December 10th, 1878, and the paper was delivered to one of the officers of the bank. This agreement was signed by A. A. McGovney & Co. This agreement was attached to the firm note, and I presume is now in the hands of the First National Bank. I cannot state the exact terms of the agreement, only so far that when sold the proceeds were to be applied upon my paper. We had a verbal understanding that the property should not be sacrificed; that it should be held and carried for our best interests. This verbal understand-

ing and agreement was made about December 10th, 1875. Outside the lot in controversy the bank held as security for my indebtedness a note of \$3,500, made by J. V. Sybrandt, and secured by a trust deed on other realty. Some of the property belonged to Capehart and myself at this time, but had never been released from the trust deed; the balance belonged to Sybrandt. Outside of the Sybrandt note, the property of our own turned over to them, part of which was covered by the trust deed, cost us about \$1,900. At that time I considered the property worth \$3,000. Did not own stock in that bank at the time of the assignment of the contract to Knox."

Re-examined by attorney for plaintiff. — "We had a verbal understanding that this property was to be carried for our best interest. I meant that no advantage would be taken of the trust; that they would not force sale of the property, but would carry it a reasonable time so that the most could be made out of it." In answer to the interrogatory, "Were there not other and prior liens existing upon the portion of this property which you say the bank held as collateral security for your indebtedness?" the witness answered: "The Sybrandt trust deed covered three separate tracts of land, upon two of which there was a prior incumbrance of \$1,500. "And in answer to interrogatory, "How much more was this property worth than this prior incumbrance of \$1,500?" answered: "My judgment was, at the time, December 10th, 1875, it was worth some \$1,000, or \$1,200; but within two or three months afterward I had occasion to inspect the property and concluded it was not worth any thing more, over and above the incumbrance." In answer to the interrogatory, "As a matter of fact is it not true that property which the bank held as collateral security for your indebtedness, other than this property in controversy, on December 10, 1875, was not worth \$3,000, over and above prior liens then existing upon it?" witness said: "It was my impression at the time, if sold at private sale, at a fair

valuation, nearly that sum might have been realized for it, as the improvements on the property cost nearly that, alone, but at forced sale it would not bring half that amount."

* * * "There was little if any demand for such property at that time. Subsequent developments have shown that there has been little or no demand for that class of property, and nothing upon which to base a value." In answer to the interrogatory, "Had the note of \$3,500, signed by J. V. Sybrandt, any value other than the property in the deed of trust given to secure it?" Answer: "No, sir."

Defendant then offered in evidence the deposition of W. D. Brown, who testified: "I had a conversation with A. A. McGovney in the fore part of December, 1875; he told me that McFarran had been suing him on a note of Sybrandt & Augustus, on which he was security; that he had sued through ugliness and pure cussedness, and that he (McGovney) should not pay it without he was obliged to do so; if he had to pay, McFarran would be one of the last he should pay of his creditors; a few days after this McGovney told me he thought he had property enough to pay all his creditors, and more too, if he could realize any thing near what it was worth, and that he should put it in a shape that it could not be sacrificed; about that time he told me he had made his property over to the First National Bank, or to Mr. Knox, as trustee for the First National Bank; I think he told me about that time he had deeded some property to Mr. Capehart; I understood from McGovney, in this last conversation with him, that he had deeded his property to the bank, or to Knox, for his (McGovney's) benefit."

Deposition of A. D. Craigie, offered in evidence by defendant, as follows: "Some time in November, 1875, I called on McGovney and presented my bill to him; he said he could not pay it then, but would, he thought, before a great while; he said his creditors were injuring him by pouncing upon him, and he did not intend to be pushed to the wall, or words to that effect, implying, of course, that he intended to make such disposition of his property that

his creditors could not get it at a sacrifice: this was my understanding from the conversation; he also said that he intended to pay all his debts if his creditors would let him alone."

Deposition of T. J. Wiley, offered in evidence by defendant, as follows: "Mr. McGovney told me they that were pushing him for the money he owed them would not get their money as soon as them that did not push him; that he was going to put his property out of his hands so they could not get it; that he was not going to have his property slaughtered; this conversation was had between the 1st and 5th of December, 1875; I was serving a good many summonses on him which led to the conversation; I was serving a summons on him then in the case of McFarraan against McGovney and Sybraadt; within the last three months (date of this deposition, April 25, 1877), I have had a conversation with McGovney concerning the disposition of his property, in which he stated he had given the First National Bank of Colorado Springs his property for safe-keeping, and while he was at Denver they had taken it all away from him and ordered his wife out of the house; if she did not get out they would throw her out; and stated that McIntire, who was president of the bank, had made his brags that he would break him (McGovney)."

Deposition of John Courter, offered in evidence by defendant, as follows: "I heard McGovney make statements concerning the transfer of his property in December, 1875; he stated that McFarraan had sued him on the Sybraadt note, and that if McFarraan had waited he would have paid it, but now he would not, if he could avoid it; said he would put his property in such shape that McFarraan could not get hold of it; that he would not allow his property to be sold under execution for it would not bring half its worth; between Christmas and New Year we met; he asked me what McFarraan had to say, meaning in reference to that suit; I told him I had heard McFarraan say he (McGovney) had put his property out of his hands for the purpose of de-

frauding him; McGovney's reply was, that he had put his property in a shape to keep McFarran from annoying him; at this time he did not tell me whom he had conveyed his property to."

The defendant here rested.

The plaintiff, James Knox, then testified in his own behalf, in rebuttal, as follows: "I am cashier of the First National Bank of Colorado Springs; A. A. McGovney was indebted to the First National Bank over \$4,000, at the time the bond for a deed from Rose was assigned to me and I took this assignment for the benefit of the bank in part payment of McGovney's indebtedness to the bank; at the time of this assignment I was cashier of the bank; I had no knowledge of McGovney's indebtedness to McFarran at the time this bond for a deed was assigned to me, and did not hear of such indebtedness for some time after the deed was made from Rose to me; I had no intention of defrauding any person in taking this assignment of the title bond from McGovney, and in taking the deed from Rose; but had the bond assigned and the deed executed to me to secure the bank so far as I could for what McGovney owed it; McGovney still owes the bank over \$2,000 of the money due it at the time of this assignment of this bond for a deed.' The plaintiff's counsel asked the witness this question, viz: "What was the consideration, if any, passed between you and McGovney for the assignment of the said bond for a deed to the premises in question by McGovney to you?" "The consideration of said assignment was the credit to be given McGovney upon his indebtedness to the bank." The defendant's counsel then moved to strike out this answer, which motion was sustained by the court and the court thereupon instructed the jury not to consider this answer in making their verdict, and plaintiff excepted.

George H. Stewart then testified on behalf of the plaintiff: "I was in December, 1875, and January, 1876, president of the First National Bank of Colorado Springs, and know that A. A. McGovney was at that time indebted

to the bank over \$4,000; I knew of this bond for a deed given by Rose, and held by McGovney, and assigned to the plaintiff, Knox; knew that McGovney was to assign this bond for security of what he owed the bank; I did not know at that time that McGovney owed McFarran any thing; previous to December 10, 1875, the officers of the bank had been urging McGovney to come in and settle up his indebtedness due the bank."

The jury rendered a verdict of not guilty, and a motion for a new trial having been interposed and overruled, judgment was rendered on the verdict. To set aside this judgment the plaintiffs appealed to this court

Messrs. WILLIAMS & McMORRIS, for appellant.

Mr. J. C. HELM, and Mr. WM. HARRISON, for appellee.

ELBERT, J. The superior facilities of a court of equity to investigate questions of fraud, its greater power to afford relief, the propriety of investigating questions touching the validity of conveyances of real estate in a direct rather than a collateral proceeding, would have made a resort to its jurisdiction in this case advisable. Courts of law, however, have generally insisted upon a broad concurrent jurisdiction in matters of fraud, and we accept the decisions as we find them. In an action of ejectment it is competent to show that a conveyance relied upon by one of the parties to the action was made with intent to defraud creditors. *Jackson, ex dem., etc. v. Myers*, 11 Wend. 535; *Jackson, ex dem., etc. v. Burgett*, 10 Johns. 456; *Remington v. Linthicum*, 14 Pet. 361; *Rogers v. Brush*, 5 Gilm. 580; *Jameson v. Beaubien*, 3 Scam. 114; *Baze v. Asper*, 6 Minn. 220; *Crook v. Swan*, 5 Conn. 140; *Marcy v. Kinney*, 9 id. 397; *Lillie v. Wilson*, 2 Root, 517.

That a like question of fraud might be investigated in an action of forcible detainer was held in the case of *Wilcoxon v. Morgan*, 2 Col. 473. There is no reason for prescribing a different rule in ejectment. If the assignment by McGov-

ney to Knox, of his bond from Rose was with intent to hinder, delay or defraud his creditors, it is immaterial that Rose, the grantor in the subsequent deed to Knox, did not participate in the fraudulent intent. That the deed was made to Knox instead of McGovney would be in pursuance and the result of the fraudulent assignment, and the deed must stand or fall with the assignment. If the taint of fraud attached to one, it attached to the other. The ends of the law cannot be defeated by indirection. To show that a conveyance was made with intent to hinder, delay or defraud creditors, the declarations of the grantor made before, and at the time of the conveyance are admissible, but not his declarations thereafter. *Wilcoxon v. Morgan*, 2 Col., *supra*; *Wheeler v. McCarristan*, 24 Ill. 40; *Randeger v. Ehrhardt* 51 Ill. 101; *Simpkins v. Rogers*, 15 Ill. 397; *Frear v. Evertson*, 20 Johns. 142.

The court erred in admitting the declarations of McGovney, touching the assignment of the bond after the date of the assignment. In view of a re-trial we notice a few of the other questions made.

If the assignment was fraudulent and void, it was immaterial that Knox did not participate in the fraudulent intent, if he paid nothing. He must have been a purchaser for a valuable consideration and without notice of the fraud. § 20, R. S., p. 340; *Wilcoxon v. Morgan*, 2 Col. 478. The evidence shows that Knox paid nothing, but claimed to hold the property in trust. If the assignment of his title bond by McGovney to Knox on the 10th of December was for the purpose of securing an existing indebtedness to the First National Bank of Colorado Springs, there was a good and sufficient consideration to support the assignment. Although there is a conflict of authority on the question, we regard it as the better doctrine, that one who takes property in payment or security of a pre-existing debt, is to be regarded as a purchaser for a valuable consideration. 1 Hilliard on Mortgages, 610; Herman on Mortgages, § 52; *Babcock v. Jordan*, 24 Ind. 14, and cases there cited.

for years, we were yet so long accustomed to see him combat with success the more acute inroads of disease and continue in the active pursuits of his profession, that our belief came eventually to be in unison with our wishes, that there were still in reserve for him many valuable years of honor and usefulness to himself and the State. It was only on the day before the last adjournment of this court that he was seen mingling with his friends, seemingly in his wonted health, giving no sign nor warning of the calamity by which we were so soon to be stricken; and to-day — so sudden was our bereavement — he rests from his labors forever. Under these circumstances it is not strange that the first intelligence of his death should have been received with surprise near to incredulity; indeed nothing better attests the high estimation in which he was held by all classes, than the universal reluctance to accept his reported death, followed by the general gloom and sincere sorrow when the melancholy truth was at last fully realized.

May it please your honors: It is well known that Judge GORSLINE was already not undistinguished on his arrival in Colorado. Trained in the old schools, and measured by their severe standards, his credentials showed that he had successfully passed the most exacting of professional ordeals, and, as we know, his career here was in keeping with its early promise. But I am to attempt no portrayal of the man nor analysis of his character; upon the rare mental endowments and moral traits by which he reached his professional eminence and acquired and held the esteem and affection of his fellows, it is not my purpose to dwell. With propriety has this task been left to those who, from longer acquaintance and a common experience with him on the bench and at the bar, were best entitled to be heard, and the friendly office has by them been most fittingly discharged.

May it please your honors: It seems but a moment since we retraced our steps, a procession of silent mourners, from the fresh grave to which we committed the poor remains of mortality. A true friend, wise counselor, upright judge

has departed hence forever. Yet while I am so conscious of the irreparable nature of our bereavement, I feel that our relations with our departed friend have not wholly ended with the grave. His influence is still to abide with us; we are inheritors and custodians of his fair fame; we continue to enjoy the fruits of his labor; he leaves behind him a contemplation a character without stain, and a noble example.

May it please the court: It only remains for me, on behalf of the bar of the State, to present to you, in these circumstances, their tribute of honor and respect to the memory of our departed brother, and to request that they be recorded.

WHEREAS, Death has removed from our midst **GORSLINE**, long a member of the bar and late one of the judges of the supreme court of Colorado:

Resolved, That in the death of Judge **GORSLINE** the bar has lost one of its most valued citizens, the bar one of its brightest ornaments, society one of its most useful members, and his friends one whose place cannot be filled.

Resolved, That in the varied relations of life which he sustained and the positions he was called upon to perform, he well his part, and as a good citizen, the great lawyer, the learned and upright judge, the wise counselor, the friend, and for his kindness of heart and charity for the lowly, he leaves a name to be revered by those who come after him, and an example which is most worthy of imitation by his brethren of the bar.

Resolved, That his great ability and spotless integrity commanded the admiration and respect of all who knew him, and his qualities of heart drew around him a circle of loving friends, to whom his loss comes with all the force of a personal bereavement; for of him it may be said, that who knew him best loved him most.

Resolved, That the sympathies of the bar are tendered to his family in the sad bereavement which has fallen upon them.

Resolved, That a copy of these resolutions be furnished the family of our deceased brother, and that a copy be also furnished to each of the daily newspapers of Denver, with the request to publish the same.

Resolved, That the chairman of this meeting appoint five members of the bar who shall each respectively present a copy of these resolutions to the circuit court of the United States for the district of Colorado, the supreme court of the State, the district court of Arapahoe county, the district court of Gilpin county, and the county court of Arapahoe.

On behalf of the court Chief Justice THATCHER responded as follows:

Gentlemen of the Bar: The court most heartily and cordially unites in the tribute of respect to the memory of our deceased professional brother. But last Tuesday, as we stood around the open grave of the departed one and looked upon the flowery wreath of affection as it rested upon his coffin, and beheld and felt the tears of sympathy start from moistened eyes, that turned to witness for the last time the precious casket enshrining his mortal remains, a feeling of sadness and grief came over all hearts. It is eminently fitting that we should now commemorate his virtues and public service.

A most accurate lawyer, a pure and able jurist, a ripe scholar, an upright citizen, a kind and trusted friend and companion, an affectionate husband, his loss is most deeply mourned by those who knew him best. Born in the State of New York, he, when yet comparatively a young man, removed to Wisconsin and entered upon the practice of his profession, in which he soon took high rank. Once by appointment and once by election he acceptably and ably filled the office of District Judge in that State. In 1860 he selected Colorado as his future home, and either as an honored member of the bar or the bench, he here remained in active life until his dying day. For four years, from June, 1866, he was a valued member of the supreme bench of our late Territory. His appointment to that position was merited alike by his eminent ability and incorruptible integrity.

He inspired suitors in court, and the people at large, with the confidence that so long as, and to the extent that the administration of justice should be intrusted to him, it would never be diverted from its pure channels. In shaping the jurisprudence of this Commonwealth, his master hand may be distinctly traced. Clearness of reasoning, depth of thought, and polished language, characterize his published opinions. His talent for discriminating the true from the false, his power in nicely weighing arguments made him a most excellent judge, and a great auxiliary to his brethren on the bench.

To his mind the system of law was a system of justice, and in his opinions there is apparent effort to decide the questions presented upon their substantial merits, untrammelled by mere technicalities, except in so far as they were thought to be essential safeguards in the due administration of justice. As a practitioner he was uniformly esteemed by his brethren of the bar. Unostentatious in his manners, of quiet, modest deportment, he was never captivated by the arena of the court room. As a counselor, however, he stood pre-eminent. His advice was greatly sought and highly prized. To the younger members of the profession he ever held out a helping hand. In all the varied relations of life he strove conscientiously to discharge his duties, and now at the age of fifty-six, honored and respected, he is laid with his fathers. He did not pretend to be without faults. Like ourselves, he was human. Like ourselves, he had foibles. But let no one violate the sacredness of the grave by uncovering them.

"No further seek his merits to disclose,
Nor draw his frailties from their dread abode,
Where they alike in trembling hope repose—
The bosom of his Father and his God."

And it is now ordered that the resolutions which so truthfully portray the character of our departed brother be entered upon the records of this court as a perpetual memorial, an enduring monument to his great worth.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

EXTRA ANNOTATIONS
—TO—
COLORADO REPORTS

VOLUME IV

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NOTES

ON THE

COLORADO REPORTS.

CASES IN 4 COLORADO.

4 COLO. 1, DENVER, S. P. & P. R. CO. v. WOODWARD.

Collateral attack on right of acting administrator.

Cited in note in 81 A. S. R. 552, on collateral attack on right of acting administrators.

Admission by plea to merits in action for wrongful death.

Cited in Hanley v. West Virginia, C. & P. R. Co. 59 W. Va. 419, 53 S. E. 625, holding that plea to merits in action for death by wrongful act admits representative character in which plaintiff sues.

Validity of summons signed by judge.

Cited in McNevins v. McNevins, 28 Colo. 245, 64 Pac. 109, holding summons issued and signed by county judge void, when he has appointed clerk, notwithstanding clerk's disqualification.

Time to object to form of verdict.

Cited in Quimby v. Boyd, 8 Colo. 194, 6 Pac. 462, holding that objections to form of verdict cannot be raised for first time in this court.

Measure of damages for death by wrongful act.

Cited in Moffatt v. Tenney, 17 Colo. 189, 30 Pac. 348, holding measure of damages in action for death by negligence pecuniary loss which party entitled to sue will be likely to suffer; Hayes v. Williams, 17 Colo. 465, 30 Pac. 352, holding compensatory damages for negligently causing death estimated accumulations of deceased during probable remainder of his life; Rooney v. New York, N. H. & H. R. Co. 173 Mass. 222, 53 N. E. 435, holding that if all elements entering into problem could be accurately determined, principle applicable to purchase of annuity would enter into determination of amount of damages to be allowed for loss of ability to earn wages.

Cited in note in 1 L.R.A.(N.S.) 199; on evidence of habits and character of person injured or killed, as affecting damages.

Degree of care required of street railways.

Cited in *Spellman v. Lincoln Rapid Transit Co.* 36 Neb. 890, 20 L.R.A. 316, 38 Am. St. Rep. 753, 55 N. W. 270, holding street-railway companies bound to exercise extraordinary care and utmost skill, diligence and human foresight.

Presumption of negligence from happening of accident.

Cited in *Wall v. Livezey*, 6 Colo. 465, holding presumption that accident to passenger by failure of machinery, appliances, or means of transportation was caused by want of due care by carrier; *Citizens' Street R. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54, holding presumption that accident to passenger through defective car, or from its management, or from anything pertaining to service which company ought to control was caused by negligence of carrier.

Cited in notes in 6 A. S. R. 794, on presumption of negligence from injury; 15 L.R.A. 36, on presumption of negligence from occurrence of accidents.

4 COLO. 13, DRUMMOND v. CARSON.**4 COLO. 14, WYATT v. FREEMAN.****Taking of appeal as entry of appearance.**

Cited in *Cates v. Mack*, 6 Colo. 401, holding act of taking appeal entry of appearance of appellant in appellate court; *Paul v. Rooks*, 16 Colo. App. 44, 63 Pac. 711; *School Dist. No. 38 v. Waters*, 20 Colo. App. 106, 77 Pac. 255,—holding appeal from judgment of justice of peace to county court waiver of defects in form of service, or want of process.

Filing of appeal bond as waiver of defects in service.

Cited in *Charles v. Amos*, 10 Colo. 272, 15 Pac. 417, holding filing of appeal bond in appellate court waiver of objection to jurisdiction of that court; *Fowler v. Fowler*, 15 Okla. 529, 82 Pac. 923, holding giving of appeal bond appearance to action and waiver of any question as to jurisdiction of court over person of defendant.

Distinguished in *White House Mountain Gold Min. Co. v. Powell*, 30 Colo. 397, 70 Pac. 679, holding filing of appeal bond by defendant in county court on appeal to district court not such appearance as waives objection to service of summons.

Appearance by answer as waiver of defects in summons.

Cited in *Union P. R. Co. v. De Busk*, 12 Colo. 294, 3 L.R.A. 350, 13 Am. St. Rep. 221, 20 Pac. 752, holding filing of answer waiver of all objections to summons and return thereof and to jurisdiction of court over person of defendant; *Keyser v. Pollock*, 20 Utah, 371, 59 Pac. 87, holding general appearance of defendant by answer waiver of objections to summons and to jurisdiction of court over person.

Sufficiency of answer by officer pleading justification.

Cited in *Johnson v. Bailey*, 17 Colo. 59, 28 Pac. 81, holding that answer defective as justification under legal process may be aided by proof; *Williams v. Mellor*, 12 Colo. 1, 19 Pac. 839, holding that officer

pleading justification must allege and prove existence and validity of judgment as well as writ; *Masters v. Teller*, 8 Okla. 271, 56 Pac. 1067, holding that officer pleading justification must allege and prove valid writ issued by court of competent jurisdiction.

Validity of conveyances in fraud of creditors.

Cited in *Townsend v. Pertersen*, 12 Colo. 491, 21 Pac. 619, to the point that conveyances made with intent to hinder or defraud creditors are void, as against creditors so affected.

Replevin against officer.

Cited in note in 25 A. S. R. 257, on replevin against officer.

4 COLO. 17, COLE v. CHEOVENDA.

Measure of damages for nondelivery of property.

Cited in *Sutherland*, Dam. 3d ed. 1879, on difference between contract price and market value of goods at time and place for delivery as damage.

4 COLO. 22, WILLOUGHBY v. GEORGE, Later appeal in 5 Colo. 80.

Method of reviewing judgment of district court.

Cited in *Bernard v. Boggs*, 4 Colo. 73; *Connor v. Connor*, 4 Colo. 74; *Hewitt v. Colorado Springs Co.* 5 Colo. 184,—holding that under code appeal is only method by which judgment of district court may be reviewed here.

Distinguished in *Harvey v. Travelers' Ins. Co.* 18 Colo. 354, 32 Pac. 935, holding that writ of error will lie in civil cases; *Stebbins v. Anthony*, 5 Colo. 273, holding that state constitution took place of organic law of territory in continuing writ of error from this court to county courts.

Power of legislature to abolish writs of error from supreme court.

Cited in *People v. Rochmond*, 16 Colo. 274, 26 Pac. 929, holding that writs of error from supreme court may be abolished unless preserved by constitution.

4 COLO. 24, LUNDIN v. KANSAS P. R. CO.

4 COLO. 24, TRIPP v. FISKE.

Duty of court to enter judgment of nonsuit or direct verdict.

Cited in *Stratton v. Union P. R. Co.* 7 Colo. App. 126, 42 Pac. 602, holding court bound to nonsuit where evidence does not warrant verdict for plaintiff; *Brown Bros. v. Potter*, 13 Colo. App. 512, 58 Pac. 785, holding court bound to direct verdict where evidence such that contrary verdict would have to be set aside; *Nicholls v. McShane*, 16 Colo. App. 165, 64 Pac. 375, holding court bound to enter judgment of nonsuit, upon motion of defendant, if any element of proof necessary to make out plaintiff's case is wanting; *Guldager v. Rockwell*, 14 Colo. 459, 24 Pac. Colo. Ann.—9.

556, holding that court may enter judgment of nonsuit in jury trial, on motion of defendant when plaintiff fails to introduce sufficient evidence to warrant judgment in his favor; *Brown v. Lapham*, 22 Colo. 264, 44 Pac. 504, holding rendition of judgment of nonsuit instead of upon merits immaterial error when proof insufficient to sustain decree in plaintiff's favor; *Livesay v. First Nat. Bank*, 36 Colo. 526, 6 L.R.A. (N.S.) 598, 118 Am. St. Rep. 120, 86 Pac. 102, holding trial court justified in directing verdict for defendant when evidence insufficient to sustain it.

Conclusiveness of judgment of nonsuit.

Cited in *Denver & R. G. R. Co. v. Iles*, 25 Colo. 19, 53 Pac. 222, holding judgment of nonsuit not *res judicata*.

4 COLO. 25, DENVER v. CAPELLI, 34 AM. REP. 62.

Liability of city for negligence.

Cited in *Denver v. Spencer*, 34 Colo. 270, 2 L.R.A. (N.S.) 147, 114 Am. St. Rep. 158, 82 Pac. 590, 7 A. & E. Ann. Cas. 1042, holding city liable for negligence of its park commission in constructing platform in park.

Cited in *Sackett*, *Instruct. Jur.* (3d ed.) 1082, on effect of defective plan of public improvement upon liability of city for injury resulting therefrom; *Farnham, Waters*, 1131, on liability of municipality for injury resulting from negligent execution of plan for improvements.

Cited in notes in 79 A. D. 475, on acts of municipal corporations as judicial or ministerial; 30 A. S. R. 380, on liability of cities for negligence and other misconduct of officers and agents; 66 A. D. 436, on municipal liability for injury in execution of governmental or sovereign powers.

— As to drains and sewers.

Cited in *Wolff v. Denver*, 20 Colo. App. 135, 77 Pac. 364, holding city council in exercise of legislative power for police purposes in establishing sewer district; *Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729, holding city bound to keep surface water drains in repair and free from obstructions; *Knostman & P. Furniture Co. v. Davenport*, 99 Iowa, 589, 68 N. W. 887, holding city not liable for mere mistake in judgment as to sufficiency of drain; *Watters v. Omaha*, 76 Neb. 855, 110 N. W. 981, 14 A. & E. Ann. Cas. 750, holding city not liable for defective plan of public work, unless construction manifestly dangerous to all reasonable minds; *Springfield v. Spence*, 39 Ohio St. 665, holding municipal corporation not liable for simply failing to provide drainage for surface water.

Cited in *Farnham, Waters*, 1140, on public authorities and not citizens as having right to select plan for drainage; *Farnham, Waters*, 1054, on right of railroad to compensation for construction of drain by city across right of way; *Farnham, Waters*, 1141, on nonliability of municipality for injury resulting from defective plan of drainage; *Farnham, Waters*, 1160, on nonliability of municipality for injuries by over-

flow of drainage caused by storms; Farnham, Waters, 1170, on necessity that municipality keep drains in repair.

Cited in notes in 54 A. R. 672, on municipal liability as to sewers; 29 A. S. R. 738, 743, on municipal liability for defects in and want of repair of sewers; 61 L.R.A. 684, 686, 696, 709, on duty and liability of municipality with respect to drainage.

When correct instruction cures erroneous ones.

Cited in *Boulder v. Niles*, 9 Colo. 415, 12 Pac. 632, holding fact that other instructions given on behalf of defendant are partially correct is not material, where it cannot be determined by which instruction jury was governed.

Definition of proximate cause.

Cited in *Lyons v. Watt*, 43 Colo. 238, 18 L.R.A.(N.S.) 1135, 95 Pac. 949, defining "proximate cause."

4 COLO. 30, KANSAS P. R. CO. v. WARD.

Duty of railroad company towards trespassers.

Cited in *Kennedy v. Denver, S. P. & P. R. Co.* 10 Colo. 493, 16 Pac. 210 (dissenting opinion), on duty owing by railroad company to trespasser on its track.

Cited in note in 90 A. D. 55, on duty and liability of railroad company towards persons other than lawfully on premises without contract relations.

Who are trespassers on railroad's right of way.

Cited in *St. Onge v. Day*, 11 Colo. 368, 18 Pac. 278, holding occupation of railroad company's right of way by kilns and wood piles of owner of land through which it passes, trespass.

Sufficiency of exceptions to instructions.

Cited in *Bradbury v. Alden*, 13 Colo. App. 208, 57 Pac. 490; *Ritchey v. People*, 23 Colo. 314, 47 Pac. 384,—holding exceptions to instructions separately paragraphed and numbered sufficient, where immediately following any numbered paragraph was exception: To giving of which instruction plaintiff then and there excepted; *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348, holding that this court will not consider objection as to numbering and signing instructions, unless timely objection made in trial court.

Cited in note in 99 A. D. 138, on instructions to jury and requisites to obtaining review.

— General exceptions.

Cited in *Coon v. Rigden*, 4 Colo. 275, holding ruling on instructions by trial court not reviewable here when exception thereto general; *Wooton v. Seigel*, 5 Colo. 424; *Miller v. People*, 23 Colo. 95, 46 Pac. 111; *Portland Gold Min. Co. v. O'Hara*, 45 Colo. 416, 101 Pac. 773,—holding that general objection to instructions en masse will not be considered by court upon review; *Keith v. Wells*, 14 Colo. 321, 23 Pac. 991; *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076; *Ruby Chief Min. & Mill. Co. v. Prentice*, 25 Colo. 4, 52 Pac. 210,—

review alleged erroneous portions of charge; *Schollay v. Moffitt-West Drug Co.* 17 Colo. App. 129, 67 Pac. 182, holding general exception to oral charge embracing distinct legal propositions useless if any of the propositions were sound.

Province of court and jury in determining question of negligence.

Cited in *Colorado C. R. Co. v. Holmes*, 5 Colo. 197, holding question of negligence for court when negligence or its absence is evident and unquestionable; *Silver Cord Combination Min. Co. v. McDonald*, 14 Colo. 191, 23 Pac. 346, 16 Mor. Min. Rep. 171, holding questions of negligence and contributory negligence questions of fact for jury.

Cited in *Sackett, Instruct. Jur.* (3d ed.) 260, on credibility and weight of testimony as for jury where evidence is conflicting.

Necessity of court repeating instructions.

Cited in *Blair v. Groton*, 13 S. D. 211, 83 N. W. 48, holding instruction given in substance in general charge properly refused.

4 COLO. 38, SEARS v. TAYLOR, 5 MOR. MIN. REP. 318.

Title by occupancy as interest in real estate.

Cited in *Aspen Min. & Smelting Co. v. Rucker*, 28 Fed. 220, holding possessory rights of discoverer of mine, who has further rights as to acquisition of title, real estate title; *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744, holding title by occupancy alone assignable interest in real estate; *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.* 15 Colo. 29, 22 Am. St. Rep. 373, 24 Pac. 920, 16 Mor. Min. Rep. 93, holding title by occupancy interest in realty capable of being conveyed by deed.

When ejectment will lie.

Cited in note in 116 A. S. R. 568, on property or invasion of possession for which ejectment is maintainable.

Presumption of ownership from possession.

Cited in *Patchen v. Keeley*, 19 Nev. 404, 14 Pac. 347, holding possessor of real estate presumed to be owner until contrary shown; *Lebanon Min. Co. v. Consolidated Republican Min. Co.* 6 Colo. 371, holding proof of possession of mining claim in possessory action prima facie evidence of title.

Cited in *Sackett, Instruct. Jur.* (3d ed.) 709, on presumption of ownership of real estate from actual peaceable possession.

4 COLO. 44, LA CROSSE GOLD MIN. CO. v. SCUDDER, 1 MOR. MIN. REP. 446.

Sufficiency of judgment on appeal.

Cited in *Langley v. Fitzgerald*, 43 Colo. 301, 95 Pac. 923, holding substantial conflict in evidence, and its legal sufficiency to sustain finding necessary in order that judgment may not be disturbed on appeal.

4 COLO. 45, HETZER v. PEOPLE.

License from city or county as defense to prosecution by state.

Cited in *Cunningham v. People*, 1 Colo. App. 155, 27 Pac. 949, holding saloon-keeper selling under license, granted by board of trustees of town, not liable to indictment under state law for "keeping open tippling house on Sunday;" *Huffsmith v. People*, 8 Colo. 175, 54 Am. Rep. 550, 6 Pac. 157, holding that same statute which confers upon city exclusive control over tippling houses divests state of its control over them; *Rogers v. People*, 9 Colo. 450, 59 Am. Rep. 146, 12 Pac. 843, holding that party cannot be indicted for keeping bawdy house under state law where power to suppress same delegated to and accepted by city which enacts ordinance covering offense; *Heinssen v. State*, 14 Colo. 228, 23 Pac. 995, holding fact that tippling house is situated in city having conditional authority to license it no defense to prosecution under state law for keeping open on Sunday; *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516, holding that keeper of tippling house may be proceeded against under either city ordinance or general statute, or both.

4 COLO. 47, VANCE v. MARONEY.

Sufficiency of return non inventus before return day of writ.

Cited in *Cheely v. Clayton*, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328; *Clayton v. Clayton*, 4 Colo. 410; *Israel v. Arthur*, 7 Colo. 5, 1 Pac. 438,—to the point that return non inventus before return day of writ will not support notice by publication and leaves court without authority to proceed to judgment.

Decrees reviewable in supreme court by writ of error.

Cited in *Sloan v. Strickler*, 12 Colo. 179, 20 Pac. 611, holding decree for sale of decedent's land to pay debts reviewable in supreme court by writ of error.

4 COLO. 50, GEORGETOWN & S. P. R. CO. v. HUTCHINSON.

Failure of commissioners to record contract as defense.

Cited in *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142, holding failure of county commissioners to enter contract on its records no defense to action thereon.

4 COLO. 52, SISTY v. BEBEE.

Necessity of defendant filing cross-bill to obtain affirmative relief.

Cited in *Mills v. Buttrick*, 4 Colo. 53, holding defendant in suit in chancery failing to file cross-bill not entitled to affirmative relief.

4 COLO. 53, MILLS v. BUTTRICK, Rehearing denied in 4 Colo. 123.

Liability of surety or guarantor after change in membership of principal debtor.

Cited in Brandt, Suretyship, 3d ed. 288, on nonliability of surety for clerk of sole trader after he takes in partner.

Cited in note in 12 Eng. Rul. Cas. 482, on continuance of guaranty to fluctuating body after change in membership.

Meaning of word "defendants" in plea.

Cited in Streeter v. Marshall Silver Min. Co. 4 Colo. 535, 7 Mor. Min. Rep. 660, holding use of words "the defendants" in pleas subsequent to first of series, which expressly designates for whom counsel appear, designate defendants in first plea, and is not appearance of defendant not named in first plea.

Right to reverse judgment against several, as to one defendant.

Cited in Teller v. Hartman, 16 Colo. 447, 27 Pac. 947, holding that error in judgment, upon appeal by part of defendants, will not be considered where it affects only non-appearing defendant; Owl Canon Gypsum Co. v. Ferguson, 2 Colo. App. 219, 30 Pac. 255 (dissenting opinion), on inability to reverse entire judgment against several defendants as to one only.

Cited in notes in 91 A. S. R. 368, on entirety of judgments void as against some of the parties; 32 Am. Dec. 605, on invalidity of judgment as to part of defendants.

4 COLO. 59, HEATON v. MYERS.

Right of defendant to present same defense by different pleas.

Cited in Hurd v. Smith, 5 Colo. 233, denying defendant right to continue to present same defense by different pleas; Sylvester v. Craig, 18 Colo. 44, 31 Pac. 387, holding filing of new answer waiver of right to assign error upon ruling sustaining demurrer to answer; Anthony v. Slayden, 27 Colo. 144, 60 Pac. 826, holding party who assigns error either to ruling refusing leave to file or striking from files amended pleading may not also assign error to previous ruling sustaining demurrer to earlier pleading which amended one supplanted.

Cited in Abbott's Pleadings, 2d ed. 1336, as to what evidence is admissible under plea of general issue in assumpsit.

Waiver of demurrer by filing amended pleading.

Cited in Enright v. Midland Sampling & Ore Co. 33 Colo. 341, 80 Pac. 1041, holding error in sustaining demurrer to complaint, waived by filing amended complaint.

Parol evidence to charge un-named party in note.

Cited in Keck v. Sedalia Brewing Co. 22 Mo. App. 187, holding that terms and obligations of negotiable note are to be found written within its corners; Sparks v. Despatch Transfer Co. 104 Mo. 531, 12 L.R.A. 714, 24 Am. St. Rep. 351, 15 S. W. 417, holding extrinsic evidence inadmissible to show agency of president of corporation who signed notes in his own name.

Distinguished in *Anderson v. Portland Flouring Mills Co.* 37 Or. 483, 50 L.R.A. 235, 82 Am. St. Rep. 771, 60 Pac. 839, holding parol evidence admissible to establish liability upon warehouse receipts.

Capability of promissory note being subject matter of subsequent parol agreement.

Cited in *Fisher v. Stevens*, 143 Mo. 181, 44 S. W. 769, holding that promissory note may be subject matter of contract by subsequent agreement by parol, if contract supported by independent consideration.

What triable under general issue in assumpsit.

Cited in *Watson v. Lemen*, 9 Colo. 200, 11 Pac. 88, to the point that at common law question whether right of action had accrued when suit commenced is triable under general issue.

4 COLO. 65, LOCKE v. CENTRAL, 34 AM. REP. 66.

Right of officer to recover on ground of implied contract.

Cited in *Durango v. Hampson*, 29 Colo. 77, 66 Pac. 883, holding no assumpsit implied on part of municipal corporation in respect to services performed by officer for which ordinances allow no compensation; *Garfield County v. Leonard*, 26 Colo. 145, 57 Pac. 693, holding that no implied assumpsit existed between county clerk and county for services rendered as clerk for which no fees were specially fixed by law; *Taylor v. Big Horn County*, 11 Wyo. 106, 70 Pac. 835, denying officer right to recover from public on ground of implied contract.

4 COLO. 68, BISHOP v. GRIFFITH.

4 COLO. 71, FIRST NAT. BANK v. BERNARD.

4 COLO. 73, BERNARD v. BOGGS.

Right of party to appeal from judgment in his favor.

Cited in *Lockhaven Trust & S. D. Co. v. United States Mortg. & T. Co.* 19 Colo. App. 28, 73 Pac. 409, holding that judgment in favor of party seeking to have it reviewed cannot be reviewed on appeal, although judgment not rendered for amount asked for; *Hall v. Pay Rock Consol. Min. Co.* 6 Colo. 81, denying party in whose favor judgment is rendered right to appeal to this court; *Harvey v. Travelers' Ins. Co.* 18 Colo. 354, 32 Pac. 935, holding party not allowed to appeal from judgment in his own favor.

4 COLO. 74, CONNOR v. CONNOR.

Judgments affected by appeal statutes.

Cited in *Eicholtz v. Wilbur*, 4 Colo. 434, holding causes commenced before, and prosecuted to judgment since Code went into effect appealable to this court under former practice or under Code at election of appellant; *Richardson v. Fitzgerald*, 132 Iowa, 253, 109 N. W. 866, holding statutes giving right to appeal only applicable to such judgments as are rendered subsequent to their enactment.

Distinguished in *Hewitt v. Colorado Springs Co.* 5 Colo. 184, holding that no appeal will lie from judgment of nonsuit in action commenced prior to date Code went into effect.

Certiorari from district to county courts.

Cited in *Re Rogers*, 14 Colo. 18, 22 Pac. 1053, holding judgments of county courts subject to review by writs of certiorari from district courts.

Appeal as continuance of suit.

Cited in *Colorado Springs Co. v. Cowell*, 6 Colo. 73; *Ohio-Colorado Min. & Mill. Co. v. Elder*, 47 Colo. 63, 99 Pac. 42,—holding perfecting of appeal continuation of suit in which judgment appealed from was rendered.

4 COLO. 76, JACKSON v. McMURRAY, 12 MOR. MIN. REP. 164.

4 COLO. 77, HURD v. WHITSETT.

What constitutes tenancy from month to month.

Cited in *Edmundson v. Preyville*, 12 Colo. App. 73, 54 Pac. 394, holding tenancy from month to month where tenant goes into possession without any agreement as to terms and rent reserved is payable monthly.

Reservation of rent as criteria of duration of term.

Cited in *White v. Sohn*, 65 W. Va. 409, 64 S. E. 442, holding reservation of rent, with payment at stated periods, one of principal criteria to determine duration of term.

Right of landlord to fix rent of holdover tenant.

Distinguished in *Atkinson v. Cole*, 16 Colo. 83, 26 Pac. 815, holding that landlord cannot arbitrarily fix by notice amount of rent which objecting tenant must pay when holding over.

Word "terms" defined.

Cited in *Govin v. Chicago*, 132 Fed. 848, holding phrase "terms and conditions, rights and privileges" not employed to convey power over or relating to time or period through which tenure dealt with is entitled to run; *Pilcher v. English*, 133 Ga. 496, 66 S. E. 163, holding county authorities not required to state in advertisement for bids on court house exact or approximate price, because statute provided that "terms" of contract be specified; *Ceranto v. Trimboli*, 63 W. Va. 340, 60 S. E. 138, construing word "terms" in affidavit to mean "demand;" *Blair v. Chicago*, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427 (dissenting opinion), on meaning of words "terms and conditions."

4 COLO. 90, HAGER v. RICE, 34 AM. REP. 68.

Parol evidence to explain draft.

Cited in *La Salle Nat. Bank v. Tolu Rock & Rye Co.* 14 Ill. App. 141, holding parol evidence admissible that it was the intention of the parties to bind the corporation by a note executed in the name of an

individual followed by the term *Prest.* and indorsed with the name of the corporation and name and office of the president.

Liability of agent signing negotiable instrument.

Cited in notes in 4 Eng. Rul. Cas. 284, on liability of one signing bill or note as agent; 37 A. R. 143, on liability of public agents on negotiable instruments.

4 COLO. 95, LEONARD v. BARTELS.

Office and nature of writ of prohibition.

Cited in *People ex rel. Dougan v. District Ct. 6 Colo. 534*, holding object of writ of prohibition to restrain subordinate judicial tribunals from exceeding their jurisdiction; *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516, holding that writ of prohibition should not be granted if complaining party has another adequate remedy at law; *People ex rel. Smith v. Second Judicial Dist. Ct. 21 Colo. 251*, 40 Pac. 460, holding writ of prohibition not writ of right; *People ex rel. Adams v. District Ct. 29 Colo. 1*, 66 Pac. 888, holding that writ of prohibition will not be permitted to supersede ordinary functions of appeal or writ of error; *People ex rel. Lindsley v. District Ct. 30 Colo. 488*, 71 Pac. 388, holding that writ of prohibition cannot be converted into writ of error for purpose of correcting mere errors in exercise of jurisdiction with inferior tribunal; *State ex rel. Rheinauer v. Malone*, 40 Fla. 129, 23 So. 575, holding writ of prohibition not granted of right, but rests in sound discretion of court; *State ex rel. Bank of Chadron v. District Ct. 5 Wyo. 227*, 39 Pac. 749, holding writ of prohibition not granted to undo that which is already done.

Cited in note in 111 A. S. R. 956, on writ of prohibition.

4 COLO. 96, CRANMER v. KANSAS P. R. CO.

4 COLO. 97, ALVORD v. MCGAUHY.

Time for filing notice of appeal.

Cited in *Willoughby v. Brown*, 4 Colo. 120, holding notice of appeal filed substantially contemporaneous with service thereof sufficient; *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657; *State ex rel. Hall v. District Ct. 34 Mont. 112*, 115 Am. St. Rep. 522, 85 Pac. 872, 9 A. & E. Ann. Cas. 728,—holding filing of notice of appeal ineffectual unless it precedes or is contemporaneous with service thereof.

4 COLO. 98, HEPBURN v. JONES.

Effect of arbitrator's failing to take oath.

Cited in *Glass-Pendery Consol. Min. Co. v. Meyer Min. Co. 7 Colo. 51*, 1 Pac. 443, to the point that valid award cannot be made if arbitrators fail to take oath prescribed by statute.

Cited in note in 69 A. D. 584, on validity of award by unsworn arbitrators.

Statute concerning awards as part of contract of submission.

Cited in *Wilson v. Wilson*, 18 Colo. 615, 34 Pac. 175, holding that statute concerning awards must be considered as part of contract of submission.

4 COLO. 100, SCHILLING v. ROMINGER.

Rights of first appropriator of water of stream.

Cited in *Coffin v. Left Hand Ditch Co.* 6 Colo. 443; *Wellington v. Beck*, 30 Colo. 409, 70 Pac. 687,—holding first appropriator of water of natural stream entitled to prior right to water to extent of his appropriation; *Kirk v. Bartholomew*, 3 Idaho, 367, 29 Pac. 40, holding that priority of appropriation of water of stream gives priority of right.

Cited in *Farnham, Waters*, 2029, on rights of prior appropriators of water under constitution; *Farnham, Waters*, 2071, on right of several landowners to unite in construction of ditch and make common appropriation.

Cited in note in 30 L.R.A. 670, on right of prior appropriation of water.

Distinguished in *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674, holding that doctrine of "appropriation," so called, is not doctrine of common law.

Validity of executed verbal license to construct irrigation ditch.

Cited in *De Graffenried v. Savage*, 9 Colo. App. 131, 47 Pac. 902, holding gratuitous license irrevocable grant after entry and construction of irrigation ditch; *Tynon v. Despain*, 22 Colo. 240, 43 Pac. 1039, holding that full performance of parol contract respecting interest in lands takes it out of statute of frauds; *Gyra v. Windler*, 40 Colo. 366, 91 Pac. 36, 13 A. & E. Ann. Cas. 841; *McLure v. Koen*, 25 Colo. 284, 53 Pac. 1058,—holding that equity will enforce right acquired under oral contract relating to realty after removal of bar of statute by execution by both parties; *Park v. Park*, 45 Colo. 347, 101 Pac. 403, holding verbal agreement for division of waters of ditch taken out of statute of frauds by open and notorious enjoyment of water for years under agreement; *North Powder Mill. Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223, holding parol license to construct irrigation ditch over land irrevocable after having been fully executed; *Maple Orchard Grove & Vineyard Co. v. Marshall*, 27 Utah, 215, 75 Pac. 369, holding parol license to enter on land to construct pipe line for irrigation irrevocable grant after entry and construction of line.

Cited in *Farnham, Waters*, 2342, on right to enforce executed parol agreement under which adjoining proprietors appropriated water of stream.

Nature of use of water for irrigation.

Cited in *Drake v. Lady Ensley Coal, Iron & R. Co.* 102 Ala. 501, 24 L.R.A. 64, 48 Am. St. Rep. 77, 14 So. 749, to the point that rights of riparian owner must give way of necessity to uses of irrigation; *Clough v. Wing*, 2 Ariz. 371, 17 Pac. 453, holding that riparian rights of common law do not exist in this territory; *Oury v. Goodwin*, 3 Ariz. 255, 26 Pac. 376, holding statutes authorizing acquirement of right of way

for irrigation ditches by eminent domain, constitutional; *Nash v. Clark*, 27 Utah, 158, 1 L.R.A.(N.S.) 208, 101 Am. St. Rep. 300, 75 Pac. 371, 1 A. & E. Ann. Cas. 300, holding use of water for irrigation public use.

What constitutes appropriation of water of stream.

Cited in *Platte Water Co. v. Northern Colorado Irrig. Co.* 12 Colo. 525, 21 Pac. 711; *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 4 L.R.A. 767, 21 Pac. 1028,—holding that mere diversion of water from stream will not constitute constitutional appropriation.

Jurisdiction of chancery to adjust all matters in connection with cause.

Cited in *Whitsett v. Kershow*, 4 Colo. 419, holding that court of chancery will generally entertain jurisdiction to adjust all matters connected with or arising out of cause of which it has rightful possession.

Cited in *Farnham, Waters*, 2011, on jurisdiction of courts of equity to protect rival claimants to water rights by injunction.

When objections to pleadings or mode of trial should be made.

Cited in *Cone v. Montgomery*, 25 Colo. 277, 53 Pac. 1052, holding jury waived by proceeding to trial without objection and right thereto cannot be raised on appeal; *United States Security & Bond Co. v. Wolfe*, 27 Colo. 218, 60 Pac. 637, holding that judgment will not be reversed upon point which trial court was given opportunity to pass upon, which is of such character, that had objection been made, error might have been obviated; *Harrison v. Carlson*, 45 Colo. 55, 101 Pac. 76, holding objection to proposed amendment of pleadings not raised in court below not entitled to consideration on appeal.

Distinguished in *Mulock v. Wilson*, 19 Colo. 296, 35 Pac. 532, holding want of direct and positive averments showing fact, existence of which may be gathered from complaint, not fatal ground of objection, when made for first time in appellate court.

4 COLO. 109, FILLEY v. CODY.

Validity of judgments rendered in vacation.

Cited in *Francis v. Wells*, 4 Colo. 274; *Kirtley v. Marshall Silver Min. Co.* 4 Colo. 111,—holding that judge had no authority to render decree in vacation; *McGan v. O'Neil*, 5 Colo. 433, holding that essential provisions of decree in chancery could not be settled in vacation; *People ex rel. Montrose County v. Hebel*, 19 Colo. App. 523, 76 Pac. 550, denying jurisdiction of judge in vacation at his chambers to enter order denying upon its merits petition for alternative writ of mandamus; *American F. Ins. Co. v. Pappe*, 4 Okla. 110, 43 Pac. 1085, holding judgments rendered by court not legally in session, void.

Distinguished in *Terpening v. Holton*, 9 Colo. 306, 12 Pac. 189, holding judgments entered in vacation valid, under Code.

Right to confer jurisdiction by consent.

Cited in *Whipple v. Stevenson*, 25 Colo. 447, 55 Pac. 188, holding that jurisdiction cannot be conferred by consent.

Effect of failure to lawfully enter up judgment.

Cited in *Alvord v. McGaughey*, 5 Colo. 244, holding that judgment may be entered on findings of court where clerk has never entered up final judgment.

When judgment takes effect.

Cited in *Schuuster v. Rader*, 13 Colo. 329, 22 Pac. 505, holding that judgment in open court takes effect from time it is rendered and not from time it is entered.

Collateral attack on judgment.

Cited in note in 23 A. S. R. 116, on collateral attack upon judgment.

4 COLO. 111, KIRTLLEY v. MARSHALL SILVER MIN. CO.**Validity of judgment rendered in vacation.**

Cited in *Francis v. Wells*, 4 Colo. 274, holding judgment or decree rendered in vacation void; *McGan v. O'Neil*, 5 Colo. 433, holding that essential provision of decree in chancery could not be settled in vacation; *American F. Ins. Co. v. Pappe*, 4 Okla. 110, 43 Pac. 1085, holding judgments rendered by court not legally in session, void.

Distinguished in *Terpening v. Holton*, 9 Colo. 306, 12 Pac. 189, holding judgments entered in vacation valid, under Code.

4 COLO. 112, WOLFLEY v. LEBANON MIN. CO. 13 MOR. MIN. REP. 282.**Location of mining claim.**

Cited in note in 7 L.R.A.(N.S.) 820, 827, 843, on location of mining claim.

Mining rights generally.

Cited in notes in 63 A. D. 104, 109, on mining rights; 58 A. S. R. 265, 278, on what included in patents for mineral lands.

Right of claimant of lode or vein to follow same.

Cited in *Carson City Gold & Silver Min. Co. v. North Star Min. Co.* 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 658, 19 Mor. Min. Rep. 118, holding claimant of lode entitled to follow it up, and prepare his diagram so as to include it, together with surface ground on each side allowed by local laws; *Larned v. Jenkins*, 51 C. C. A. 344, 113 Fed. 634, 22 Mor. Min. Rep. 94, holding that locator of lode mining claim abandons rights beyond lines of patented claim when he enters it and accepts patent; *Hall v. Equator Min. & Smelting Co.* Fed. Cas. No. 5931, holding claimant restricted as to lineal course of lode to lines of his survey; *Stevens v. Williams*, Fed. Cas. No. 13,414, 1 Mor. Min. Rep. 557, holding that location may include 1,500 feet in length along lineal course of lode and 150 feet on each side of it; *Johnson v. Buell*, 4 Colo. 557, holding plaintiff in ejectment not entitled to recover to extent that lode in its onward course or strike departs from side lines of patented location; *Lebanon Min. Co. v. Rogers*, 8 Colo. 34, 5 Pac. 661, holding that patentee cannot follow lode when in its outward course or strike it departs from vertical side lines; *Duggan v. Davey*, 4 Dak. 110, 26 N. W. 887, 17

Mor. Min. Rep. 59, to the point that patentee obtains government title to entire land, soil, mineral and all; *Davis v. Shepherd*, 31 Colo. 141, 72 Pac. 57, 22 Mor. Min. Rep. 575, holding point at which apex of vein, departs from either side line of claim, marks point where right to follow it on strike under location ceases; *Bullion, B. & C. Min. Co. v. Eureka Hill Min. Co.* 5 Utah, 3, 11 Pac. 515 (dissenting opinion), on rights of first locator to part of lode which passed on apex into another claim, where lode comes back to claim.

Cited in note in 53 L.R.A. 491, on right to follow vein or lode on its dip beyond surface lines of location.

Necessity for filing of adverse claim to determine title under valid location.

Cited in *Marshall Silver Min. Co. v. Kirtley*, 12 Colo. 410, 21 Pac. 492, 16 Mor. Min. Rep. 6, holding filing of adverse claim first step in proceedings to determine right of possession and title under valid location, for purpose of establishing right to patent.

Validity of patent broader or narrower than law.

Cited in *Clary v. Hazlitt*, 67 Cal. 286, 7 Pac. 701, holding unauthorized reservation or condition in United States patent to land, void; *Silver Bow Min. & Mill. Co. v. Clark*, 5 Mont. 378, 5 Pac. 570, holding patent narrower than law ineffectual to defeat full title.

Validity of state regulations of location of mining claims.

Cited in *Butte City Water Co. v. Baker*, 196 U. S. 119, 49 L. ed. 409, 25 Sup. Ct. Rep. 211, holding state legislation prescribing additional regulations in respect to location of mining claims valid.

Nature of notice of application.

Cited in *Minard v. Douglas County*, 9 Or. 206, holding notice of application for laying out highway in nature of process.

4 COLO. 120, WILLOUGHBY v. BROWN.

Necessity of statement on appeal.

Cited in *Blatchley v. Coles*, 6 Colo. 82, holding that statement on appeal took place of bill of exceptions under former practice.

4 COLO. 123, MILLS v. BUTTERICK.

4 COLO. 126, DUNN v. PEOPLE.

Sufficiency of forged instrument as basis of conviction.

Cited in *Neff v. United States*, 91 C. C. A. 241, 165 Fed. 273, holding forged instrument sufficient to form basis of conviction if under any contingency it may be prejudicial.

4 COLO. 128, COUNTY COMRS. v. SLOAN.

Review of judgment in cause not appealable.

Cited in *Harvey v. Travelers' Ins. Co.* 18 Colo. 354, 32 Pac. 935, holding court without jurisdiction to review judgment where cause not appealable by terms of statute.

4 COLO. 129, PEOPLE v. KEELING.

Jurisdiction of supreme court to issue writ of quo warranto.

Cited in *People ex rel. Robinson v. Boughton*, 5 Colo. 487, holding that Constitution confers upon this court original jurisdiction to issue writs of quo warranto; *State ex rel. McGee v. Gardner*, 3 S. D. 553, 54 N. W. 606, holding that supreme court has jurisdiction to issue writ of quo warranto in cases where statutory writ has substituted ancient writ; *Atty. Gen. v. Sullivan*, 163 Mass. 446, 28 L.R.A. 455, 40 N. E. 843, holding that statute authorizes proceedings in form of information, in nature of writ of quo warranto, to be brought in this court.

Jurisdiction of superior court to issue writ of mandamus.

Cited in *People ex rel. Swift v. Bingham*, 82 Cal. 238, 22 Pac. 1039, holding that superior court has jurisdiction to issue writ of mandamus to oust usurper from office of supervisor of city and county.

Construction of election laws.

Cited in *People ex rel. Johnson v. Earl*, 42 Colo. 238, 94 Pac. 294, holding that all provisions of election laws are not mandatory.

Distinguished in *State ex rel. Holman v. Murray*, 41 Minn. 123, 42 N. W. 858, construing act fixing date for election of municipal officers as prohibiting election upon day antecedent to that specified.

Irregularities avoiding election.

Cited in note in 90 A. S. R. 65, on irregularities avoiding elections.

Discretion of court in granting writ of quo warranto.

Cited in *State ex rel. Walker v. McLean County*, 11 N. D. 356, 92 N. W. 385, holding remedy by quo warranto in Supreme Court not matter of strict right; *State ex rel. Jackson v. Mansfield*, 99 Mo. App. 146, 72 S. W. 471, holding proceeding by quo warranto to oust municipality of its franchise, for illegal incorporation, brought by state's attorney without leave of court, within discretion of trial court; *State ex rel. Eckhart v. Hoff*, 88 Tex. 297, 31 S. W. 290, holding that district judge had discretion to deny leave to file information to oust officers elected at election held on wrong date, where no private right would be vindicated and public injury would result.

4 COLO. 134, CONNOR v. PEOPLE.

Validity of bail taken by court without jurisdiction.

Cited in *Haney v. People*, 12 Colo. 345, 21 Pac. 39, holding bail void when taken by court having no jurisdiction, or by officer destitute of legal authority.

4 COLO. 138, COLLINS v. DAWLEY, 34 AM. REP. 73.

Assignability of policy of certificate of insurance.

Cited in *Crocker v. Hugin*, 103 Iowa, 243, 72 N. W. 411, holding certificate of mutual benefit association assignable.

Cited in notes in 56 A. D. 753, on assignment of insurance; 87 A. S. R. 488, 503, on assignment of life insurance policies.

Distinguished in *Mutual L. Ins. Co. v. Hagerman*, 19 Colo. App. 33,

72 Pac. 889, holding that policy of life insurance payable to assured's wife if she survive him, otherwise to her children, vests in her only contingent interest, and she can assign no greater interest.

Effect of renewal of note for which collateral is pledged.

Cited in *Case v. Fant*, 3 C. C. A. 418, 10 U. S. App. 415, 53 Fed. 41, holding that collateral security remained as security same as if there had been no renewal of note; *California Nat. Bank v. Ginty*, 108 Cal. 148, 41 Pac. 38, holding renewal of note for which collateral is pledged not payment of debt; *First Nat. Bank v. Newton*, 10 Colo. 161, 14 Pac. 428, holding giving of debtor's note, bill or check, or those of third person, to meet antecedent debt, prima facie not payment or discharge of debt.

Disapproved in *Reed v. Cramb*, 22 Ill. App. 34, holding that pledge of collaterals of third party to secure note, only secures fulfillment of contract as it then stands.

Collateral securities.

Cited in note in 32 A. S. R. 717, on collateral securities.

4 COLO. 143, DUNCAN v. WHEDBEE.

4 COLO. 145, DAVIDSON v. PEOPLE.

Admissibility of threats by deceased in murder trial.

Cited in *Babcock v. People*, 13 Colo. 515, 22 Pac. 817, holding proof of uncommunicated threats by deceased against prisoner competent, where there is some evidence of hostile act by deceased immediately before commission of homicide; *Warford v. People*, 41 Colo. 203, 92 Pac. 24, holding proof of communicated threats by deceased admissible in trial for homicide, where there is other evidence tending to show self defense; *Territory v. Hall*, 10 N. M. 545, 62 Pac. 1083, holding that recent uncommunicated threats may become relevant, when question is as to what was deceased attitude at time of encounter to show that attitude was hostile.

Cited in *Bowlby's Homicide*, 3d ed. 407, on admissibility of uncommunicated threats as tending to show that person uttering them was aggressor; *Bowlby's Homicide*, 3d ed. 408, on admissibility of uncommunicated threats to show quo animo of demonstration or attack; *Bowlby's Homicide*, 3d ed. 420, on province of court to determine whether there is evidence of hostile act or movement upon part of victim warranting admission of evidence of threats.

Cited in notes in 89 A. S. R. 707, on evidence of threats in prosecution for homicide; 17 L.R.A. 659, on evidence of threats of accused, or of person injured or killed; 3 L.R.A.(N.S.) 526, 527, on evidence of antecedent threats on trial for homicide.

Admissibility of evidence of character of deceased in murder trial.

Cited in *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526, holding that accused must show attack before he can show violent and dangerous

felonious; May v. People, 8 Colo. 210, 6 Pac. 816, holding refusal of court to allow defendant in murder trial to show reputation of deceased for violence in foreign country, not error; Redus v. People, 10 Colo. 208, 14 Pac. 323, holding testimony showing that deceased was quarrelsome and dangerous man, when intoxicated, immaterial to determine intent, unless at time of homicide defendant had knowledge of deceased's character when intoxicated; Wickham v. People, 41 Colo. 345, 93 Pac. 478, holding that court in murder trial could upon its own motion orally withdraw testimony from jury relating to decedent's reputation for peace, when received upon supposition that other testimony would make it competent; Harrison v. Com. 79 Va. 374, 52 Am. Rep. 634, holding evidence of dangerous character of deceased admissible in murder case where case of self defense has been prima facie made out.

Cited in Bowlby's Homicide, 3d ed. 429, on necessity of one setting up self-defense to first show attack upon himself before showing dangerous character of victim.

Cited in notes in 124 A. S. R. 1028, on admissibility of evidence of character or reputation of deceased in homicide cases; 3 L.R.A.(N.S.) 359, on character and reputation of deceased as affecting homicide.

4 COLO. 151, DEAN v. HOOK.

4 COLO. 154, COLORADO C. R. CO. v. MOLLANDIN.

Argumentative denials.

Cited in Abbott's Pleadings, 2d ed. 984, on sufficiency of denial argumentative in form; Abbott's Pleadings, 2d ed. 986, on right to strike out argumentative denial when pleaded in connection with general denial.

Nature of city's permission to operate railroad on street.

Cited in McPhee & Mc G. Co. v. Union P. R. Co. 87 C. C. A. 619, 158 Fed. 5; Denver & S. F. R. Co. v. Domke, 11 Colo. 247, 17 Pac. 777, holding permission granted by city to lay and operate tracks upon portions of its streets, license.

Effect of legislative authority to perform act.

Cited in note in 1 L.R.A.(N.S.) 93, on effect of legislative authority upon liability for private nuisance.

Right of abutting owner to compensation for use of street by railroad.

Cited in Spencer v. Point Pleasant & O. River R. Co. 23 W. Va. 406, holding abutting lot owners not entitled to compensation from railroad, where building its road through street with consent of council.

Distinguished in Mollandin v. Union P. R. Co. 4 McCrary, 290, 14 Fed. 394, holding abutting owners entitled to compensation for use of street for railroad purposes; Denver v. Bayer, 7 Colo. 113. 2 Pac. 6, holding interference with street which permanently diminishes value of abutting owner's premises as much a damage as physical injury thereto.

4 COLO. 162, DENVER, S. P. & P. R. CO. v. WOODWARD.**Operation and effect of section eleven of Bill of Rights.**

Cited in *National Bank v. Riethmann*, 25 C. C. A. 101, 49 U. S. App. 144, 79 Fed. 582; *Lundin v. Kansas P. R. Co.* 4 Colo. 433; *Colorado Springs v. Neville*, 42 Colo. 219, 93 Pac. 1096,—holding that section eleven of Bill of Rights, prohibiting retrospective legislation, operates as to pending causes under statute, as saving clause incorporated into repealing statute.

What is a retrospective law.

Cited in *United Mines Co. v. Hatcher*, 25 C. C. A. 46, 49 U. S. App. 139, 79 Fed. 517, holding that construction of amendment to lien law, so as to give it retrospective operation, would be contrary to section eleven of Bill of Rights; *Evans v. Denver*, 26 Colo. 193, 57 Pac. 696; *Perry v. Denver*, 27 Colo. 93, 59 Pac. 747,—defining retrospective law; *Brown v. Challis*, 23 Colo. 145, 46 Pac. 679, holding right of tenant in common of mining property to have partition sale not extinguished by amendatory act passed pending partition proceedings; *Ducey v. Patterson*, 37 Colo. 216, 9 L.R.A.(N.S.) 1066, 119 Am. St. Rep. 284, 86 Pac. 109, 11 A. & E. Ann. Cas. 393, holding that statute permitting release of one of several joint debtors without affecting liability of others does not affect rights of debtor under existing judgment.

Distinguished in *Day v. Madden*, 9 Colo. App. 464, 48 Pac. 1053, holding repeal of part of statute allowing attachment on ground that action was on overdue note, valid, though it affects attachments levied; *Campbell v. Iron Silver Min. Co.* 27 C. C. A. 646, 55 U. S. App. 150, 83 Fed. 643, holding act amending previous law so as to allow but one, instead of two, new trials, as of right, in certain suits, not retrospective and void because applying to action then pending.

Construction of statutes.

Cited in *Jones v. Stockgrowers Nat. Bank*, 17 Colo. App. 79, 67 Pac. 177, holding that statute must be interpreted as prospective unless contrary intent is clearly manifested.

—Statutes providing remedy for injuries resulting in death.

Cited in *Letson v. Brown*, 11 Colo. App. 11, 52 Pac. 287, on nature or cause of action, which may be subject matter of suit under acts of 1872 and 1877.

Measure of damages for death by wrongful act.

Cited in *Mitchell v. Colorado Mill. & Elevator Co.* 12 Colo. App. 277, 55 Pac. 736, holding damages awarded under statute giving right of action for death by wrongful act compensatory exclusively.

4 COLO. 169, HITTSON v. DAVENPORT.**Competency of secondary evidence to prove contents of lost record.**

Cited in *Bruns v. Clase*, 9 Colo. 225, 11 Pac. 79, holding proof of diligent and bona fide, but unsuccessful, search for instrument in place where same belongs, is general, kept, or most likely to be found, sufficient. Colo. Ann.—10.

cient to admit secondary evidence; *Conway v. John*, 14 Colo. 30, 23 Pac. 170, holding oral proof of contents of missing files in cause tried by justice admissible after proper foundation laid.

Enforceability of contract to pay in gold.

Cited in *Foxworthy v. Colby*, 64 Neb. 216, 62 L.R.A. 393, 89 N. W. 800, holding contracts to pay certain number of dollars in gold enforceable.

Cited in notes in 29 L.R.A. 519, 520, on special contract and obligations to make payment in gold or silver; 29 L.R.A. 593, on form of judgment and procedure in case of liability to make payment in coin.

Recognition of different kinds of money by courts.

Cited in note in 87 A. D. 127, on extent to which courts recognize different kinds of money.

4 COLO. 176, BOYLE v. PEOPLE, 34 AM. REP. 76.

Competency of jurors.

Cited in *Imboden v. People*, 40 Colo. 142, 90 Pac. 608, holding creditors of bank not per se disqualified to act as jurors in prosecution of bank officers for conspiracy to defraud bank.

Cited in notes in 9 A. S. R. 759, on rejection of juror for bias; 36 Am. Dec. 532, on bias or opinion as ground for challenge to jurors.

— **Competency of members of association to check crime.**

Cited in *Guy v. State*, 96 Md. 692, 54 Atl. 879, holding members of Law and Order League not disqualified to act as jurors in prosecution for violation of Local Option Law; *State v. Hoxsie*, 15 R. I. 1, 2 Am. St. Rep. 838, 22 Atl. 1059, holding person who has contributed money for prosecution of keepers of liquor nuisances not incompetent to act as juror in trial for such crime; *Starke v. State*, 17 Wyo. 55, 96 Pac. 148, holding members of association combined to check larceny of live stock not per se incompetent as jurors in trial of such crime.

Cited in *Abbott's Crim. Tr.* 2d ed. 238, on membership in society to prosecute crime as disqualification of proposed juror.

4 COLO. 182, MILLER v. PEOPLE.

What constitutes larceny.

Cited in *State v. Rechnitz*, 20 Mont. 488, 52 Pac. 264, holding instruction defining larceny erroneous, if it omits to state criminal intent necessary to constitute the crime.

Cited in note in 57 A. D. 273, on what constitutes larceny.

4 COLO. 184, CORNING TUNNEL CO v. PELL.

When judgment is final.

Cited in *Colorado E. R. Co. v. Union P. R. Co.* 36 C. C. A. 263, 94 Fed. 312, holding order of dismissal for want of prosecution, with judgment for costs, final judgment, from which appeal will lie; *Gates v. Canfield*, 2 N. Y. Civ. Proc. Rep. (Browne) 254, holding judgment final if it concludes action, although it does not settle all rights of parties.

Cited in note in 60 A. D. 436, on final and interlocutory judgments and decrees.

4 COLO. 185, LEE v. GRIMES.

Followed without discussion in *Lee v. Grimes*, 4 Colo. 185.

Authority of attorney or agent.

Cited in *Abbott's Pleadings*, 2d ed. 1145, on absence of necessity of proving agent's authority, if plea not verified.

Cited in notes in 76 A. D. 263, on powers of attorneys at law; 132 A. S. R. 169, on implied authority of attorney in conducting litigation.

4 COLO. 189, JORDAN v. FINLEY.

Validity of bill of exceptions signed in vacation.

Cited in *Filley v. Cody*, 4 Colo. 542, holding bill of exceptions signed in vacation no part of record in absence of stipulation, and order of court permitting signing out of term.

4 COLO. 190, CARNAHAN v. PELL.

Amendment of process.

Cited in note in 101 A. S. R. 553, on amending writs of execution.

Negotiability of instrument payable on contingency.

Cited in *Jennings v. First Nat. Bank*, 13 Colo. 417, 16 Am. St. Rep. 210, 22 Pac. 777, holding instrument payable upon contingency not negotiable under statute.

4 COLO. 196, CRATER v. McCORMICK.

Nature of covenant to pay for use of party wall.

Cited in *Cook v. Paul*, 4 Neb. (Unof.) 93, 66 L.R.A. 673, 93 N. W. 430, to the point that covenant to pay for use of party wall does not run with land.

Cited in note in 66 L.R.A. 679, on enforcement of obligation to contribute to cost of party walls, by or against grantees or successors in title.

Conclusiveness of findings of referee.

Cited in *Perdew v. Coffin*, 11 Colo. App. 157, 52 Pac. 747, holding that findings of referee will not be disturbed by appellate court when supported by evidence and not manifestly against weight of evidence. **Effect of averments and admissions in pleadings.**

Cited in *Wilson v. Hawthorne*, 14 Colo. 530, 20 Am. St. Rep. 290, 24 Pac. 548, holding every uncontroverted material allegation of complaint or answer taken as true for purpose of action; *Burris v. Anderson*, 27 Colo. 506, 62 Pac. 362, holding that admissions in original answer may be used against appellees; *Dodge v. Chambers*, 43 Colo. 366, 96 Pac. 178, holding admissions and averments made and sworn to in complaint binding upon plaintiff through all subsequent stages of case.

4 COLO. 201, ARAPAHOE COUNTY v. GRAHAM.

Discretion of commissioners as to payment of costs in preliminary actions.

Cited in Otero County v. Wood, 11 Colo. App. 219, 52 Pac. 214, holding allowance of claim against county for costs or fees in criminal cases before justice wholly within discretion of county commissioners; Sargent v. La Plata County, 21 Colo. 158, 40 Pac. 366, holding costs in preliminary examination before justice in discretion of county commissioners; Merwin v. Boulder County, 29 Colo. 169, 67 Pac. 285, holding allowance of fees of deputy district attorney wholly within discretion of county commissioners.

Right of officer to demand fees for services.

Cited in McMullin v. Montrose County, 18 Colo. App. 117, 70 Pac. 449, holding that right of public officer to demand and receive fees for services depends upon rendition of services.

4 COLO. 204, BYERS v. MCPHEE.

Discretion of court as to granting continuance.

Cited in Dyer v. McPhee, 6 Colo. 174, holding appellate court not justified in interfering with court's discretion, where motion addressed to discretion of court in absence of plain and arbitrary abuse of such discretion; Hartford F. Ins. Co. v. Hammond, 41 Colo. 323, 92 Pac. 686, holding denial of continuance because principal attorney was too ill to attend trial not abuse of discretion of court.

Cited in note in 74 A. D. 141, on continuance of civil causes.

4 COLO. 209, DOWNING v. FLORER.

Jurisdiction of county court on appeal from justice court.

Cited in Robinson v. Compher, 13 Colo. App. 343, 57 Pac. 754, holding that county court acquires no jurisdiction on appeal where justice had no jurisdiction of subject matter; Brandenburg v. Reithman, 7 Colo. 323, 3 Pac. 577, holding that appeal from judgment of court without jurisdiction does not invest appellate court with original jurisdiction; Whalen v. McMahon, 16 Colo. 373, 26 Pac. 583, holding that county court had no appellate jurisdiction of causes over which justice of the peace had no jurisdiction; Denver, S. P. & P. R. Co. v. Roberts, 6 Colo. 333, holding appearance in justice's court, and in county court on appeal waiver of privilege to have cause brought in township where defendant resides, if justice had jurisdiction; Behymer v. Nordloh, 12 Colo. 352, 21 Pac. 37, holding voluntary appearance in appellate court having jurisdiction of subject matter and entry upon trial on merits waiver of objection to lower court's jurisdiction; Ramer v. Smith, 4 Colo. App. 434, 36 Pac. 302, holding that cause comes into county court from justice court for trial de novo; Otero County v. Hoffmire, 9 Colo. App.

526, 49 Pac. 375, holding that appeal will lie to county court from judgment of justice, on change of venue, where he was without jurisdiction; *Pueblo v. Dye*, 44 Colo. 35, 96 Pac. 969, holding that defendant's voluntary submission to county court's jurisdiction operated to vest jurisdiction in that court notwithstanding justice did not have jurisdiction, where county court would have had original jurisdiction.

Distinguished in *People ex rel. School Dist. No. 38 v. Court of Appeals*, 33 Colo. 258, 79 Pac. 1017, holding that defendant waives right to appeal to urge grounds not presented before justice by specially appearing before justice and moving to dismiss for want of jurisdiction of person, based upon specific grounds.

Implied jurisdiction of inferior tribunal.

Cited in *State ex rel. Gordon v. Hopkins*, 87 Mo. 519, to the point that inferior jurisdiction can take nothing by implication.

4 COLO. 211, NIPPEL v. HAMMOND.

Presumption of agent's authority from possession of deed.

Cited in *Hubback v. Ross*, 96 Cal. 426, 31 Pac. 353, holding that possession of deed by agent of grantor does not confer upon him ostensible authority to deliver deed to grantee as security for personal loan to himself.

Sufficiency of certificate of acknowledgment to deed of married woman.

Cited in *Knight v. Lawrence*, 19 Colo. 425, 36 Pac. 242, on sufficiency of certificate of certifying officer making acknowledgment of execution of deed by married woman.

Cited in notes in 41 Am. Dec. 176, 181, on sufficiency of acknowledgment of deeds; 108 A. S. R. 569, 570, as to when defects in certificates of acknowledgment are fatal.

Discretion of court to prohibit sale under trust deed for short time.

Cited in *Denver Brick & Mfg. Co. v. McAllister*, 6 Colo. 261, holding that court has discretion to fix time within which amount found due under trust deed shall be paid before order for foreclosure sale takes effect, in cases where redemption is allowed.

4 COLO. 223, DUGGAN v. BLISS, 34 AM. DEC. 80.

Right of assignor to reserve interest in assignment for creditors.

Cited in *Claffin v. Iseman*, 23 S. C. 416, holding assignment for benefit of creditors in which interest is reserved to assignor without provision for payment of all his debts fraudulent; *Temple Grocer Co. v. Claibagh*, 18 Tex. Civ. App. 655, 45 S. W. 482, holding that reservation in assignment for benefit of creditors, that creditors who accept its provisions shall thereby discharge debtor from their claims renders deed "fraudulent and void upon its face as to creditors."

Cited in note in 58 A. S. R. 86, on fraudulent assignments for creditors.

4 COLO. 235, SMITH v. DISTRICT CT.**Effect of repeal of statute giving jurisdiction.**

Cited in *Campbell v. Iron Silver Min. Co.* 27 C. C. A. 646, 55 U. S. App. 150, 83 Fed. 643, holding remedies prescribed by one legislature for redress of private wrongs subject to modification or change by subsequent legislature; *Callahan v. Jennings*, 16 Colo. 471, 27 Pac. 1055, holding that statutory right to appeal may be taken away by repeal of statute even as to causes pending on appeal for trial de novo.

Cited in *Sutherland*, Stat. Const. 2d ed. 553, on pending proceeding as failing upon refusal of statute giving jurisdiction; *Sutherland*, Stat. Const. 2d ed. 1169, on repeal of statute giving jurisdiction as taking away right to proceed in pending cases; *Sutherland*, Stat. Const. 2d ed. 551, on effect of repeal of statute on powers, jurisdiction and pending proceedings.

Waiver of objection to jurisdiction by voluntary appearance.

Cited in *Washington County v. Murray*, 45 Colo. 115, 100 Pac. 538, denying right to object on appeal to regularity in getting before court below in absence of any objection therein; *Cochrane v. Parker*, 12 Colo. App. 169, 54 Pac. 1027; *Las Animas County v. Stone*, 11 Colo. App. 476, 53 Pac. 616,—holding appearance by party confers upon court, having original jurisdiction of subject matter, jurisdiction of person; *Engel v. Atkinson*, 18 Colo. App. 267, 71 Pac. 683, holding entry of general appearance in appellate court having original jurisdiction waiver of all irregularities in manner of appeal affecting court's jurisdiction of person; *Behymer v. Nordloh*, 12 Colo. 352, 21 Pac. 37, holding voluntary appearance in appellate court having jurisdiction of subject matter and entry upon trial on merits waiver of objection to lower court's jurisdiction; *Union P. R. Co. v. De Busk*, 12 Colo. 294, 3 L.R.A. 350, 13 Am. St. Rep. 221, 20 Pac. 752, holding filing of answer to merits waiver of all objections to summons and return and to court's jurisdiction; *Christ v. Flannagan*, 23 Colo. 140, 46 Pac. 683, holding parties who voluntarily submit controversy to court having jurisdiction of subject matter estopped to question its authority; *Hall v. Jones*, 45 Colo. 228, 100 Pac. 418, holding failure of justice to file transcript in county court waived where parties appear and impanel jury.

— What constitutes an appearance.

Cited in *Law v. Nelson*, 14 Colo. 409, 24 Pac. 2, holding motion to dismiss appeal not general appearance.

Distinguished in *Todd v. De La Mott*, 9 Colo. 222, 11 Pac. 90, holding motion filed after adjournment and not acted upon not such appearance as to give court jurisdiction over person filing motion.

4 COLO. 239, DENVER & R. G. R. CO. v. OLSEN.**Construction of writing as function of court.**

Cited in note in 69 A. D. 455, on construction of writing as question for court.

Liability of railroad for injury to trespassing men or animals.

Cited in *Kansas P. R. Co. v. Cranmer*, 4 Colo. 524, holding railroad company liable, if it failed to use ordinary care to avoid injury after becoming aware of danger to one guilty of negligently exposing himself; *Denver & R. G. R. Co. v. Stewart*, 1 Colo. App. 227, 28 Pac. 658, holding railroad not liable for killing of stock running at large, in violation of statute, when not guilty of wilful or gross negligence; *Denver & R. G. R. Co. v. Divilbiss*, 13 Colo. App. 304, 57 Pac. 743, holding railroad company not liable for ordinary negligence with reference to trespassing stock running at large within city limits in contravention of ordinance.

4 COLO. 242, JOHNSON v. FISHER.**Nature of contract of guaranty.**

Cited in *Brandt, Suretyship*, 3d ed. 239, on contract of guaranty and suretyship as prospective in operation.

4 COLO. 244, CLELLAND v. PEOPLE.**Necessity that record show authority for special term.**

Cited in *Territory v. Delinquent Tax List*, 3 Ariz. 69, 21 Pac. 888, holding that record must affirmatively show authority by which special term is held.

Disapproved in *Black v. Bent*, 20 Colo. 342, 38 Pac. 387, holding presumption that special term of court at which proceedings under review were had was legally convened.

Right to file supplemental abstract after appeal is taken.

Cited in *Iowa State Sav. Bank v. Jacobson*, 8 S. D. 292, 66 N. W. 453, holding that leave to file supplemental abstract long after appeal perfected will not be allowed.

4 COLO. 246, GOMER v. SHINER.**4 COLO. 247, ADAMS v. BINKLEY.****Who is occupant under town site act.**

Cited in *Singer Mfg. Co. v. Tillman*, 3 Ariz. 122, 21 Pac. 818, holding "occupant," within meaning of town site act, one who is settler or resident of town, and in actual bona fide possession of lot at time made.

Rights of occupant under town site act.

Cited in *Greiner v. Fulton*, 46 Kan. 405, 26 Pac. 705, holding bona fide occupant of portion of town-site entitled to have his possession protected.

Effect of entry of town site on trust.

Cited in *Pascoe v. Green*, 18 Colo. 326, 32 Pac. 824, to the point that trust closed upon entry of town site.

4 COLO. 249, **ARNOLD v. WOODARD**, reaffirmed on later appeal in 14 Colo. 164, 23 Pac. 444.
Estoppel to deny landlord's title.

Cited in notes in 120 A. S. R. 58; 89 A. S. R. 80,—on estoppel to deny landlord's title.

4 COLO. 251, BARNARD v. MCKENZIE, 9 MOR. MIN. REP. 403.

Constitutionality of mechanics' lien laws.

Cited in *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576, on validity of mechanic's lien laws.

Who are entitled to mechanics' liens.

Cited in *Lindemann v. Belden Consol. Min. & Mill. Co.* 16 Colo. App. 342, 65 Pac. 403, holding professional mining expert and geologist not entitled to mechanic's lien on mine for work done under contract with owner; *Albright v. Smith*, 2 S. D. 577, 51 N. W. 590, holding use of materials and work upon premises and not contract which supports mechanic's lien under statute; *Boyle v. Mountain Key Min. Co.* 9 N. M. 237, 50 Pac. 347, holding general manager of mine who does not perform bodily toil not entitled to lien.

Criticized in *Thompson v. Wise Boy Min. & Mill. Co.* 9 Idaho, 363, 74 Pac. 958, holding labor on ore extracted from mine performed in quartz mill subject to mechanic's lien.

Construction of mechanics' lien statutes.

Cited in *Williams v. Uncompahgre Canal Co.* 13 Colo. 469, 22 Pac. 806; *Cannon v. Williams*, 14 Colo. 21, 23 Pac. 456; *Rico Reduction & Min. Co. v. Musgrave*, 14 Colo. 79, 23 Pac. 458; *Small v. Foley*, 8 Colo. App. 435, 47 Pac. 64; *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744; *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 Pac. 786; *Ford v. Springer Land Asso.* 8 N. M. 37, 41 Pac. 541,—holding that mechanic's lien law should be liberally construed; *Rara Avis Gold & Silver Min. Co. v. Bouscher*, 9 Colo. 385, 12 Pac. 433; *Tabor v. Armstrong*, 9 Colo. 285, 12 Pac. 157,—holding that mechanic's lien statute should not be extended by construction to cases not provided by statute; *Greeley, S. L. & P. R. Co. v. Harris*, 12 Colo. 226, 20 Pac. 764, holding that failure to serve statement as required by mechanic's lien statute defeats lien.

Validity of judgment for payment of money in lien action.

Cited in *Hart v. Mullen*, 4 Colo. 512, holding judgment for payment of money unwarranted in action to enforce lien under statute; *Hildebrandt v. Savage*, 4 Wash. 524, 30 Pac. 643, holding that there can be no personal judgment in action to foreclose mechanic's lien where lien fails.

4 COLO. 254, ROCHE v. CAMPBELL.**Recovery of part in ejectment.**

Cited in note in 54 A. D. 415, on recovery in ejectment of part under claim for whole.

4 COLO. 255, DEVER v. MORTRAGON.**4 COLO. 256, BURDSALL v. WAGGONER.**

Followed without special discussion in Burdsall v. Waggoner, 4 Colo. 261.

Validity of conveyance by insolvent debtor to wife.

Cited in Gwynn v. Butler, 17 Colo. 114, 28 Pac. 466, holding conveyance by insolvent debtor to wife invalid, though wife innocent in accepting it or ignorant of its effect.

Validity of conveyance without valuable consideration.

Cited in Wells v. Schuster-Hax Nat. Bank, 23 Colo. 534, 48 Pac. 809, holding conveyance not fraudulent because not founded upon valuable consideration.

Right to maintain creditor's bill before judgment.

Cited in Neuman v. Dreifurst, 9 Colo. 228, 11 Pac. 98, holding that complaint in nature of creditor's bill cannot be maintained before judgment; Hood v. Saunders, 11 Colo. 106, 17 Pac. 102, holding complaint in nature of creditor's bill fatally defective, where it shows upon its face that part of indebtedness has not been reduced to judgment; Stock-Growers' Bank v. Newton, 13 Colo. 245, 22 Pac. 444, holding judgment creditor desiring to set aside supposed fraudulent deed to real estate entitled to bring action to test validity of deed before attempting to levy execution on premises.

Cited in note in 90 A. D. 297, on creditor's bills and proceedings in equity in aid of execution.

Distinguished in Livingston v. Swofford Bros. Dry Goods Co. 12 Colo. App. 320, 56 Pac. 351, holding that creditor's bill to set aside fraudulent transfer of personalty may be maintained by contract creditors without first reducing their claims to judgment; Ziska v. Ziska, 20 Okla. 634, 23 L.R.A.(N.S.) 1, 95 Pac. 254, holding necessity for issuance of execution and its return without satisfaction before bringing creditor's suit limited to cases where there is no trust and no lien upon specific property in favor of plaintiff.

Sufficiency of petition to set aside fraudulent conveyance.

Cited in House v. Johnson, 19 Colo. App. 524, 76 Pac. 743, holding petition to set aside fraudulent conveyance need not allege that it was made with intent to defraud plaintiff; Kindel v. Le Bert, 23 Colo. 385, 58 Am. St. Rep. 234, 48 Pac. 641, holding mere charge of fraud not such allegation as calls for denial.

Necessity that evidence correspond to pleadings.

Cited in Emery v. Yount, 7 Colo. 107, 1 Pac. 686, holding that defendant in suit to set aside fraudulent conveyance cannot be required

to meet and overcome evidence not responsive to pleadings; *Gibbs v. Wall*, 10 Colo. 153, 14 Pac. 216, holding that evidence must correspond to claim or defense.

Distinguished in *Mulock v. Wilson*, 19 Colo. 296, 35 Pac. 532, holding presumption in favor of proceedings in trial court and that evidence sustained complaint where evidence not preserved by bill of exceptions.

Conclusiveness of trial court's judgment as to issues of fact.

Cited in *Witkowski v. Hill*, 17 Colo. 372, 30 Pac. 55, holding that appellate court will not substitute its own judgment for judgment of trial court upon issue of fact.

Joinder of claims for relief.

Cited in *Abbott's Pleadings*, 2d ed. 766, on right to join claim for incidental specific relief with relief which is main object of suit.

4 COLO. 261, BURDSALL v. WAGGONER.

What constitutes implied emancipation of minor.

Cited in *Ingram v. Southern R. Co.* 152 N. C. 762, 67 S. E. 926, holding implied emancipation, where minor son contracts for his services with knowledge of his father, who makes no objection thereto.

Cited in note in 113 A. S. R. 115, on emancipation of infants.

4 COLO. 263, JACKSON v. ALLEN, 7 MOR. MIN. REP. 127.

Validity of note procured under threat.

Cited in *McClair v. Wilson*, 18 Colo. 82, 31 Pac. 502, holding note obtained under threat to sue valid.

Examination of record by appellate court.

Cited in *Miller v. Taylor*, 6 Colo. 41, 9 Mor. Min. Rep. 547, holding that court will examine entire record with view to just determination where testimony taken before referee; *Bates v. Wilson*, 14 Colo. 140, 24 Pac. 99; *Stock-Growers' Bank v. Newton*, 13 Colo. 245, 22 Pac. 444,—holding that court must examine and weigh testimony, taken at trial by court on depositions uninfluenced by findings of court below; *Brand v. Merritt*, 15 Colo. 286, 25 Pac. 175, holding that judgment of trial court will not be disturbed wherever there is evidence enough in case to justify judgment, *Hoagland v. Cole*, 18 Colo. 426, 33 Pac. 151, holding that appellate court will not pass upon mere questions of conflicting evidence; *Rittmaster v. Brisbane*, 19 Colo. 371, 35 Pac. 736, holding that appellate court will sift and weigh evidence taken and reported at trial in writing uninfluenced by finding of trial court.

Distinguished in *Kimball v. Lyon*, 19 Colo. 266, 35 Pac. 44, holding findings by referee entitled to same consideration as verdict of jury; *Noble v. Faull*, 26 Colo. 467, 58 Pac. 681, holding findings of referee approved by trial court entitled to same weight on appeal as verdict of jury.

When female is competent to contract.

Cited in *Hutchinson v. McLaughlin*, 15 Colo. 492, 11 L.R.A. 287, 25

Pac. 317, holding that female becomes competent to contract at age of eighteen.

4 COLO. 269, PEYTON v. GREGORY.

4 COLO. 270, DENVER & R. G. R. CO. v. GLASSCOTT.

Competency of evidence of similar occurrences.

Cited in Holy Cross Gold Min. & Mill. Co. v. O'Sullivan, 27 Colo. 237, 60 Pac. 570, holding evidence that "missed shots" in other mines had always been detected and removed without explosion, inadmissible in personal injury action, where no foundation laid; Cleveland, C. C. & I. R. Co. v. Wynant, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118, holding evidence of similar occurrences on other occasions inadmissible to raise presumption that place was defective and dangerous.

4 COLO. 274, FRANCIS v. WELLS.

Validity of judgments rendered in vacation.

Cited in McGan v. O'Neil, 5 Colo. 58, holding final decree rendered in vacation, void; American F. Ins. Co. v. Pappé, 4 Okla. 110, 43 Pac. 1085, holding judgments rendered by court not legally in session, void.

Cited in notes in 23 A. S. R. 116, on collateral attack upon judgment; 33 L.R.A. 88, on power of officials to act, as determined by place of performance.

4 COLO. 275, COON v. RIGDEN.

Necessity for special exceptions to general charge.

Cited in McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076, holding that objections and exceptions to general charge must be special to entitle party to review in appellate court.

What errors of law are reviewable by supreme court.

Cited in Keith v. Wells, 14 Colo. 321, 23 Pac. 991, holding that supreme court can review only errors of law occurring at trial to which exceptions were duly preserved, where no motion for new trial and bill of exceptions imperfect.

Judicial notice of who are court officers.

Cited in Londoner v. People, 15 Colo. 557, 26 Pac. 185, holding fact that relator is sheriff judicially noticed in challenge to array of jurors.

Recriminatory fraud.

Cited in note in 8 A. S. R. 728, 739, on recriminatory fraud.

When subscription is at end of memorandum.

Cited in California Canneries Co. v. Scatena, 117 Cal. 447, 49 Pac. 462, holding signature of seller written across face of memorandum for want of space at bottom of paper, subscribed at end of memorandum.

County court as court of record.

Cited in Hoagland v. Hoagland, 19 Utah, 103, 57 Pac. 20, holding county court court of record and invested by statutes with jurisdiction in divorce cases.

rights of married women to contract and hold property.

Cited in *Stramann v. Scheeren*, 7 Colo. App. 41, 42 Pac. 191, holding that married woman may contract with husband as if she were feme sole; *Plamer v. Hanna*, 6 Colo. 55; *De Votie v. McGerr*, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. 923,—holding that married woman, as to her separate estate, has no husband; *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493, holding that married woman may contract same as if sole; *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, holding each spouse entitled to rents, issues, and profits of his or her separate estate.

Cited in note in 77 A. S. R. 97, on liability of wife's separate estate to husband's creditors for value of increase due to his acts.

Rights of creditors in debtor's services.

Cited in note in 21 L.R.A. 624, on rights of creditors in personal services of debtor.

Presumption of ownership from control of wife's property.

Cited in *Campbell v. Fillmore*, 13 Colo. App. 503, 58 Pac. 790, holding fact that husband had charge and control of wife's property raised no presumption of ownership or authority to sell.

4 COLO. 285, McINTIRE v. BARNES.

Right of subcontractor to lien for expense incurred by fault of contractor.

Cited in *Tabor v. Armstrong*, 9 Colo. 285, 12 Pac. 157, holding subcontractor not entitled to lien for expense incurred through idleness enforced by default or negligence of principal contractor.

Cited in note in 20 L.R.A. 562, on payment to contractors or subcontractors as affecting liens of subordinate claimants.

Meaning of word "best" in contract for materials.

Cited in *Drainage Commission v. National Contracting Co.* 136 Fed. 780, holding contract for construction of public improvement with "best quality of imported Portland cement" not satisfied by use of sound imported Portland cement which filled special requirements.

Effect of owner's consent to contractor's working after expiration of time.

Cited in *Louisville & N. R. Co. v. Mason & H. Co.* 126 Ky. 844, 104 S. W. 975, holding that railroad waived right to rescind construction contract for failure of contractor to complete work in agreed time by consenting to work performed after that time; *Charleston Lumber Co. v. Friedman*, 64 W. Va. 151, 61 S. E. 815, holding consent of owner to contractor's going on with work after failure to finish within specified time no waiver of damage sustained.

Right to waive condition of accord agreement.

Cited in *Cary v. McIntyre*, 7 Colo. 173, 2 Pac. 916, holding that condition of accord agreement may be waived by parties thereto.

4 COLO. 291, PEOPLE EX REL. MUNN v. OURAY.

Jurisdiction of district judge to issue writ of mandamus.

Cited in *People ex rel. Montrose County v. Hebel*, 19 Colo. App. 523,

76 Pac. 550, holding that district judge has no jurisdiction in vacation at his chambers to enter order denying upon its merits petition for alternative writ of mandamus; *Bean v. People*, 6 Colo. 98, to the point that district judge could not make writ of mandamus returnable at his pleasure into any county of his district.

4 COLO. 293, NO. 5 MIN. CO. v. BRUCE, 3 MOR. MIN. REP. 146.

Number of jurors necessary to verdict.

Cited in note in 43 L.R.A. 54, 77, on number and agreement of jurors necessary to valid verdict.

Necessity for motion for new trial to review question of law.

Cited in *Touse v. Consolidated R. & Power Co.* 29 Utah, 95, 80 Pac. 506, 4 A. & E. Ann. Cas. 299 (dissenting opinion), on necessity of motion for new trial to review question of law.

Liability of shareholders owning shares in severalty.

Cited in *Servant v. McCampbell*, 46 Colo. 292, 104 Pac. 394, holding shareholders in corporation owning shares in severalty not jointly liable for commissions of agent effecting sales under employment of attorney with power to sell number of shares belonging to shareholders severally.

4 COLO. 303, MILLER v SPARKS, 6 MOR. MIN. REP. 231.

Right of re-entry for nonpayment of rent.

Cited in note in 15 Eng. Rul. Cas. 560, on landlord's right of re-entry for nonpayment of rent.

Validity of stipulation dispensing with demand for rent.

Cited in *Hicks v. Beacham*, 131 Ga. 89, 62 S. E. 45, holding that express stipulation dispensing with demand for rent may be made in lease.

Necessity for demand in action of forcible entry and detainer.

Cited in *Farncomb v. Stern*, 18 Colo. 279, 32 Pac. 612, holding that plaintiff in action of forcible entry and detainer need not make prior demand for possession of premises, where entry forcible and illegal; *West Ridge Coal Co. v. Von Storch*, 5 Lack. Leg. News, 189, holding that notice of forfeiture in mine lease must ask no more than lessees are justly entitled to.

Distinguished in *Miller v. Colorado Springs*, 3 Colo. App. 309, 33 Pac. 74, holding that prior demand must be made and pleaded in case where prior demand is required.

Jurisdiction of district court upon certiorari from justice.

Cited in *Hoppie v. Best*, 4 Colo. 555, holding district court authorized, upon certiorari from justice's court, to render independent judgment upon law and evidence.

4 COLO. 313, HAWSE v. BURGMIRE.

Power of state to limit time for bringing actions on foreign judgments.

Cited in *Lamb v. Powder River Live Stock Co.* 67 L.R.A. 558, 65

O. C. A. 570, 132 Fed. 434, holding power of state to prescribe different limitation for actions on judgments of courts of other states conditional upon reasonable time being given for exercise of right of action.

Cited in *Parmele's Whart. Conf. L.* (3d ed.) 1247, on bar of debt outlawed by *lex fori*.

Cited in note in 48 L.R.A. 640, as to when statute of limitations will govern action in another state or country.

Where cause of action arises.

Distinguished in *Bliler v. Boswell*, 9 Wyo. 57, 59 Pac. 798, holding that cause of action upon notes executed here, but whose maker and payee resided in sister state, arose in such other state.

4 COLO. 316, *BARKER v. HAWLEY*.

When judgment is reversible on conflicting evidence.

Cited in *Dickson v. Moffat*, 5 Colo. 114; *Schleier v. Luedeke*, 6 Colo. 242; *Denver Fire Brick Co. v. Platt*, 11 Colo. 509, 19 Pac. 536; *McGrath v. Bassick*, 11 Colo. 528, 19 Pac. 462; *Boulder v. Fowler*, 11 Colo. 396, 18 Pac. 337; *Ullman v. McCormic*, 12 Colo. 553, 21 Pac. 716; *La Fitte v. Rups*, 13 Colo. 207, 22 Pac. 309; *Hunt v. Ohmertz*, 15 Colo. 447, 24 Pac. 1047; *Bugh v. Rominger*, 15 Colo. 452, 24 Pac. 1046; *Johnson v. Kountze*, 21 Colo. 486, 43 Pac. 445,—holding that verdict will not be disturbed where testimony is conflicting and verdict not manifestly against weight of evidence; *Johnson v. Jones*, 16 Colo. 138, 26 Pac. 584, holding that verdict will not be disturbed where there was evidence upon which jury could find judgment rendered unless it appears that they were actuated by passion or prejudice; *Spaulding v. Saltiel*, 18 Colo. 86, 31 Pac. 486, holding that conflicting evidence will not be reviewed upon appeal for purpose of substituting court's judgment for that of jury; *Salomon v. Webster*, 4 Colo. 353 (dissenting opinion), as to when verdict will be set aside.

4 COLO. 342, *CODY v. FILLEY*.

Necessity that appellant sign undertaking on appeal.

Cited in *Byers v. Gilmore*, 10 Colo. App. 79, 50 Pac. 370, holding that undertaking on appeal under Code need not be signed by appellant.

Waiver of copy of notice of appeal.

Cited in *Read v. Benton County*, 10 Or. 154, holding that copy of notice of appeal may be waived by county clerk acting for defending county.

4 COLO. 344, *PULLMAN PALACE CAR CO. v. BARKER*, 34 AM. REP. 89.

Liability for remote consequences of negligence generally.

Cited in *Sutherland*, Dam. 3d ed. 108, on liability of carriers for consequential damages for its torts; *Sutherland*, Dam. 3d ed. 3610, on liability of wrongdoer for all direct injury resulting, although not contemplated as probable result of act done

Cited in notes in 36 A. R. 382, on recovery of consequential damages;

R. Co. 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 350, holding carrier responsible for miscarriage of passenger whom it directed to leave train at point three miles short of her station.

Degree of care owing by carrier to ill passengers.

Cited in note in 97 A. D. 500, on special duty towards sick, aged, or feeble passengers.

Disapproved in St. Louis Southwestern R. Co. v. Ferguson, 26 Tex. Civ. App. 460, 64 S. W. 797, holding railroad liable for injury to woman causing miscarriage, although shock of collision of cars on making up train would not have injured ordinary passenger.

Right of carrier to refuse to receive sick passengers.

Distinguished in Connors v. Cunard S. S. Co. 204 Mass. 310, 26 L.R.A. (N.S.) 171, 134 Am. St. Rep. 662, 90 N. E. 601, holding that ocean passenger carrier has right to refuse to receive as ordinary passenger person in need of medical attention during voyage.

4 COLO. 348, KNOX v. McFERRAN, Modified on later appeal in 5 Colo. 217.

Power of court to correct records.

Cited in Pleyte v. Pleyte, 15 Colo. 44, 24 Pac. 579, holding inherent power in courts to correct clerical errors in records; Pleyte v. Pleyte, 14 Colo. 593, 23 Pac. 1007, holding that application to correct record in cause pending before this court does not lay foundation for new proceeding in error; Denver City Tramway Co. v. Roberts, 43 Colo. 522, 96 Pac. 186, holding that supreme court will allow filing of supplemental bill of exceptions tending only to make recitals of original more complete, though time for filing original in trial court has expired.

. Distinguished in Breene v. Booth, 3 Colo. App. 470, 33 Pac. 1007, holding trial court without power to amend record after appeal, where character of judgment essentially changed.

Presumption that evidence warranted conclusion of lower court.

Cited in Seeley v. Taylor, 17 Colo. 70, 28 Pac. 461, holding presumption that lower court was governed by proper views of law and that evidence warranted conclusion, in absence of bill of exceptions.

4 COLO. 350, MOHR v. BARNES.

Effect of plea of payment.

Cited in Lokken v. Miller, 9 N. D. 512, 84 N. W. 368, holding that plea of payment to complaint for liquidated demand confesses cause of action and casts burden upon defendant to sustain plea.

4 COLO. 352, MILLER v. SEYBERT.

4 COLO. 353, SALOMON v. WEBSTER.

What constitutes an acceptance.

Cited in McFarlane v. Wadhams, 165 Fed. 987, holding that acceptance must be complete and precise adoption of proposition; Davis v. Thomas,

28 Colo. 303, 64 Pac. 187, holding offer to accept under modification rejection of offer.

Sufficiency of evidence to support verdict.

Cited in *Rankin v. Cardillo*, 38 Colo. 216, 88 Pac. 170, holding judgment which is but slightly supported by evidence and manifestly against weight thereof not permitted to stand.

Necessity of jury believing from evidence.

Cited in *Gorman v. People*, 17 Colo. 596, 31 Am. St. Rep. 350, 31 Pac. 335, holding instruction telling jury "if they believe," omitting words "from evidence" objectionable; *Boykin v. People*, 22 Colo. 496, 45 Pac. 419, holding omission from one instruction words "from the evidence" not error, when cured by other instructions.

Right to set off joint demand against separate demand.

Cited in *Ingols v. Plimpton*, 10 Colo. 535, 16 Pac. 155, holding that joint demand cannot be set off against separate demand.

4 COLO. 369, UTLEY v. CLARK-GARDNER LODE MIN. CO. 4 MOR. MIN. REP. 39.

Discrimination against foreign corporations.

Cited in notes in 95 A. D. 537, on power of state to discriminate against foreign corporations doing business therein; 24 L.R.A. 289, on recognition or exclusion of foreign corporations; 60 L.R.A. 330, on constitutional equality in relation to corporate taxation; 70 L.R.A. 541, on right of nonresidents to sue foreign corporations; 1 L.R.A.(N.S.) 558, on compelling designation of person upon whom process may be served as a condition of right of foreign corporation to do business.

Right of foreign corporation without certificate to enforce its contracts.

Cited in *Black v. Caldwell*, 83 Fed. 880, holding foreign corporation entitled, as matter of comity, to sue and collect on contract, owned by it, in this state; *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93, holding deed to foreign corporation which has not complied with state law relating to doing business within state not necessarily void; *Black v. Vermont Marble Co.* 1 Cal. App. 718, 82 Pac. 1060, holding statutory provision that foreign corporation shall not "maintain" any actions in courts of state no bar to commencement of action for protection of property or enforcement of its rights; *Rockford Ins. Co. v. Rogers*, 9 Colo. App. 121, 47 Pac. 848, holding contract made by foreign corporation in this state without first complying with statutory requirements as to filing certificate, valid; *Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co.* 11 Colo. App. 264, 52 Pac. 1040; *Kindel v. Beck & P. Lithographing Co.* 19 Colo. 310, 24 L.R.A. 311, 35 Pac. 538,—holding failure of foreign corporation to file statutory certificate no defense to action by it upon contract made in this state; *Craig v. A. Leachen & Sons Rope Co.* 38 Colo. 115, 87 Pac. 1143, holding that statute requiring foreign corporations to file certificate before doing business here does not prohibit them from suing to protect property or rights; Colo. Ann.—11.

Tabor v. Goss & P. Mfg. Co. 11 Colo. 419, 18 Pac. 537; *Illinois Sewing Mach. Co. v. Harrison*, 43 Colo. 362, 96 Pac. 177,—holding fact of foreign corporation's non-compliance with statutory requirements matter of defense to be pleaded by defendant in bar of action; *Chicago Mill & Lumber Co. v. Sims*, 101 Mo. App. 569, 74 S. W. 128, holding foreign corporation entitled to sue for breach of warranty where conveyance out of which suit grew was made before plaintiff had any legal right to do business here; *Powder River Cattle Co. v. Custer County*, 9 Mont. 145, 22 Pac. 383, holding failure of foreign corporation to file certificate of incorporation no bar to right to sue in courts of territory in action not based on any contract; *Probst v. Domestic Missions*, 3 N. M. 373, 5 Pac. 702, holding foreign corporation which fails to file certificate not debarred from access to courts in protecting its previously vested estate in territory; *Gould Land & Cattle Co. v. Rocky Mountain Bell Teleph. Co.* 17 Wyo. 507, 101 Pac. 939, holding doctrine of state comity not applicable to protect foreign corporation seeking to recover upon contract expressly prohibited by law.

Cited in *Abbott's Pleadings*, 2d ed. 730, on nonavailability on demurrer of foreign corporation's noncompliance with statute.

Criticised in *Coleman v. Jagers*, 12 Idaho, 125, 118 Am. St. Rep. 207, 85 Pac. 894, denying foreign corporation, which has failed to comply with constitutional and statutory requirements, right to enforce contract.

What constitutes "doing business" by foreign corporation.

Cited in *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739, holding contract by foreign corporation to manufacture machinery in its home state not doing business within meaning of constitution and statute; *General Conference of Free Baptists v. Berkey*, 156 Cal. 466, 105 Pac. 411, holding mere prosecution or defending of suits by foreign corporation not "doing business" within meaning of statutes; *Miller v. Williams*, 27 Colo. 34, 59 Pac. 740, holding purchase by foreign corporation of negotiable promissory notes secured by deed of trust, not doing business within state; *George R. Barse Live Stock Co. v. Range Valley Cattle Co.* 16 Utah, 59, 50 Pac. 630, holding mere prosecution of suit by foreign corporation not "doing business" within meaning of constitution or statute; *A. Booth & Co. v. Weigand*, 28 Utah, 372, 79 Pac. 570 (dissenting opinion), as to what constitutes "doing business" by foreign corporation in this state.

Cited in note in 14 L.R.A. 532, on what constitutes "dealing" or "carrying on business."

Service of process constituting due process of law.

Cited in note in 50 L.R.A. 590, on service of process sufficient to constitute due process of law.

4 COLO. 375, THATCHER v. ROCKWELL, Affirmed in 105 U. S. 467, 26 L. ed. 949.

Sufficiency of charge to jury.

Cited in *McClelland v. Burns*, 5 Colo. 390; *Finerty v. Fritz*, 6 Colo.

136; Dozenback v. Raymer, 13 Colo. 451, 22 Pac. 787; Kindel, 15 Colo. 539, 25 Pac. 990,—holding that judgment reversed where charge, considered as whole, satisfies cou were not improperly advised as to any material point; Str Creek Min. & Development Co. v. Ellison, 42 Colo. 498, holding that insufficient, ambiguous, or uncertain instructions cured by other instructions upon same subject embraced in **Right to set off separate demand against joint demand**.

Cited in Thalheimer v. Crow, 13 Colo. 397, 22 Pac. 779; Capehart, 40 Colo. 446, 90 Pac. 1033,—holding that separate cannot be set off against joint demand.

Distinguished in Canfield v. Arnett, 17 Colo. App. 426, holding that one maker of joint and several promissory note pose, in action thereon, counterclaim as indebtedness upon him from plaintiff.

When agreement to pay debt of another is within statute of frauds.

Cited in Mulvany v. Gross, 1 Colo. App. 112, 27 Pac. 61; purchaser's promise to pay encumbrance not collateral with of frauds; Johnson v. Bott, 18 Colo. App. 469, 72 Pac. 61; Reser, 19 Colo. 88, 34 Pac. 572,—holding promise of one, in answer for debt of another, not within statute of frauds, where upon new consideration moving from creditor and promisee to Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162, holding agreement not within statute although it may directly relate to person.

Cited in Brandt, Suretyship, 3d ed. 394, on stranger indebted in blank as guarantor.

Cited in note in 95 A. D. 253, on oral promise to answer for debt of another.

4 COLO. 410, CLAYTON v. CLAYTON.

Conclusiveness of divorce decree obtained upon constructive service.

Cited in Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298, 3 Rep. 328, holding decree of divorce obtained by husband as to his absent wife wholly void for want of jurisdiction in granted it; Clayton v. Cheeley, 5 Colo. 337, on validity of divorce obtained upon constructive service; Shrader v. Shrader, 34 Colo. 18 So. 672, holding decree of divorce rendered upon illegal constructive service void as to parties who have not appeared or pleaded.

Cited in note in 57 L.R.A. 598, on right to contest validity of divorce decree after death of one or both parties.

Jurisdiction where want of service appears by record.

Cited in San Juan & St. L. Min. & S. Co. v. Finch, 4 Colo. App. 100, holding that jurisdiction of county court did not attach where service affirmatively appears by record.

Necessity for strict compliance with statute in constructive service.

Cited in *Israel v. Arthur*, 7 Colo. 5, 1 Pac. 438, holding strict compliance with method pointed out by statute necessary in obtaining service of process by publication.

Right to use testimony of party against him as admission.

Cited in *Buddee v. Spangler*, 12 Colo. 216, 20 Pac. 760, holding that sworn testimony of party to action may be used against him as admission.

4 COLO. 418, BLORE v. HOOKADAY.

4 COLO. 419, WHITSETT v. KERSHOW.

Right to have deed construed as mortgage.

Cited in *Fetta v. Vandevier*, 3 Colo. App. 419, 34 Pac. 168; *Townsend v. Petersen*, 12 Colo. 491, 21 Pac. 619,—holding that deed absolute in form may be proved by oral testimony to be mortgage.

— Degree of proof required.

Cited in *Mahoney v. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. 1020; *Armor v. Spalding*, 14 Colo. 302, 23 Pac. 789,—holding clear, unequivocal and convincing proof necessary to have absolute deed construed as mortgage; *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391, holding mere preponderance of evidence insufficient to warrant absolute deed being adjudged mortgage; *Butsch v. Smith*, 40 Colo. 64, 90 Pac. 61, holding that action to have deed absolute on its face adjudged mortgage must be made out beyond reasonable doubt; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790, holding strong and unequivocal evidence necessary to establish real contract where cause of action would be barred by statute of frauds but for equitable considerations; *Nesmith v. Martin*, 32 Colo. 77, 75 Pac. 590, holding establishment of contract by clear, certain and conclusive proof necessary to establish trust by oral evidence alone, in order to take case out of statute of frauds; *Laesch v. Morton*, 38 Colo. 171, 120 Am. St. Rep. 106, 87 Pac. 1081, holding clear, definite and conclusive proof necessary to take oral agreement for perpetual right of way out of statute of frauds; *Freeman v. Peterson*, 45 Colo. 102, 100 Pac. 600, holding uncorroborated verbal declarations insufficient to establish resulting trust.

Statutory disqualification of party as witness.

Cited in *Gilham v. French*, 6 Colo. 196, holding one directly interested in event of civil action disqualified from testifying of his own motion, or on his own behalf, when adverse party sues as heir of deceased person; *Rathvon v. White*, 16 Colo. 41, 26 Pac. 323, holding party to suit who is interested in result disqualified from testifying on his own behalf when adverse party sues as administrator; *Temple v. Magruder*, 26 Colo. 890, 85 Pac. 832, holding physician disqualified to testify in proceeding to establish his claim against estate for medical services rendered decedent.

Distinguished in *Prewitt v. Lambert*, 19 Colo. 6, 34 Pac. party not precluded from testifying in action in which defended as administrator and who does not defend as such.

4 COLO. 433, LUNDIN v. KANSAS P. R. CO.

Constitutionality of retrospective legislation.

Cited in *United Mines Co. v. Hatcher*, 25 C. C. A. 46, 4139, 79 Fed. 517, holding that amendment to lien statute given retrospective operation; *National Bank v. Riethmann* 101, 49 U. S. App. 144, 79 Fed. 582, holding that section of rights operates as saving clause in repealing statutes; *Anthony*, 5 Colo. 273, to the point that section eleven of B operates, as to pending causes under statute, as saving incorporated into repealing statute.

4 COLO. 434, EICHOLTZ v. WILBUR.

When cause is pending in appellate court.

Cited in *Colorado Springs Co. v. Cewell*, 6 Colo. 73, holding pending in appellate court when appeal perfected.

4 COLO. 436, CODY v. FILLEY.

4 COLO. 438, RE BROWN.

4 COLO. 440, HARRIS v. DURAN.

4 COLO. 442, DE LA MAR v. HURD, Later appeal in 126, 17 Pac. 288, 13 Colo. 7, 21 Pac. 903, 14 C.

23 Pac. 792, and 1 Colo. App. 327, 29 Pac. 18

Necessity that trial judge sign and seal bill of exceptions

Cited in *Marshall Silver Min. Co. v. Kirtley*, 8 Colo. 108, 1 *Gates v. People*, 11 Colo. 292, 17 Pac. 783; *Reed v. Cates*, 119 Pac. 464,—holding that bill of exceptions not sealed by cannot be considered; *Williams v. People*, 25 Colo. 251, 54 holding that bill of exceptions must be signed and sealed by in order to constitute part of record.

Effect of pleading over on defective pleading.

Cited in *Central & G. Road Co. v. People*, 5 Colo. 39, holding defects in pleading may be aided by pleading over; *Bushnell Min. & Smelting Co.* 12 Colo. 247, 21 Pac. 921, holding that complaint may be cured by denials and allegations of answer.

4 COLO. 444, PIPE v. SMITH, Later appeal in 5 Colo. Parol evidence to identify subject-matter of deed.

Cited in *Colorado C. R. Co. v. Smith*, 5 Colo. 160; *Hanna*, 5 Colo. 303,—holding parol evidence admissible to apply general description in deed to subject matter; *Laughlin v. Hawl*

170, 11 Pac. 45, holding parol evidence admissible to identify property where description in sheriff's return of levy, and other documents, is in such general terms as to call for evidence dehors writing; *Murray v. Hobson*, 10 Colo. 66, 13 Pac. 921, holding parol testimony admissible to identify land described in deed as "designated on recorded plat as vacant land formed by change of bed of Arkansas river," and by metes and bounds; *Loveland v. Clark*, 11 Colo. 265, 18 Pac. 544, to point that subject-matter of exception in deed made in general terms may be made certain by parol evidence; *Hanlon v. Hobson*, 24 Colo. 234, 42 L.R.A. 502, 51 Pac. 433, holding parol evidence admissible to identify land mentioned in deed of trustee under town site acts.

4 COLO. 468, GOSS v. BOULDER COUNTY.

Nature of bond of county treasurer.

Cited in *Gartley v. People*, 24 Colo. 155, 49 Pac. 272, holding bond of county treasurer measure of his duties and contract covering them. **Mode of bringing up affidavit in attachment.**

Cited in *Buddee v. Spangler*, 12 Colo. 216, 20 Pac. 760, holding that affidavit in attachment stands as pleading and is properly brought up by record; *Merchants' Nat. Bank v. Grunthal*, 38 Fla. 93, 20 So. 809, holding affidavit in attachment statutory pleading properly brought up by record and not in bill of exceptions.

Defects avoiding attachment.

Cited in note in 79 A. D. 166, on irregularities and defects avoiding attachment.

Right of court to vacate attachment on motion.

Cited in *Sonnesyn v. Akin*, 12 N. D. 227, 97 N. W. 557, holding that court may vacate attachment on motion when it appears that affidavit as foundation thereof is false.

Judgments depending on validity of attachment.

Cited in note in 76 A. S. R. 801, on judgments depending for validity on attachment of property.

4 COLO. 474, BACON v. LAMB.

Time to file notice of appeal.

Cited in *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657, holding filing of notice of appeal ineffectual unless it precedes or is contemporaneous with service thereof.

4 COLO. 474, BARNDOLLAR v. PATTON.

4 COLO. 475, SWENSON v. GIRARD F. & M. INS. CO.

Nature of appeal.

Cited in *Western Cornice & Mfg. Works v. Leavenworth*, 52 Neb. 418, 72 N. W. 592, holding that appeal in effect affords retrial of questions presented.

Cited in Sutherland, Stat. Const. 2d ed. 1222, on power right of appeal, after appeal is perfected and pending.

When appeal is taken.

Cited in Hall v. Denver Omnibus & Cab Co. 13 Colo. Pac. 402, holding filing of papers in county court by jus from latter's court not docketing of case; Cates v. MacI holding act of taking appeal entry of appearance of par which he has appealed; Law v. Nelson, 14 Colo. 409, 24 I that appeal bond must be filed and approved before appe sidered "taken."

Necessity that transcript be filed within time prescri rules.

Cited in Kasson v. Follett, 9 Colo. 348, 12 Pac. 195, b to district court rightly dismissed for failure of appell transcript of proceedings below to be filed in court within by rule of court.

4 COLO. 481, BREED v. FIRST NAT. BANK, 1 REP. 467, Later appeal in 6 Colo. 235.

Power of superintendent or agent to borrow money.

Cited in Arthur v. Gard, 3 Colo. App. 133, 32 Pac. 343, mining superintendent had authority to execute due bill Sanford Cattle Co. v. Williams, 18 Colo. App. 378, 71 Pac. general manager of cattle company without implied auth company by execution of promissory note; Schramm v. L Colo. 516, 94 Pac. 345, holding no implied authority of age money for his principal from fact of his being in charg sole manager and also in charge of ranch; Rizzuto v. R Lumber Co. 44 Colo. 413, 98 Pac. 728, holding manager of corporation without implied power to borrow money o credit; American Min. & Smelting Co. v. Converse, 175 M N. E. 594, holding that advance of money where object is within power of agent not authorized to borrow money.

Cited in note in 29 A. S. R. 96, on agent's power to be **Duty of principal to repudiate unauthorized act of age**

Cited in Smyth v. Lynch, 7 Colo. App. 383, 43 Pac. principal not bound to deny authority of one assuming to unless, after knowledge of facts, shows he has ratified ; equity would forbid him to deny it; Ilfeld v. Ziegler, 4 91 Pac. 825, holding mere silence evidence of ratification but where sale completed by agent before knowledge of it reach St. Louis Gunning Advertising Co. v. Wanamaker & Bro App. 270, 90 S. W. 737, holding failure of principal to repu act evidence to be considered that he ratified it, where between agent and third party settled before principal Thompson v. Laboringman's Mercantile & Mfg. Co. 60 V L.R.A.(N.S.) 311, 53 S. E. 908, holding failure of princip

from or repudiate unauthorized act of agent within reasonable time, evidence of ratification.

Cited in Sackett, Instruct, Jur. (3d ed.) 372, on ratification by failing to repudiate agent's unauthorized acts.

Cited in notes in 79 A. D. 389, on ratification of unauthorized acts by silence; 29 A. S. R. 97, on ratification of agent's act in borrowing money; 6 L.R.A.(N.S.) 313, on implied ratification of unauthorized loan effected by agent.

Distinguished in *Witcher v. Gibson*, 15 Colo. App. 163, 61 Pac. 192, holding principal bound to know what his agent does when transactions are entered on his books and open to his inspection.

4 COLO. 507, CORNING TUNNEL CO. v. PELL, 14 MOR. MIN. REP. 612.

Mining rights.

Cited in *Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co.* 196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 266, holding owner of tunnel site who simply seeks to protect his tunnel and who has not yet discovered a lode claim, not required to adverse an application for patent of the lode claim through which the tunnel runs.

Cited in note in 63 A. D. 103, 110, on mining rights.

— Effect of subsequent discovery from surface on rights of owner of located tunnel vein.

Cited in note in 53 L.R.A. 794, 796, on rights under tunnel-site locations.

Distinguished in *Ellet v. Campbell*, 18 Colo. 510, 23 Pac. 521, holding owner of located tunnel claim not bound upon discovery of mineral lode therein to make another discovery and location of lode from surface to be protected against subsequent location of same lode.

Disapproved in *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.* 13 C. C. A. 390, 32 U. S. App. 75, 66 Fed. 200 (reversing 53 Fed. 321), holding that no discovery or location of blind lode or vein from surface subsequent to location of tunnel can deprive owner of tunnel claim who diligently prosecutes his work of his rights; *Hepe Min. Co. v. Brown*, 11 Mont. 370, 28 Pac. 732 (overruling decision in earlier case between same parties in 7 Mont. 550, 19 Pac. 218), holding that after location of tunnel claim a person discovering a lode within the surface boundaries crossing the line of the tunnel will be restrained until it is demonstrated that the lode will not be discovered in the tunnel.

4 COLO. 512, HART & S. CORP. v. MULLEN.

Right of court to render personal judgment in action to enforce lien.

Distinguished in *Cannon v. Williams*, 14 Colo. 21, 23 Pac. 456; *St. Kevin Min. Co. v. Isaacs*, 18 Colo. 400, 32 Pac. 822,—holding that court may render personal judgment for amount found to be due in action to foreclose mechanic's lien, although claim for lien abandoned.

4 COLO. 515, BYERS v. HUSSEY.

Release of surety.

Cited in Brandt, Suretyship, 3d ed. 722, on release of surety by binding extension of time to principal.

4 COLO. 524, KANSAS P. R. CO. v. CRANMER.

Doctrine of last clear chance.

Cited in Denver & B. P. Rapid Transit Co. v. Dwyer, 20 Colo. 132, 36 Pac. 1106; Poston v. Denver Consol. Tramway Co. 11 Colo. App. 187, 53 Pac. 391; Hector Min. Co. v. Robertson, 22 Colo. 491, 45 Pac. 406,—holding contributory negligence no bar to recovery when defendant, with knowledge of plaintiff's exposed condition, might have prevented injury by exercise of ordinary care; Denver & R. G. R. Co. v. Buffehr, 30 Colo. 27, 69 Pac. 582; Nichols v. Chicago, B. & Q. R. Co. 44 Colo. 501, 98 Pac. 808,—holding that party who has last opportunity of avoiding injury must prevent it if, by exercise of reasonable care he can do so; Denver City Tramway Co. v. Wright, 47 Colo. 366, 107 Pac. 1074, holding contributory negligence no bar to recovery where offending party failed to use due care after becoming aware of other's peril, or failed to use due care to become cognizant of it; Kennedy v. Denver, S. P. & P. R. Co. 10 Colo. 493, 16 Pac. 210, holding one guilty of contributory negligence not entitled to recover for injury received from train unless gross or wanton negligence on part of trainmen established.

Cited in Cooley, Torts, 3d ed. 1460, on freedom from negligence where trespasser on railroad was not discovered in time to avoid injury.

Distinguished in Chicago, R. I. & P. R. Co. v. Crisman, 19 Colo. 30, 34 Pac. 286, holding negligence on part of railroad no excuse for traveler approaching crossing without using proper care on his part.

Duty of trial court in instructing juries.

Cited in Moffatt v. Tenney, 17 Colo. 189, 30 Pac. 348, on duty of trial courts in instructing juries.

4 COLO. 526, MORGAN v. HEDGES, Dissenting opinion in 5 COLO. 50.

Right to sue cotenant in replevin.

Cited in Adams v. Thornton, 5 Cal. App. 455, 90 Pac. 713, holding tenant in common entitled to maintain replevin against cotenant where cotenant took entire crop after division had been made.

Cited in note in 50 A. S. R. 841, on action by co-tenant to recover possession of property of cotenancy.

4 COLO. 532, RE SMITH.

Right of justice to dismiss preliminary complaint upon failure of prosecutor to act.

Cited in State ex rel. Romano v. Yaakey, 43 Wash. 15, 85 Pac. 990, 9 A. & E. Ann. Cas. 1071, holding that justice of the peace had no

power to dismiss preliminary complaint on ground that prosecuting attorney had not investigated and filed information.

4 COLO. 535, STREETER v. MARSHALL SILVER MIN. CO. 7 MOR. MIN. REP. 660.

Confining appearance to parties served.

Cited in *White v. White* (W. Va.) 24 L.R.A.(N.S.) 1279, 66 S. E. 2, holding appearance confined to parties served with process where decree in general terms recites appearance.

Right to enter final judgment against one of several defendants.

Cited in *Bissell v. Cushman*, 5 Colo. 76, holding that final judgment cannot be entered against one or more of several defendants without disposing of case as to all, where all have been served.

Right to reverse entire judgment as to one defendant only.

Cited in *Owl Canon Gypsum Co. v. Ferguson*, 2 Colo. App. 219, 30 Pac. 255, holding that entire judgment against several defendants cannot be reversed as to one and remain as to others.

Cited in notes in 32 Am. Dec. 605, on invalidity of judgment as to part of defendants; 91 A. S. R. 368, on entirety of judgments void as against some of the parties.

Measure of damages in tort action.

Cited in *Clifford v. Denver, S. P. & P. R. Co.* 9 Colo. 333, 12 Pac. 219, holding damages other than actual, natural and proximate result of wrong committed not allowable; *Gray v. Linton*, 38 Colo. 175, 88 Pac. 749, holding damages recoverable in action for eviction actual, natural and proximate result of wrong.

4 COLO. 542, FILLEY v. CODY.

Necessity that papers not parts of record be preserved by bill of exceptions.

Cited in *Wike v. Campbell*, 5 Colo. 126, holding that papers filed in progress of trial and not intrinsically parts of record cannot become such by being incorporated therein; *Truesdale v. Montrose*, 44 Colo. 416, 99 Pac. 63, holding that agreed statement of facts filed in court below must be presented by bill of exceptions.

4 COLO. 543, HAECKMAN v. MANNING.

Effect of release of one of two joint or joint and several obligors.

Cited in *Hochmark v. Richler*, 16 Colo. 263, 26 Pac. 818, holding that release of maker of several note without consent of co-maker releases latter.

Cited in *Sutherland*, Dam. 3d ed. 354, on release of one jointly or jointly and severally liable by satisfaction, as discharge of all.

Distinguished in *Ghost v. Shuman*, 4 Colo. App. 88, 34 Pac. 733, holding that action for rents and profits may be prosecuted against party assuming ownership, notwithstanding disclaimer by occupant. Accord and satisfaction.

Cited in note in 100 A. S. R. 400, on accord and satisfaction.

4 COLO. 546, PRICE v. KRAMER.**Remedy of taxpayer for excessive or illegal assessment.**

Cited in *Metcalf v. Fisher*, 2 Colo. App. 375, 31 Pac. 175, holding excessive tax assessment insufficient ground to warrant injunction against county treasurer to restrain him from collecting tax by distraint of property; *Woodward v. Ellsworth*, 4 Colo. 580, holding illegality in tax assessment insufficient as sole ground to warrant injunction to restrain sale of personalty to satisfy taxes; *Breeze v. Haley*, 10 Colo. 5, 13 Pac. 913, holding that injunction will not lie to restrain collection of tax on ground of excessive valuation; *Orlando v. Giles*, 51 Fla. 422, 40 S. W. 834, holding owners of lots without remedy in courts where they have failed to make timely application to city council as reviewing board; *Ward v. Alsop*, 100 Tenn. 619, 46 S. W. 573, holding that complaint must be made to board of equalization before suit to recover tax paid under protest can be maintained.

Cited in *Cooley, Tax*, 3d ed. 1381, on necessity for following statutory provisions in order to review assessments.

4 COLO. 555, HOPPIE v. BEST.**Effect of failure to object to testimony at trial.**

Cited in *Piela v. People*, 6 Colo. 343, holding defendant considered as having waived objections to illegal testimony offered on trial by failing to object to same; *Farncomb v. Stern*, 18 Colo. 279, 32 Pac. 612, holding that reviewing court will not pass upon sufficiency of evidence unless it appears that objection was taken in apt time at trial court.

4 COLO. 557, JOHNSON v. BUELL, 9 MOR. MIN. REP. 502.
Mining rights.

Cited in notes in 63 A. D. 104, 109, on mining rights; 58 A. S. R. 265, 278, on what included in patents for mineral lands.

4 COLO. 558, DECKER v. MYLES.**Sufficiency of publication of statutory notice.**

Cited in *Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109, holding notice published in each daily issue of newspaper for full period of twenty days compliance with order of court requiring publication once a week for three successive weeks; *Mortgage Trust Co. v. Redd*, 38 Colo. 458, 8 L.R.A.(N.S.) 1215, 120 Am. St. Rep. 132, 88 Pac. 473, holding that notice published in three consecutive weekly issues of newspaper before date noticed for making application for order of sale was for three successive weeks; *Harrison v. Wallis*, 44 Misc. 492, 90 N. Y. Supp. 44, holding four weeks' notice of *lis pendens* published for first and last time, on Sunday valid, unless defendant shows that notice was actually published after sunrise on Sundays in question, where two weeks must intervene between last publication and return day.

Distinguished in *Hunt v. Eureka Gulch Min. Co.* 14 Colo. 451, 24

Pac. 550, 17 Mor. Min. Rep. 340, holding that action in support of adverse claim not maintainable unless adverse claim be filed within sixty days of publication.

Proper defendants in proceedings under Mechanics' Lien Act.

Cited in *Snodgrass v. Holland*, 6 Colo. 596, holding owners of property to be charged defendants proper in proceedings under Mechanics' Lien Law; *German Nat. Bank v. Elwood*, 16 Colo. 244, 27 Pac. 705, to the point that defendants proper in proceedings to foreclose miners' and mechanics' liens are owners of property sought to be charged; *Post v. Miles*, 7 N. M. 317, 34 Pac. 586 (dissenting opinion), on necessary parties to proceeding in equity to enforce mechanics' lien.

Nature of proceeding to enforce mechanics' lien.

Cited in *Bradbury v. Butler*, 1 Colo. App. 430, 29 Pac. 463; *Hanna v. Colorado Sav. Bank*, 3 Colo. App. 28, 31 Pac. 1020; *San Juan & St. L. Min. & S. Co. v. Finch*, 6 Colo. 214,—holding proceedings to enforce rights under mechanics' lien law equitable in their nature.

4 COLO. 567, LAWRENCE v. ROBINSON, 12 MOR. MIN. REP. 287.

Mining partnerships.

Cited in *Abbott v. Smith*, 3 Colo. App. 264, 32 Pac. 843, holding each party to agreement to engage in business of prospecting for and development of mining property for joint use of all, agent of other.

Cited in notes in 83 A. D. 104 107, on mining partnerships; 19 Eng. Rul. Cas. 555, on presumption of equality of shares of partners; 7 L.R.A.(N.S.) 818, on location of mining claim.

Distinguished in *Walcott v. Watson*, 53 Fed. 429, holding fact insufficient to establish mining copartnership between parties.

4 COLO. 578, BACON v. LAMB.

4 COLO. 580, WOODWARD v. ELLSWORTH.

Enforcement of payment of tax.

Cited in notes in 29 L.R.A. 280, on priority of claims for taxes against debtor's assets; 17 L.R.A.(N.S.) 466, on effect of property being in custodia legis on right to enforce payment of taxes.

—Against national bank.

Cited in *Cooley, Tax*, 3d ed. 834, on right to collect tax on funds of insolvent national bank in hands of receiver; *High, Receiv.* 4th ed. 458, on right to enjoin sale of property of national bank in hands of receiver for tax levied after bank became insolvent.

Cited in notes in 45 L.R.A. 743, on state taxation of national banks; 96 A. D. 291, on power of states to tax stock and other property of national banks.

4 COLO. 584, GREEN v. RICHARDSON.

Right of beneficiary to sue on contract.

Cited in *Teller v. Ferguson*, 24 Colo. 432, 51 Pac. 429; *McIntire v.*

Schiffer, 31 Colo. 246, 72 Pac. 1056; *Moore v. First Nat. Bank*, 38 Colo. 336, 10 L.R.A.(N.S.) 260, 120 Am. St. Rep. 120, 88 Pac. 385, 12 A. & E. Ann. Cas. 268,—holding third party for whose use and benefit contract was directed made, entitled to sue thereon in his own name; *International Trust Co. v. Keefe Mfg. & Invest. Co.* 40 Colo. 440, 18 L.R.A.(N.S.) 455, 91 Pac. 915, to the point that third party, for whose benefit simple contract has been entered into for valuable consideration moving from promisee, may sue thereon in his own name.

Cited in notes in 39 A. S. R. 533, on promise for benefit of third person; 71 A. S. R. 182, 200; 25 L.R.A. 264, 266,—on right of third party to sue upon contract made for his benefit.

4 COLO. 586, KNOX v. McFARRAN.

Competency of evidence of fraudulent conveyance in ejectment.

Cited in *Lewis v. Hamilton*, 26 Colo. 263, 58 Pac. 196, to the point that at common law it was competent in ejectment to show that conveyance was made with intent to defraud creditors; *Rauer v. Thomas*, 60 Kan. 71, 55 Pac. 285, holding it competent in action to recover real property to prove that conveyance relied upon to show title in third person as defense to suit was made with intent to defraud creditors.

Competency of grantor's incapacity as defense in ejectment.

Cited in *Elder v. Schumacher*, 18 Colo. 433, 33 Pac. 175, holding evidence of grantor's incapacity competent as defense to action of ejectment.

Admissibility of vendor's declarations in action against vendee.

Cited in *Brown Bros. v. Potter*, 13 Colo. App. 512, 58 Pac. 785, holding declarations of vendor, made long after transfer, inadmissible in evidence in action against vendee, to show that transfer was fraudulent.

Pre-existing debt as valuable consideration.

Cited in *Cassidy v. Harrelson*, 1 Colo. App. 458, 29 Pac. 525; *Haraszthy v. Shandel*, 1 Colo. App. 137, 27 Pac. 876,—holding pre-existing debt good consideration to support transfer of property as against existing creditors; *Beaman v. Stewart*, 19 Colo. App. 226, 74 Pac. 344, holding pre-existing debt sufficient consideration to sustain plea of bona fide purchaser for value; *McMurtrie v. Riddell*, 9 Colo. 497, 13 Pac. 181, holding judgment creditor purchasing property at sheriff's sale under his own judgment, bona fide purchaser; *Merchants' Bank v. McClelland*, 9 Colo. 608, 13 Pac. 723; *First Nat. Bank v. Schmidt*, 6 Colo. App. 216, 40 Pac. 479; *Jerome v. Carbonate Nat. Bank*, 22 Colo. 37, 43 Pac. 215,—holding one who takes property in payment or security of pre-existing debt purchaser for valuable consideration; *Lomax v. Colorado Nat. Bank*, 46 Colo. 229, 104 Pac. 85, holding pre-existing debt sufficient consideration for promissory note; *Henry v. Vliet*, 33 Neb. 130, 19 L.R.A. 590, 29 Am. St. Rep. 478, 49 N. W. 1107, holding pre-existing debt valuable consideration for chattel mortgage; *Reid, M. & Co. v. Bird*, 15 Colo. App. 116, 61 Pac. 353, holding chattel mortgage in consideration of pre-existing debt not valid as against vendor who had right to rescind sale to mortgagor for fraud.

Effect of notice of unrecorded deed on rights of attaching creditor.

Cited in *Campbell v. First Nat. Bank*, 22 Colo. 177, 43 Pac. 1007, holding rights of holder of unrecorded deed superior to those of creditor of grantor, who, having notice of conveyance, causes property to be attached as that of debtor.

Parol evidence to show resulting trust.

Cited in *Lipscomb v. Nichols*, 6 Colo. 290; *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604; *Waterbury v. Fisher*, 5 Colo. App. 362, 38 Pac. 846; *Walker v. Bruce*, 44 Colo. 109, 97 Pac. 250,—holding that resulting trusts may be shown by parol.

